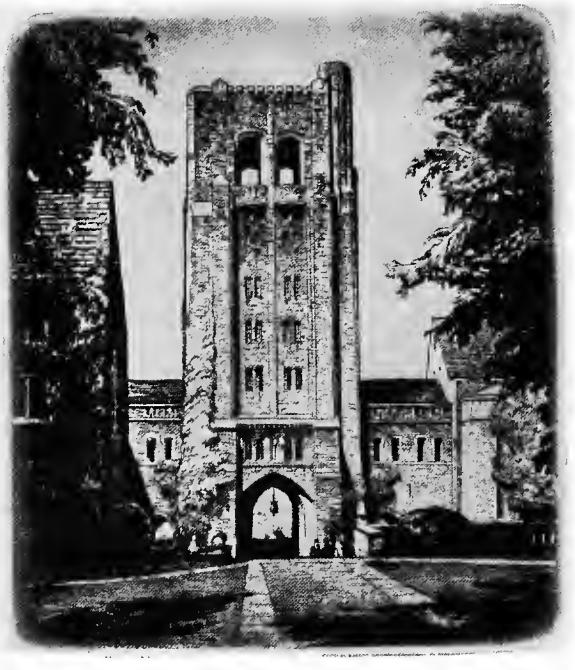

THE
LAW OF EVIDENCE

BY

SIDNEY L. PHIPSON, M.A. (CANTAB.)
OF THE INNER TEMPLE, BARRISTER-AT-LAW

SIXTH EDITION

LONDON
SWEET & MAXWELL LTD.
LAW PUBLISHERS
3 CHANCERY LANE, W.C., 2
MELBOURNE, SYDNEY AND BRISBANE
LAW BOOK CO. OF AUSTRALASIA, LIMITED
TORONTO
THE CARSWELL COMPANY, LIMITED
1921

PREFACE

TO THE SIXTH EDITION

In the present edition this work has again been very carefully revised throughout, the Introductory matter and some of the principal topics rather more fully treated, and the citation of cases increased by nearly eight hundred examples, so that the reader has at hand, in illustration of the text, not a mere list of relevant authorities, but a practically complete digest of evidentiary decisions, with the facts, rulings, and where discoverable the reasons for admission or exclusion, concisely given.

The cases and statutes have been brought down to February, 1921.

SIDNEY L. PHIPSON.

4 PAPER BUILDINGS, TEMPLE.
March, 1921.

PREFACE

TO THE FIRST EDITION

It has been my endeavour in the following pages to supply to practitioners and students a work upon Evidence which should take a middle place between the admirable but extremely condensed Digest of Sir James Stephen, and that great repository of evidentiary law, Taylor on Evidence.

I have, as far as practicable, adhered to one uniform method of arrangement throughout—that of stating: (1) The rules of evidence; (2) the principles upon which they are founded; (3) their various limitations; and (4) the illustrations to the rules. The latter have, for the convenience of the reader, been arranged not only in separate columns according to their admissibility or the reverse, but, wherever possible, in pairs, which present analogous facts but different decisions, the contrasted cases being placed side by side at the same height in the page.

References to the leading English text-books, as well as to the standard treatise of Dr. Wharton on the American law, have also been appended to each branch of the subject.

I gladly acknowledge my indebtedness not only to the latter work, but also to the valuable writings of Professor James B. Thayer, of Harvard University, whose labours have done so much to elucidate the law of evidence; to the scholarly notes to the last American edition of Best, by (I understand) his former pupil, Mr. C. F. Chamberlayne, to which frequent reference has been made in the present volume; and to other able American writers whose names are mentioned herein.

The number of cases cited has been relatively very considerable; and the references given thereto in the text have been repeated in the Index, with the addition of the various alternative reports to the more modern decisions.

SIDNEY L. PHIPSON.

7 King's Bench Walk, Temple.
October 1892.

TABLE OF CONTENTS

	PAGES
PREFACE	iii
TABLE OF STATUTES CITED	xi
TABLE OF CASES CITED	xxv

BOOK I.

PRODUCTION OF EVIDENCE.

CHAP.	PAGES
I. INTRODUCTORY	1-17
II. MATTERS OF WHICH EVIDENCE IS UNNECESSARY	17-26
III. MATTERS TO WHICH EVIDENCE MUST BE CONFINED—PLEADINGS—PARTICULARS—VARIANCE AND AMENDMENT — FACTS IN OTHER CASES EXCLUDED	27-29
IV. BURDEN OF PROOF—RIGHT TO BEGIN—MATTERS NOT TO BE STATED TO THE JURY—COURSE OF EVIDENCE—SPEECHES—REPLY—THE "BEST EVIDENCE" RULE	30-48

BOOK II.

ADMISSIBILITY OF EVIDENCE.

PART I.—FACTS.

V. FACTS IN ISSUE—RELEVANCY—ADMISSIBILITY	49-54
VI. THE FACT OR TRANSACTION IN ISSUE—*Res Gesta*	50-87
VII. AGENCY — PARTNERSHIP — COMPANY — CONSPIRACY—CO-TRESPASS, ETC.	88-102
VIII. FACTS RELEVANT TO PROVE THE MAIN FACT	103-135
IX. FACTS RELEVANT TO SHOW IDENTITY, OR CONNECT THE PARTIES WITH THE TRANSACTION	136-144
X. FACTS RELEVANT TO PROVE STATES OF MIND	145-157
XI. SIMILAR FACTS:—ADMISSIBLE, OR NOT, TO PROVE (1) THE MAIN FACT—OR (2) THE IDENTITY OR CONNECTION OF THE PARTIES —EXCEPTIONS	158-171
XII. SIMILAR FACTS—ADMISSIBLE TO PROVE STATES OF MIND	172-185
XIII. CHARACTER	186-192
XIV. FACTS AFFECTING WITNESSES, DOCUMENTS, OR THE ADMISSIBILITY OR WEIGHT OF EVIDENCE	193
XV. FACTS EXCLUDED BY PUBLIC POLICY	194-199
XVI. FACTS EXCLUDED BY PRIVILEGE	200-217
XVII. HEARSAY:—RULE AGAINST	218-226
XVIII. EXCEPTIONS TO THE HEARSAY RULE—ADMISSIONS	227-236

CHAP.		PAGES
XIX.	PERSONS WHOSE ADMISSIONS MAY BE EVIDENCE AGAINST A PARTY	237-254
XX.	STATEMENTS IN THE PRESENCE, AND DOCUMENTS IN THE POSSESSION, OF A PARTY	255-262
XXI.	CONFESSIONS	263-275
XXII.	STATEMENTS BY DECEASED PERSONS	276-277
XXIII.	DECLARATIONS AGAINST INTEREST	278-286
XXIV.	DECLARATIONS IN THE COURSE OF DUTY	287-293
XXV.	DECLARATIONS AS TO PUBLIC OR GENERAL RIGHTS	294-306
XXVI.	DECLARATIONS AS TO PEDIGREE	307-317
XXVII.	DYING DECLARATIONS IN CASES OF HOMICIDE	318-323
XXVIII.	DECLARATIONS BY TESTATORS AS TO THEIR WILLS	324-334
XXIX.	STATEMENTS IN PUBLIC DOCUMENTS: — STATUTES, STATE PAPERS, AND GOVERNMENT GAZETTES	335-338
XXX.	PUBLIC REGISTERS AND RECORDS	339-354
XXXI.	PUBLIC INQUISITIONS. SURVEYS, ASSESSMENTS, AND REPORTS	355-362
XXXII.	OFFICIAL CERTIFICATES, LETTERS AND RETURNS	363-371
XXXIII.	CORPORATION, COMPANY, AND BANKERS' BOOKS	372-377
XXXIV.	PUBLISHED HISTORIES — MAPS — DICTIONARIES—GRAMMARS AND ALMANACS—SCIENTIFIC, PROFESSIONAL AND MERCANTILE RECORDS	378-381
XXXV.	REFUTATION—OPINION—INFERENCE—RELIEF	382-403
XXXVI.	JUDGMENTS: — GENERAL RULES — JUDGMENTS *in rem* — JUDGMENTS *in personam*	404-430
XXXVII.	PROBATES — VERDICTS — AWARDS — REPORTS — INQUISITIONS—PLEADINGS—WRITS—AND DEPOSITIONS IN FORMER TRIALS	431-440

PART II.—WITNESSES.

XXXVIII.	PROCESS, KINDS OF—ATTENDANCE WITH OR WITHOUT DOCUMENTS—SERVICE—EXPENSES—ABUSE OF PROCESS — PROTECTION OF WITNESSES	441-448
XXXIX.	COMPETENCY AND COMPELLABILITY — OATH AND AFFIRMATION	449-463
XL.	EVIDENCE TAKEN AT THE TRIAL—EXAMINATION, CROSS-EXAMINATION, RE-EXAMINATION — NUMBER OF WITNESSES — CORROBORATION	464-494
XLI.	EVIDENCE TAKEN BEFORE OR AFTER TRIAL—AFFIDAVITS—INTERROGATORIES—DEPOSITIONS—COMMISSIONS	495-513

PART III.—DOCUMENTS.

XLII.	AUTHORSHIP AND EXECUTION—ATTESTATION—ANCIENT DOCUMENTS — CONNECTED AND INCORPORATED DOCUMENTS — ALTERATIONS—BLANKS—REGISTRATION—STAMPS, ETC.	514-532
XLIII.	CONTENTS OF DOCUMENTS GENERALLY: — PRIMARY AND SECONDARY EVIDENCE. CONTENTS OF PARTICULAR DOCUMENTS:—PUBLIC—JUDICIAL—AND PRIVATE	533-565
XLIV.	EXCLUSION OF EXTRINSIC EVIDENCE IN SUBSTITUTION OF DOCUMENTS	566-573
XLV.	EXCLUSION OF EXTRINSIC EVIDENCE TO CONTRADICT, VARY, OR ADD TO DOCUMENTS	574-604

CHAP. PAGES

XLVI. ADMISSION OF EXTRINSIC EVIDENCE IN AID OF INTERPRETATION 605-665

XLVII. ADMISSION OF EXTRINSIC EVIDENCE TO REBUT PRESUMPTIONS AFFECTING DOCUMENTS 666-675

BOOK III.

EFFECT OF EVIDENCE.

XLVIII. WEIGHT OF EVIDENCE—PRESUMPTIONS—ESTOPPELS 676-687

XLIX. WRONGFUL ADMISSION OR REJECTION OF EVIDENCE, AND REMEDIES THEREFOR 688-691

APPENDIX—CRIMINAL EVIDENCE ACT, 1898..... 693-695

OATHS ACT, 1838..... 696

OATHS ACT, 1888..... 696-698

OATHS ACT, 1909..... 698-699

INDEX 701

TABLE OF STATUTES CITED

PAGE

4 Ed. I. Statute 1 ..... 358, 359
9 Ed. II. (De Articulis Cleri) 212
23 Hen. VIII. c. 5 (Statute of Sewers) 357
1 Ed. VI. c. 12, s. 22 263
5 Eliz. c. 9, s. 12 446
31 Eliz. c. 4 450
4 Jac. I. c. 1 450
7 Jac. I. c. 12 (Shop Book Debts Act, 1609) 229
21 Jac. I. c. 16 (Limitation Act, 1623) 14, 242, 243, 244, 478, 677, 681
—— c. 19 (Bankrupts Act, 1623), s. 6 451
13 Car. II. Statute 1, c. 12, s. 4 212
29 Car. II. c. 3 (Statute of Frauds), 234, 247, 516, 517, 525, 526, 527, 568, 570, 572, 576 585, 590, 632
s. 4 595
s. 7 580
s. 17 604
1 Will. & M. c. 18 (Toleration Act, 1688) 573
3 Will. & M. c. 11 (Poor Relief Act, 1691), s. 6 25
7 & 8 Will. III. c. 3 (Treason Act, 1695), s. 1 450
—— c. 7 (House of Commons (Elections) Act, 1695), s. 5.. 336
—— c. 12 (Ir.), s. 4 285
12 & 13 Will. III. c. 5 (Returns to Parliament Act, 1700) 336
1 Anne, c. 9, s. 3 450
6 Anne, s. 2 (Ir.) 349
—— c. 22 (Bankrupts) Act, 1706 664
7 Anne, c. 20 (Middlesex Registry Act, 1708), ss. 6, 12, 19 349
24 Geo. II. c. 23 (Calendar (New Style) Act, 1750) 661
2 Geo. III. c. 28 (Bumboat Act) 405
13 Geo. III. c. 63 (East India Company Act, 1772), s. 40 512
42 Geo. III. c. 85 (Criminal Jurisdiction Act, 1802) 513
44 Geo. III. c. 102 (Habeas Corpus Act, 1804) 444
45 Geo. III. c. 92 (Writ of Subpœna Act, 1805), s. 3 ..... 444, 447
s. 4 ..... 444, 446, 447
46 Geo. III. c. 37 (Witnesses Act, 1806) 213
47 Geo. III. Session 2, c. 68, s. 29 349
50 Geo. III. c. 102 (Unlawful Oaths (Ireland) Act, 1810), s. 5 511
51 Geo. III. c. 1 (Regency Act, 1811) 364
52 Geo. III. c. 146 (Parochial Registers Act, 1812) 341, 344
55 Geo. III. c. 194 (Apothecaries Act, 1815) 57
56 Geo. III. c. 87 (Grand Jury (Ireland) Act, 1816) s. 3 511
58 Geo. III. c. 91 361
—— c. 24 485
1 & 2 Geo. IV. c. 117 25
5 Geo. IV. c. 83 (Vagrancy Act, 1824) 42, 189, 455, 694
s. 3 8
6 Geo. IV. c. 50 (Juries Act, 1825), ss. 23, 24 9

PAGE

9 Geo. IV. c. 14 (Statute of Frauds Amendment Act, 1828: Lord Tenterden's Act), s. 1 ..... 242, 244
s. 3 280
11 Geo. IV. & 1 Will. IV. c. 40 (Executors Act, 1830) 670
s. 2 670
—— c. 68 (Carriers Act, 1830) 338
1 & 2 Will. IV. c. 22 (London Hackney Carriage Act, 1831) 438
—— c. 37 (Truck Act, 1831) 683
—— c. 58 (Interpleader Act, 1831) 435
2 & 3 Will. IV. c. 1 (Crown Lands Act, 1832), s. 26 349
—— c. 71 (Prescription Act, 1832) 112
3 & 4 Will. IV. c. 15 (Dramatic Copyright Act, 1833) 15
—— c. 42 (Civil Procedure Act, 1833), s. 3 244
s. 26 449
—— c. 74 (Fines and Recoveries Act, 1833), ss. 84, 88... 565
4 & 5 Will. IV. c. 92 (Fines and Recoveries (Ireland) Act, 1834), s. 79 565
5 & 6 Will. IV. c. 41 (Gaming Act, 1835) 478
—— c. 50 (Highway Act, 1835), s. 76 225
—— c. 62 (Statutory Declarations Act, 1835) 501
s. 7 501
6 & 7 Will. IV. c. 71 (Tithe Act, 1836), ss. 60, 61, 62, 63, 64 359
—— c. 76 (Stamp Act, 1836) 216
—— c. 85 (Marriage Act, 1836), ss. 2, 20 344
—— c. 86 (Births, Marriages and Deaths Registration Act, 1836) 340, 341, 342
s. 31 344
s. 38 ..... 341, 344
s. 44 341
—— c. 106 (Stannaries Act, 1836), s. 19 23
—— c. 111 (Previous Conviction Act, 1836) 38, 41, 189
—— c. 114 (Trial for Felony Act, 1836) 44
7 Will. IV. & 1 Vict. c. 22 (Births and Deaths Registration Act, 1837), s. 8 ..... 342, 343, 344
—— c. 26 (Wills Act, 1837) 580
ss. 14, 15, 16, 17 520
ss. 19, 20, ... 588
s. 21 ..... 394, 529
s. 24 618
s. 27 618
s. 33 618
—— c. 36 (Post Office (Offences) Act, 1837), s. 25 .. 9
—— c. 53 (Liberty of Ely Act, 1837) 25
—— c. 69 (Tithe Act, 1837), s. 2 359
1 & 2 Vict. c. 94 (Public Record Office Act, 1838), ... 536
ss. 12, 13 ..... 543, 552
—— c. 105 (Oaths Act, 1838) 695
s. 1 458
—— c. 106 (Pluralities Act, 1838) 448
2 & 3 Vict. c. 71 (Metropolitan Police Courts Act, 1839), s. 40 420
3 & 4 Vict. c. 92 (Non-parochial Registers Act, 1840) 339, 344
3 & 4 Vict. c. 92 (Non-parochial Registers Act, 1840), s. 17 554
s. 20 344
4 & 5 Vict. c. 30 (Ordnance Survey Act, 1841), s. 12 360

PAGE

5 & 6 Vict. c. 45 (Copyright Act, 1842), s. 11 348
—— c. 106 (Fisheries (Ireland) Act, 1842), s. 63 214
6 & 7 Vict. c. 18 (Parliamentary Voters' Registration Act, 1843), s. 17 516
ss. 35, 50, 51 444
s. 76 379
s. 88 485
s. 94 350
—— c. 85 (Evidence Act, 1843), s. 1 .....449, 451
—— c. 86 (London Hackney Carriages Act, 1843) 588
s. 28 413
—— c. 98 (Slave Trade Act, 1843), s. 4 512
7 & 8 Vict. c. 12 (International Copyright Act, 1844), s. 8 348
—— c. 45 (Nonconformist Act, 1844), s. 2 109
—— c. 56 Church Building (Banns and Marriages) Act, 1844), s. 2 365
—— c. 81 (Marriages (Ireland) Act, 1844) 290, 291, 345
s. 71 344
—— c. 101 (Poor Law Amendment Act, 1844), s. 2 411
8 & 9 Vict. c. 10 (Bastardy Act, 1845), s. 6 485
—— c. 16 (Companies Clauses Consolidation Act, 1845) 555
ss. 9, 28, 98 373
s. 99 91
s. 127 555
—— c. 18 (Land Clauses Consolidation Act, 1845) 434
s. 68 435
—— c. 20 (Railway Clauses Consolidation Act, 1845) 16
—— c. 83 (Poor Law (Scotland) Act, 1845), s. 80 694
—— c. 109 (Gaming Act, 1845) 478
s. 9 216
—— c. 113 (Evidence Act, 1845) 554
s. 1 .....23, 540, 553, 554, 556, 561
s. 2 23
s. 3 .....549, 550, 552
—— c. 118 (Inclosure Act, 1845), s. 105 434
9 & 10 Vict. c. 93 (Fatal Accidents Act, 1846: Lord Campbell's Act). 418
—— c. 95 (County Courts Act, 1846), s. 83 451
11 & 12 Vict. c. 42 (Indictable Offences Act, 1848: Jervis' Act) .....
ss. 11, 12, 13, 14, 15 444
s. 16 .....442, 444, 447
s. 17 .....502, 503, 510, 511
s. 18 .....455, 509, 693
s. 20 .....443, 447
Sched. N 509
—— c. 43 (Summary Jurisdiction Act, 1848: Jervis' Act)..28, 139, 144
s. 1 .....29, 445, 518
s. 3 444
s. 7 .....443, 444, 445, 447
s. 9 29
s. 12 38
s. 14 .....34, 38, 43, 350, 368
—— c. 44 (Justices' Protection Act, 1848: Jervis' Act), c. 41. 405
—— c. 78 (Crown Cases Act, 1848) 690
—— c. 99 (Inclosure Act, 1848), ss. 13, 14 434

		PAGE
12 & 13 Vict.	c. 1 (Inland Revenue Board Act, 1849), s. 6	348
——	c. 68 (Foreign Marriages Act, 1849), s. 17	366
12 & 13 Vict.	c. 92 (Cruelty to Animals Act, 1849)	95
——	c. 109 (Petty Bag Act, 1849), ss. 11, 17	23
	s. 13	553
14 & 15 Vict.	c. 40	554
	ss. 21, 22	346
——	c. 93 (Petty Sessions (Ireland) Act, 1851), s. 14	509, 511
——	c. 99 (Evidence Act, 1851)	457, 461, 560
	s. 2	449
	s. 3	550
	s. 7	24, 539, 550, 561
	ss. 9, 10, 11	562
	s. 13	367, 557
	s. 14	538, 554, 555. 560, 561
	s. 16	461
	s. 18	371
15 & 16 Vict.	c. 56 (Pharmacy Act, 1852), s. 7	354
——	c. 76 (Common Law Procedure Act, 1852), s. 55	534
——	c. 86 (English Chancery Act, 1852)	439
16 & 17 Vict.	c. 30 (Criminal Procedure Act, 1853), s. 1	413
	s. 9	444
——	c. 83 (Evidence Amendment Act, 1853), s. 1. 210, 449, 451,	457
17 & 18 Vict.	c. 31 (Railway and Canal Traffic Act, 1854),	638
	s. 7	338, 516
——	c. 34 (Attendance of Witnesses Act, 1854), ss. 1, 2	444, 447
——	c. 36 (Bills of Sale Act, 1854)	564
——	c. 38 (Gaming Houses Act, 1854), ss. 5, 6	216
——	c. 80 (Registration of Births, Deaths and Marriages (Scotland) Act, 1854), s. 58	345
——	c. 102 (Corrupt Practices Prevention Act, 1854)	10
——	c. 103 (Towns Improvement (Ireland) Act, 1854	556
——	c. 104 (Merchant Shipping Act, 1854)	360, 440
	s. 18	360, 361
	s. 270	502
	s. 285	351
	ss. 448, 449	252, 440
——	c. 125 (Common Law Procedure Act, 1854)	519
	s. 18	42
	s. 20	697
	s. 22	472
	s. 23	472, 480
	s. 24	480
	s. 25	482
	s. 26	523
	s. 27	108
18 & 19 Vict.	c. 124 (Charitable Trusts Amendment Act, 1855)	565
	s. 42	530
19 & 20 Vict.	c. 47 (Joint Stock Companies Act, 1856), s. 40	373
——	c. 96 (Marriage (Scotland) Act, 1856), s. 2	345
——	c. 97 (Mercantile Law Amendment Act, 1856), s. 13	244
	s. 14	242, 244
——	c. 102 (Common Law Procedure Amendment Act (Ireland), 1856), ss. 23, 24	697

PAGE

20 & 21 Vict. c. 43 (Summary Jurisdiction Act, 1857) 691
—— c. 60 (Irish Bankrupt and Insolvent Act, 1857), s. 308.. 215
s. 365 502
—— c. 77 (Court of Probate Act, 1857), s. 22 .....23, 560
ss. 62, 63 432
s. 65 432
s. 69 560
—— c. 85 (Matrimonial Causes Act, 1857), s. 13 23
s. 22 466
21 & 22 Vict. c. 25 (Births and Deaths Registration Act, 1858)....340, 344
s. 3 554
—— c. 90 (Medical Act), s. 27 354
s. 32 110
s. 54 380
—— c. 93 (Legitimacy Declaration Act, 1858), s. 8 408
22 & 23 Vict. c. 17 (Vexatious Indictments Act, 1859) 190
—— c. 63 (British Law Ascertainment Act, 1859) 390
23 & 24 Vict. c. 18 (Marriage (Society of Friends) Act, 1860), s. 1... 344
—— c. 127 (Solicitors Act, 1860), s. 22 353
24 & 25 Vict. c. 10 (Admiralty Court Act, 1861), s. 14 23
s. 18 9
s. 35 410
—— c. 11 (Foreign Law Ascertainment Act, 1861) 390
—— c. 66 697
—— c. 96 (Larceny Act, 1861) 189
ss. 28, 29, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85.. 215
s. 58 34
s. 103 9
s. 109 413
s. 116 .....38, 41, 189
—— c. 97 (Malicious Damage Act, 1861) 151
s. 67 413
—— c. 99 (Coinage Offences Act, 1861), ss. 9, 12 559
s. 24 34
s. 37 189
—— c. 100 (Offences Against the Person Act, 1861), ss. 5, 27, 52, 56, 62 462
ss. 42, 43 .....368, 413, 462
s. 44 .....368, 413
s. 45 413
ss. 48, 49, 50, 51, 53, 54 .....456, 694
s. 52 .....462, 694
s. 55 .....456, 462, 694
—— c. 104 (Indian High Courts Act, 1861), ss. 10, 11..... 512
—— c. 134 (Bankruptcy Act, 1861) 122
25 & 26 Vict. c. 68 (Fine Arts Copyright Act, 1862) 542
ss. 4, 5 348
—— c. 89 (Companies Act, 1862) 374, 376, 411
s. 18 369
s. 37 373
s. 67 373
s. 115 253
—— c. 91 (Medical Council Act, 1862), ss. 2, 3 380

PAGE

26 & 27 Vict. c. 11 (Registration of Births and Deaths (Ireland) Act), s. 5 345
—— c. 27 (Marriage Law (Ireland) Amendment Act, 1863), s. 16 344
—— c. 49 (Duchy of Cornwall Management Act, 1863), s. 2.. 23
—— c. 125 (Statute Law Revision Act, 1863) 230, 446
27 & 28 Vict. c. 19 (Companies Seals Act, 1864) 374
—— c. 97 (Registration of Burials Act, 1864), s. 5...340, 343, 344
—— c. 101 (Highway Act, 1864), s. 12 558
28 & 29 Vict. c. 9 (Affirmation (Scotland) Act, 1865) 697
—— c. 18 (Criminal Procedure Act, 1865), ss. 1, 7 523
s. 2 .....43, 44
s. 3 472
s. 4 .....480, 504, 508
s. 5 .....480, 504, 508
s. 6 .....189, 367, 482
s. 8 108
—— c. 63 (Colonial Laws Validity Act, 1865), s. 6 549
29 & 30 Vict. c. 19 (Parliamentary Oaths Act, 1866) 661
—— c. 109 (Naval Discipline Act) 694
s. 65 694
30 & 31 Vict. c. 29 (Banking Companies (Shares) Act, 1867: Leeman's Act), s. 1 123
—— c. 35 (Criminal Law Amendment Act, 1867: Russell Gurney's Act), s. 3 .....443, 503
s. 6 .....321, 503, 506, 510
s. 7 510
s. 8 697
—— c. 59 (Statute Law Revision Act, 1867) 336
—— c. 70 (Public Records Ir. Act, 1867) 552
—— c. 84 (Vaccination Act of 1867), ss. 29, 31 411
—— c. 131 (Companies Act, 1867) 374, 376
31 & 32 Vict. c. 37 (Documentary Evidence Act, 1868), s. 2....22, 337 539, 550
s. 3 539
s. 5 22
s. 6 551
—— c. 39 (Jurors' Affirmation (Scotland) Act, 1868) 697
—— c. 45 (Sea Fisheries Act, 1868) 513
—— c. 75 (Juries Act (Ireland), 1868), s. 3 697
—— c. 119 (Regulation of Railways Act, 1868), s. 26..... 9
—— c. 121 (Pharmacy Act, 1868), s. 13 354
s. 15 380
—— c. 125 (Parliamentary Elections Act, 1868) 409
32 & 33 Vict. c. 24 (Newspapers, Printers, and Reading Rooms Repeal Act, 1869) 216
—— c. 41 (Poor Rate Assessment and Collection Act, 1869), s. 18 361
—— c. 67 (Valuation (Metropolis) Act, 1869), s. 9 105
s. 45 .....361, 677
s. 65 105
—— c. 68 (Evidence Further Amendment Act, 1869), s. 2.. 449, 457, 485
s. 3 .....166, 216, 449, 457
s. 4 697

PAGE

32 & 33 Vict. c. 68, s. 6 199
s. 31 451
—— c. 73 (Telegraph Act, 1869), s. 23 9
33 & 34 Vict. c. 49 (Evidence Amendment Act, 1870) 697
—— c. 52 (Extradition Act, 1870), s. 5 338
s. 14 513
—— c. 90 (Foreign Enlistment Act, 1870), ss. 8, 9 37
—— c. 91 (Clerical Disabilities Act, 1870) 565
33 & 34 Vict. c. 97 (Stamp Act, 1870) 531
—— c. 99 (Inland Revenue Repeal Act, 1870) 216
—— c. 104 (Joint Stock Companies Arrangement Act, 1870).. 376
—— c. 110 (Matrimonial Causes and Marriage Law (Ireland) Amendment Act, 1870), s. 42 344
34 & 35 Vict. c. 70 (Local Government Board Act, 1871), s. 5 551
—— c. 112 (Prevention of Crimes Act, 1871), ss. 7, 15, 20.. 189
s. 9 .....38, 41, 189
s. 16 9
s. 18 .....367, 558
s. 19 .....174, 178, 179
35 & 36 Vict. c. 10 (Marriage (Society of Friends) Act, 1872)..... 344
—— c. 33 (Ballot Act, 1872) 350
ss. 24, 37 485
—— c. 65 (Bastardy Laws Amendment Act, 1872), s. 4 485
—— c. 93 (Pawnbrokers Act, 1872) 16
—— c. 94 (Licensing Act, 1874), ss. 36, 58 348
36 & 37 Vict. c. 16 (Marriage Law (Ireland) Amendment Act, 1873), s. 4 344
—— c. 60 (Extradition Act, 1873), ss. 4, 5 513
—— c. 66 (Judicature Act, 1873) 21, 586, 588
s 24 20
ss. 56, 57 385
s. 61 .....23, 557
s. 62 461
s. 76 23
37 & 38 Vict. s. 42 (Buildings Societies Act, 1874), s. 20 371
—— c. 49 (Licensing Act, 1874) 96
—— c. 57 (Real Property Limitations Act, 1874) 112
—— c. 78 (Vendor and Purchaser Act, 1874), s. 2 524
—— c. 88 (Births and Deaths Registration Act, 1874)..340, 342, 343
s. 37 346
s. 38 .....341, 342, 343, 344
38 & 39 Vict. c. 36 (Artizans and Labourers' Dwellings Improvement Act, 1875) 434
—— c. 55 (Public Health Act, 1875) 350, 425, 434, 541, 545
s. 20 163
ss. 130, 135, 297 551
s. 150 .....420, 516
s. 267 122
—— c. 57 (Pharmacy Act (Ireland), 1875), s. 27 354
—— c. 59 (Public Records Ireland Act, 1875) 552
—— c. 63 (Sale of Food and Drugs Act, 1875) 110, 362
s. 6 95
s. 21 .....368, 456

			PAGE
38 & 39 Vict.	c. 66	(Statute Law Revision Act, 1875)	346
——	c. 87	(Land Transfer Act, 1875), s. 80	371
		s. 103	216
——	c. 90	(Employers and Workmen Act, 1875), s. 4	423
39 & 40 Vict.	c. 18	(Treasury Solicitor Act, 1876), s. 1	23
——	c. 36	(Customs Consolidation Act, 1876), s. 259	453
		s. 261	110
——	c. 48	(Bankers' Books Evidence Act, 1876)	348, 375
		s. 6	548
——	c. 56	(Commons Act, 1876)	360
		s. 7	305
——	c. 61	(Divided Parishes and Poor Law Amendment Act, 1876), s. 34	485
——	c. 75	(Rivers' Pollution Prevention Act, 1876), s. 2	57
——	c. 80	(Merchant Shipping Act, 1876), s. 45	252
40 & 41 Vict.	c. 14	(Evidence Act, 1877)	453, 694
——	c. 18	(Settled Estates Act, 1877), s. 48	516
——	c. 21	(Prison Act, 1877)	639
——	c. 26	(Companies Act, 1877)	376
——	c. 41	(Crown Office Act, 1877), s. 4	23
		s. 5	23
——	c. 57	(Judicature Act (Ir.), 1877)	24
41 & 42 Vict.	c. 26	(Parliamentary and Municipal Registration Act, 1878), s. 36	444
——	c. 31	(Bills of Sale Act, 1878)	530, 632
		s. 10	604
		s. 16	564
——	c. 33	(Dentists Act, 1878), ss. 11, 29	354
		ss. 13, 14, 15	362
——	c. 49	(Weights and Measures Act, 1878), s. 16	155
——	c. 52	(Public Health (Ireland) Act, 1878), s. 265	551
42 & 43 Vict.	c. 8	(Registration of Births, Deaths, and Marriages (Army) Act, 1878), ss. 2, 3	351
——	c. 11	(Bankers' Books Evidence Act, 1879), ss. 3, 4, 5	375
		s. 6	375, 376, 457, 543
		ss. 7, 9	375, 376
——	c. 34	(Childrens Dangerous Performances Act, 1879)	462
——	c. 49	(Summary Jurisdiction Act, 1879)	367, 443
		s. 22	349, 350, 367, 558
		s. 27	367
		s. 31	558
		s. 33	691
		s. 36	444
		s. 39	34
		s. 41	445, 501
		s. 49	8
——	c. 76	(Companies Act, 1879)	376
43 & 44 Vict.	c. 9	(Statutes (Definition of Time) Act, 1880)	25
——	c. 19	(Companies Act, 1880)	376
——	c. 41	(Burial Laws' Amendment Act, 1880), s. 10	340, 343, 344
44 & 45 Vict.	c. 24	(Summary Jurisdiction (Process) Act, 1881), s. 4	446
——	c. 41	(Conveyancing Act, 1881), s. 3	117, 524
		ss. 44, 48	519
		ss. 54, 55	587

		PAGE
44 & 45 Vict.	c. 49 (Land Law (Ireland) Act, 1881)	385
——	c. 58 (Army Act) [1881]*	694
	s. 69	20, 556
	s. 70	20, 556, 694
	s. 156	456
	s. 163	337, 351, 353, 365, 371
	s. 164	559
——	c. 60 (Newspaper Libel and Registration Act, 1881), s. 15	348
——	c. 62 (Veterinary Surgeons Act, 1881), ss. 3, 9	354
——	c. 69 (Fugitive Offenders Act, 1881), ss. 15, 27	446
	s. 29	513
45 & 46 Vict.	c. 9 (Documentary Evidence Act, 1882), s. 2	337, 539, 549, 551, 552
	s. 4	551
——	c. 39 (Conveyancing Act, 1882), s. 3	89, 146
	s. 7	565
	ss. 8, 9	519
——	c. 50 (Municipal Corporations Act, 1882)	555
	s. 24	555
	s. 231	379
——	c. 61 (Bills of Exchange Act, 1882), s. 9	614
	s. 16	592
	s. 20	530
	s. 21	584
	s. 25	516
	s. 30	32
	s. 49	16
	ss. 54, 55	686
	ss. 62, 89	588
	s. 64	528
	ss. 69, 70	547
——	c. 72 (Revenue, Friendly Societies, and National Debt Act, 1882), s. 11	376
——	c. 75 (Married Women's Property Act, 1882), ss. 12, 16	456, 694
	s. 17	435
46 & 47 Vict.	c. 3 (Explosive Substances Act, 1883), s. 4	34, 456
	s. 6	216
——	c. 22 (Sea Fisheries Act, 1883), s. 17	353
——	c. 38 (Trial of Lunatics Act, 1883)	33
——	c. 51 (Corrupt and Illegal Practices Prevention Act, 1883), s. 59	216
——	c. 52 (Bankruptcy Act, 1883), s. 17	215
	s. 27	198, 210
——	c. 61 (Agricultural Holdings (England) Act, 1883), ss. 33, 54	16
47 & 48 Vict.	c. 14 (Married Women's Property Act, 1884), s. 1	456, 457
——	c. 54 (Yorkshire Registries Act, 1884), ss. 9, 20, 21, 51	349
——	c. 61 (Judicature Act, 1884), s. 14	519
	s. 16	444
48 & 49 Vict.	c. 36 (Artillery and Rifle Ranges Act, 1885), s. 6	552

* By the Army (Annual) Act, 1890 (53 & 54 Vict. c. 4), s. 41, the date is to be omitted from the short title of the Army Act, 1881.

			PAGE
48 & 49 Vict.	c. 54	(Pluralities Acts Amendment Act, 1885)	448
——	c. 69	(Criminal Law Amendment Act, 1885)	453, 456, 462, 694
		ss. 2, 3	485, 491
		s. 4	462, 485, 505, 510
		s. 5	268, 510
		s. 9	462
49 & 50 Vict.	c. 5	(Drill Grounds Act, 1886)	552
——	c. 33	(International Copyright Act, 1886), ss. 7, 8	348
50 & 51 Vict.	c. 28	(Merchandise Marks Act, 1887), s. 2	34, 95
		s. 5	95
		s. 19	216
		s. 28	457
——	c. 35	(Criminal Procedure (Scotland) Act, 1887), s. 36	694
——	c. 57	(Deeds of Arrangement Act, 1887), ss. 5, 6, 7, 11	565
——	c. 71	(Coroners Act, 1887), s. 4	511
		s. 5	443, 511
		s. 19	444
51 & 52 Vict.	c. 41	(Local Government Act, 1888)	555
——	c. 43	(County Courts Act, 1888), s. 28	561
		s. 73	27
		s. 78	445
		s. 80	27
		s. 81	416, 423
		s. 82	27
		s. 86	27
		s. 87	28
		s. 110	443, 444, 445
		s. 111	447
		s. 112	444
		s. 120	689
		s. 180	23
		s. 184	565
——	c. 46	(Oaths Act, 1888)	449, 451, 695, 696, 698
		ss. 1, 3	458
		s. 2	459, 460
		s. 5	459
——	c. 52	(Public Health (Buildings in Streets) Act), 1888), s. 3	420
——	c. 59	(Trustee Act, 1888), s. 8	283
——	c. 65	(Solicitors Act, 1888)	362
		s. 13	434
52 & 53 Vict.	c. 10	(Commissioners for Oaths Act, 1889)	366
		s. 1	461
		s. 2	461
		s. 3	24, 461
		s. 6	24
——	c. 49	(Arbitration Act, 1889)	250, 362
		s. 8	441
		s. 11	433
		s. 12	434
		ss. 13, 14	385, 434
		s. 15	434
		s. 18	441, 444
——	c. 63	(Interpretation Act, 1889), s. 3	642

PAGE

52 & 53 Vict. c. 63 s. 9 ..... 20, 549
s. 20 514
s. 33 417
s. 34 379
53 & 54 Vict. c. 5 (Lunacy Act, 1890) 29, 362
ss. 28, 116 357
ss. 184, 185 198
s. 186 ..... 198, 435
s. 329 109
—— c. 21 (Inland Revenue Regulation Act, 1890), s. 24.... 110
—— c. 37 (Foreign Jurisdiction Act, 1890), s. 4....22, 25, 26, 364
—— c. 39 (Partnership Act, 1890), ss. 2, 5, 6, 7, 8, 10, 11, 12, 13, 16 90
s. 9 414
s. 15 242
s. 36 338
—— c. 63 (Companies (Winding up) Act, 1890) 198
—— c. 71 (Bankruptcy Act, 1890), s. 27 215
54 & 55 Vict. c. 10 (Middlesex Registry Act, 1891) 349
—— c. 17 (Charitable Trusts (Recovery) Act, 1891), s. 5..361, 434
—— c. 39 (Stamp Act, 1891), s. 8 532
s. 14 ..... 235, 531
s. 65 556
s. 72 536
ss. 91, 93, 95, 97 536
—— c. 50 (Commissioners for Oaths Act, 1891) 366
s. 2 24
55 & 56 Vict. c. 4 (Betting and Loans (Infants) Act, 1892) 457
—— c. 6 (Colonial Probates Act, 1892), ss. 2, 3 560
—— c. 19 (Statute Law Revision Act, 1892) .108, 472, 480, 482, 523
—— c. 23 (Foreign Marriage Act, 1892), ss. 9, 10, 12, 13, 16, 18 346
—— c. 57 (Private Street Works Act, 1892) 409
—— c. 64 (Witnesses' (Public Inquiries) Protection Act, 1892) 448
56 & 57 Vict. c. 53 (Trustee Act, 1893), s. 24 91
—— c. 56 (Fertilisers and Feeding Stuffs Act, 1893), s. 5... 368
—— c. 66 (Rules Publication Act, 1893), s. 3 .....338, 549
—— c. 71 (Sale of Goods Act, 1893), s. 4 526
ss. 10, 12 617
s. 11 ..... 617, 639
s. 14 124
s. 55 ..... 579, 617
—— c. 73 (Local Government Act, 1894) 350
57 & 58 Vict. c. 41 (Prevention of Cruelty to Children Act, 1894).. 68, 185, 403, 456, 694
s. 17 403
s. 18 185
s. 19 68
—— c. 60 (Merchant Shipping Act, 1894), ss. 64, 695..252, 352, 370
s. 82 588
ss. 113, 114 604
s. 123 546
ss. 239, 240 ..... 346, 351
s. 254 346

		PAGE
57 & 58 Vict. c. 60.	s. 255	352
	s. 339	346
	s. 483	360
	s. 690	252, 435
	s. 691	252, 361, 435, 513
	s. 694	523
58 & 59 Vict. c. 9	(Documentary Evidence Act, 1895), s. 1	552
—— c. 39	(Summary Jurisdiction (Married Women) Act, 1895)	410
59 & 60 Vict. c. 25	(Friendly Societies Act, 1896), s. 56	516
	s. 100	350
60 & 61 Vict. c. 52	(Dangerous Performances Act, 1897)	462
—— c. 65	(Land Transfer Act, 1897), s. 1	432, 564
	ss. 2, 25	564
	s. 8	349
	s. 14	360
61 & 62 Vict. c. 36	(Criminal Evidence Act, 1898)	451, 456, 691, 692, 693, 694
	s. 1	44, 45, 101, 142, 186, 188, 210, 215, 453, 454, 455, 457, 489, 492, 494, 509
	ss. 2, 3	455
	s. 4	455, 456, 457
	ss. 6, 7	453
—— c. 39	(Vagrancy Act, 1898), s. 1	455
—— c. 41	(Prison Act, 1898), s. 11, Sched.	444
—— c. 49	(Vaccination Act, 1898), ss. 3, 4	411
—— c. 58	(Marriage Act, 1898)	340
	ss. 4, 6, 7	344
	(Evidence Act, 1898), New South Wales	550
62 & 63 Vict. c. 33	(Board of Education Act, 1899), s. 83	551
—— c. 51	(Sale of Food and Drugs Act, 1899)	91
	s. 22	368
63 & 64 Vict. c. 48	(Companies Act, 1900), s. 1	369
—— c. 51	(Money Lenders Act, 1900)	14
1 Ed. VII. c. 22	(Factory and Workshop Act, 1901), ss. 63, 64, 65, 147.	371
	s. 147	47
2 Ed. VII. c. 8	(Cremation Act, 1902), s. 7	344
—— c. 28	(Licensing Act, 1902), s. 9	349
—— c. 42	(Education Act, 1902)	350
3 Ed. VII. c. 36	(Motor Car Act, 1903), s. 9	401, 486
	s. 19	453
4 Ed. VII. c. 15	(Prevention of Cruelty to Children Act, 1904)	456
	s. 12	456
—— c. 23	(Licensing Act, 1904)	362, 435
5 Ed. VII. c. 11	(Railway Fires Act, 1905)	170
—— c. 15	(Trade Marks Act, 1905), s. 50	348
	s. 51	348, 370
6 Ed. VII. c. 27	(Fertilisers and Feeding Stuffs Act, 1906), s. 3	368
—— c. 32	(Dogs Act, 1906), s. 1	162
—— c. 40	(Marriage With Foreigners Act, 1906)	346
—— c. 41	(Marine Insurance Act, 1906), s. 18	146, 387
	s. 20	149, 387
	s. 22	536
	s. 89	537
	s. 54	577

PAGE

6 Ed. VII. c. 58 (Workmen's Compensation Act, 1906),.....16, 17, 240, 282, 411, 435
Sched. I. (4) 9
s. 7 .....252, 361
s. 8 371
7 Ed. VII. c. 16 (Evidence (Colonial Statutes) Act, 1907) 549
—— c. 23 (Criminal Appeal Act, 1907), ss. 3, 4, 5, 20 690
s. 9 .....386, 443, 511, 513
—— c. 24 (Limited Partnerships Act, 1907) 90
—— c. 29 (Patents and Designs Act, 1907), s. 25 409
ss. 28, 52 348
s. 29 683
s. 34 9
s. 64 549
s. 77 501
s. 78 370
s. 79 .....348, 370, 549
8 Ed. VII. c. 26 (Naval Marriages Act, 1908) 346
—— c. 45 (Punishment of Incest Act, 1908) 214
s. 4 456
s. 5 464
—— c. 48 (Post Office Act, 1908) 552
—— c. 59 (Prevention of Crime Act, 1908) 558, 559
s. 10 .....47, 189, 236
—— c. 67 (Children Act, 1908) 453, 456
s. 12 424
ss. 28, 29 511
s. 30 .....462, 485, 494, 511
s. 114 464
s. 123 .....8, 47, 371, 403
—— c. 67 (Children Act, 1908), s. 124 540
Part II. 461, 511
—— c. 69 (Companies (Consolidation) Act, 1908) 362, 555
s. 17 369
s. 23 370
s. 25 373
ss. 32, 163 375
ss. 33, 69, 71, 220 .....370, 373
ss. 62, 74, 116 91
s. 78 518
s. 84 .....92, 150
ss. 109, 111 434
s. 115 253
s. 174 .....198, 210, 443, 447
s. 175 .....215, 502
s. 215 502
s. 225 23
s. 226 447
9 Ed. VII. c. 39 (Oaths Act, 1909) 697, 698
s. 2 .....458, 459
10 Ed. VII & 1 Geo. V. c. 8 (Finance Act, 1910) 501
—— c. 24 (Licensing Consolidation Act, 1910), s. 61 379
1 & 2 Geo. V. c. 6 (Perjury Act, 1911), s. 1 14
s. 13 485
s. 14 .....367, 557

PAGE

1 & 2 Geo. V. c. 13 (Parliament Act, 1911), s. 3 366
—— c. 28 (Official Secrets Act, 1911) 194
2 & 3 Geo. V. c. 20 (Criminal Law Amendment Act, 1912), s. 7..... 455
3 & 4 Geo. V. c. 2 (Army Act, 1913) 559
—— c. 7 (Children Employment Abroad Act, 1913) 456
4 & 5 Geo. V. c. 17 (British Nationality and Statute of Aliens Act, 1914), ss. 3, 21 367
—— c. 58 (Criminal Justice Administration Act, 1914), s. 28 350, 367, 456, 462, 485, 558
s. 29 443
—— c. 59 (Bankruptcy Act, 1914), s. 15 215
s. 16 .....370, 434, 677
s. 25 .....198, 210, 213, 441, 443, 447, 496
s. 26 434
s. 72 461
s. 117 243
s. 132 20
s. 137 337
s. 138 .....349, 350, 374, 408, 561
s. 139 561
s. 141 502
s. 142 23
s. 144 561
s. 166 .....215, 216
5 & 6 Geo. V. c. 30 (Naval Discipline Act, 1915), s. 9 353
—— c. 35 (Naval Marriages Act, 1915) 346
—— c. 66 (Milk and Dairies Act, 1915), ss. 8, 9 368
—— c. 90 (Indictments Act, 1915) 27, 174
Sch. I. R. 57
s. 3 .....27, 28
s. 4 27
s. 5 .....28, 57
—— c. 94 (Evidence Amendment Act, 1915), s. 5 552
6 & 7 Geo. V. c. 50 (Larceny Act, 1916), ss. 5, 6, 7, 20, 21, 22..... 215
s. 43 .....174, 178, 179, 215, 216
—— c. 65 (Ministry of Pensions Act, 1916), s. 6 .....368, 552
s. 16 23
—— c. 68 (New Ministries and Secretaries Act, 1916), s. 11. 23, 368, 552
7 & 8 Geo. V. c. 6 (Ministry of National Service Act, 1917), s. 2.. 23, 368, 552
—— c. 51 (Air Forces (Constitution Act, 1917), s. 10..23, 368, 552
s. 12 371

TABLE OF CASES

PAGE

ABADOM *v.* Abadom 475
Abbey *v.* Lill 387
Abbeyleix *v.* Sutcliffe 10, 243
Abbot *v.* Massie 612, 613, 639
Abbott *v.* Abbott.....340, 347, 366, 389, 555
— *v.* Bates 629, 662
— *v.* Middleton 618
Abdallah *v.* Rickards 431
Abel *v.* Potts 352
Abinger *v.* Ashton 386
Aboulóff *v.* Oppenheimer 406
Abraham *v.* Bullock 99
Abrahams *v.* Dimmock 14
Abrath *v.* N. E. Ry. 11 Q. B. D. 31, 32, 36
— 11 App. Cas. 16
Abrey *v.* Crux 582, 593, 597, 603
Acerro *v.* Petroni 468
Ackerley, *Re* 618
Acme Co. *v.* Sutherland Co..... 663
Actæon, The 233, 251
Acton *v.* Castle Mail Co. 147
Adair *v.* Young 496
Adam *v.* Kerr 519
— Steamship Co. *v.* London Assce. Co. 209
Adams *v.* Adams 351
— *v.* Batley 213
— *v.* Canon 382
— *v.* Thrift 150
Adamson, *Re* 325, 681
— *v.* Martin 9
Adamthwaite *v.* Synge 539
Admiralty Commrs. *v.* Aberdeen Co. 246
Agace, *Exp.* 244, 246
Agar *v.* Anthenæum Assur. 98
Agassiz *v.* London Tram Co...58, 59, 70, 71, 80
Agnew *v.* Jobson 10
Agricultural &c. Co. *v.* Fitzgerald 528, 571
Ainsworth *v.* Wilding 206, 208
Aird, *Re* 603
Airey, *Re* 524
Aitken *v.* Batchelor 250
— *v.* McMeckan 386
Ajum *v.* Union Insur...104, 163, 171
Aktieselkab *v.* Ekman 662
Alabaster *v.* Harness 213
Albert *v.* Grosvenor Co. 604
Alcock *v.* Leeuw 663
— *v.* Royal Exchange Assur.386, 471
Aldersey, *Re* 680
Alderson *v.* Clay 258, 572
Aldous *v.* Cornwell 528

PAGE

Aldridge *v.* Aldridge 345
— *v.* G. W. Ry. 162, 170
Alexander *v.* Steinhardt 105
— *v.* Vanderzee 15
Alison's Case 410, 419
Allcard *v.* Skinner 33
Allen *v.* Allen 217, 457, 474
— *v.* Cameron 617, 638
— *v.* Dundas 408, 409, 431
— *v.* Flood 149
— *v.* Maddock 526
— *v.* Morrison 328
— *v.* Pink 577, 591
— *v.* Sundius 106
— *v.* Worthy 411
— *v.* Yoxall 446
Allgood *v.* Blake 616, 621
Alliance Synd. *v.* McIvor 251
Allison *v.* Johnson 370
Allsop *v.* Joy 407
Alperton Co. *v.* Manning 202
Alsop *v.* Bowtrel 365
Alston, *Re* 680
Altone *v.* Delmeanny 473
Alwina, The 22
Amalgamated Properties *v.* Globe & Phœnix Co. 477
Ambrose *v.* Clendon 55, 76
Amyot *v.* Dwarris 618
Amys *v.* Barton 62, 83
Anderson, *Exp.*, *Re* Tollemache.. 429
— *Re*, 39 L. J. P. 586
— *Re*, 7 Ch. D. 613
— *Re*, 1905, 2 Ch. 683, 685
— *v.* Bk. of Columbia 209
— *v.* Calvert 156, 175, 176
— *v.* Collinson 408, 419
— *v.* Gorrie 405
— *v.* Hamilton 195
— *v.* Sutherland 123
— *v.* Weston 681
— *v.* Whalley 469
Andrew *v.* Raeburn 464
Andrews *v.* Andrews 625, 643, 644, 653
— *v.* Mitchell 689
— *v.* Ulthwaithe 384
— *v.* Wirral, R. C..541, 545, 546, 556
Angell *v.* Duke, 32 L. T. 594, 595
— L.R. 10 Q.B. 579, 594, 597
Anglesey *v.* Hatherton ..133, 162, 301
Anglo-Californian Bk. *v.* London, &c. Co. 599
Angus *v.* Clifford 150
Annesley *v.* Anglesea 205, 307, 466, 482
Anon, 1 Stra. 249

PAGE
Anon, 3 T.R. 471
— 2 Atk. 48
— 1 Ld. Ry. 230, 354
— *v.* Anon 199
Anstee *v.* Nelms 384, 612, 656
Anstell *v.* Alexander 472
Anthony, *Re* 401
— *v.* Anthony 119, 351
Apothecaries Co. *v.* Bentley 36
— *v.* Jones 57
Applebee, *Re* 668, 672
— *v.* Percy 95
Appleby *v.* Johnson 590
Appleton, *Re* 670
— *v.* Braybrook 366
Arbon *v.* Fussell.....108, 125, 397, 523, 532
Armitage *v.* Nicholson 96
Armstrong *v.* Hewitt 525
— *v.* Normandy 238
— *v.* Stockham 366
Arnold *v.* Bath and Wells (Bishop) 347
— *v.* Cheque Bk. 686
Arnot *v.* United African Co. 370
Arnot's Case 374
Arnott, *Re* 203, 205
— *v.* Hayes 375, 376
Arthur *v.* Dudgeon 500
Arton, *Re* 389
Ashburton *v.* Pape 201
Ashbury Carriage Co. *v.* Riche.. 98
Ashford *v.* Price 250
Ashforth v. Redford 15
Ashhurst *v.* Mason 151
Ashley *v.* Harrison 75
Ashling *v.* Boon 531
Ashmore *v.* Hardy 232
Ashpitel *v.* Sercombe 258
Ashton, *Re* 627, 645, 660, 661
— *Re*, *Exp.* McGowan 89
— *Re*, Ingram *v.* Papillon..667, 669
Ashtown *v.* Waterford 195
Ashwell, *Re* 682
Asiatic Petroleum Co. *v.* Anglo-Persian Co. 194
Askew *v.* Woodhead 412
Assheton-Smith *v.* Owen....290, 295, 297, 304, 612, 629
Assyrian, The 385
Astbury *v.* Astbury 242, 244
Aste *v.* Stumore 125
Astley *v.* Astley 190
— *v.* Mills 580
Asylum *v.* Handysides 375
Atcherley *v.* Sprigg 679
Atherford *v.* Beard 535
Atherton, *Re* 213, 215
Athill, *Re* 380
Athlone Peerage 346
Atkins *v.* Tredgold 243
Atkinson, *Re* 334, 517
— *v.* Morris..219, 325, 326, 328, 329, 330, 333
Atlay, *Re* 613, 626, 656
Attlay, *Re* 541, 564
Attorney-General *v.* Antrobus.. 304, 359, 360
PAGE
Attorney-General *v.* Barker 555
— *v.* Berkeley 204
— *v.* Bertrand 19, 42
— *v.* Birmingham 385, 414
— *v.* Bournemouth 571
— *v.* Bowman 187
— *v.* Bradlaugh, 1 C. & E. 64, 104, 121
— *v.* —14 Q.B.D. 335, 337, 661
— *v.* Briant 196
— *v.* Cleeve 133
— *v.* Collom 684
— *v.* Cunard 214
— *v.* Emerson ...111, 112, 294, 298, 354, 675
— *v.* Eriché 411
— *v.* Esher 130
— *v.* Hitchcock 481, 482
— *v.* Horner.....295, 297, 299. 301. 303, 304, 525
— *v.* Horner (No. 2) 542
— *v.* Jefferys 671
— *v.* Kohler 309
— *v.* Lindsay-Hogg 131
— *v.* Merrick 360
— *v.* Metrop. Ry. 496, 501
— *v.* Moorsom Roberts 359
— *v.* Nottingham..159, 162, 170, 195
— *v.* Oldham 341
— *v.* Pagham Co. 495
— *v.* Radloff 187, 200
— *v.* Slingsby 118, 385
— *v.* Stephens.....74, 130, 218, 225
— *v.* Theakstone 20, 337
— *v.* Vandeleur 111, 629, 664
— *v.* Warwick 230, 372, 373
— *v.* Wimbledon 420
Attwood *v.* Small 451
Augustien *v.* Challis ...570, 573, 578
Austin *v.* Evans 443
Australian, etc., Soc. *v.* National, etc., Assn. 526
Avery *v.* Chartsworth 517
Aveson *v.* Kinnaird ..55, 61, 62, 78, 83, 210, 277, 321
Ayers *v.* Hanson 25
Aylesford Peerage..58, 60, 61, 77, 78, 198, 199, 220, 312, 679
Aynesley, *Re* 668, 669, 672
Ayrey *v.* British, etc., Co. 99

B., *Re* 435
B. *v.* B. 119
Babbage *v.* Babbage 216
Backhouse *v.* Jones..76, 116, 135, 165
Bacon, *Exp.* 411
— *Re* 581, 614, 670, 671, 675
— *v.* Bacon 203
— *v.* Chesney 243
— *v.* Kavanagh 633
Baddeley *v.* Mortlock 191
Badeley *v.* Consolidated Bk..... 414
Bader *v.* Power 338
Badische *v.* Levinstein..385, 390, 464
Baerlein *v.* Chartered Bk..... 689
Bagley, *Re* 461
Bagot *v.* Bagot, 1 L.R.I. 1 498
— *v.* — 1 L.R.I. 308 118
— *v.* Williams 416, 422

PAGE
Bagshaw *v.* Pimm 43
Bailey *v.* Bidwell 523
— *v.* Macaulay 197
— *v.* Woolstone 579
Baillie *v.* Butterfield 431
Bain *v.* Case 352
— *v.* Mason 345
— *v.* Whitehaven Ry. ...11, 374, 688
Bainbrigge *v.* Baddeley 417, 423
Baines *v.* Ewing 90
Baird *v.* Fortune 648, 663
Baker, *Re*, Connell *v.* Baker..... 441
— *v.* Ambrose 461
— *v.* Baker 317
— *v.* Cave 372
— *v.* Dale 476, 480
— *v.* Dening 515
— *v.* L. & S. W. R. Ry. 208
— *v.* Richardson 624
— *v.* Sales 176
Bakewell *v.* Davis 364, 369
Baldney *v.* Ritchie 543
Baldwin *v.* Casella 95
Balfe *v.* Halpenny 598
Balfour *v.* Tillett 443
Balkis Co., *Re* 517
— *v.* Tomlinson 685
Ball, *Re* 331
— *v.* Dunsterville 516, 518
— *v.* Wallasey Bd. 127
Ballantyne *v.* Mackinnon 407, 410
Ballard *v.* Way 336
Balls *v.* Westwood 685
Balme, *Re* 528
Bamfield *v.* Massey 192
Banbury Peerage 678
Banbury *v.* Bank of Montreal..27, 416
Bandon *v.* Becher 406
Bank of Australasia *v.* Palmer.. 599
— England *v.* Anderson 664
— Ireland *v.* Cogry Co. 92
— Montreal *v.* Stuart 33
— N. S. Wales *v.* Piper 89
— N. Zealand *v.* Simpson..608, 616, 617, 622, 637
— Syria, *Re* 91
Banks, *Re* 619
— *v.* Goodfellow 104
Banner *v.* Banner 433
— *v.* Jackson 207
Barangba Oil Co., *Re* 374
Barbat *v.* Allen 688
Barber *v.* Holmes 351
Barden *v.* Kyverberg 133, 155
Barker *v.* Furlong 40
— *v.* Jansen 617
— *v.* Keat 612
Barksdaile *v.* Gilliatt 618
Barlow *v.* Rhodes 649
Barnes *v.* Lucille 162
— *v.* Mawson 300
— *v.* Merritt...18, 172, 175, 183, 250
— *v.* Trompowsky 46
Barnett *v.* Aldridge 9
— *v.* Allen 75, 399, 402
— *v.* South London Tram Co... 99
Barnstaple, *Re* 586
Barough *v.* White 241

PAGE
Barraclough *v.* Greenhough 432
— *v.* Johnson 302
Barratt *v.* Kearns 448
Barrett *v.* Henry 354
— *v.* Irvine 89, 96, 160
— *v.* Long 175
Barron *v.* Ryan 418
— *v.* Willis 33
Barrow *v.* Dyster 124
Barrs *v.* Fewkes.....580, 581, 666, 671, 675
— *v.* Jackson.410, 416, 420, 431, 432
Bartholomew *v.* George 465
Bartle *v.* Arnold 454
Bartlett *v.* Smith 12, 14
Barton *v.* Bk. of N. S. Wales..580, 586
— *v.* Dawes 623, 648
Baskett, *Re* 332
Bass *v.* B. 216, 217
Batchelor *v.* Honeywood 402
Bate *v.* Kinsey 204
Bateman *v.* Bailey 61, 76
— *v.* Faber 682
— *v.* Hunt 587
Batemann, *Re* 653
Bater *v.* Bater, 1906, P. 406, 408
— *v.* — 1907, P. 390
Bates *v.* Eley 500
— *v.* Hewitt 145, 146, 152
Batson, *Re*, *Exp.* Hastie 447
Batten, *Re*, *Exp.* Milne 565
Battie-Wrightson, *Re*..538, 560, 603, 637, 661
Battyll *v.* Lyles 120
Bauerman *v.* Radenius 248
Baugh *v.* Cradocke 202
Bawdon *v.* London, &c., Ince.... 99
Baxendale *v.* Bennett 687
— *v.* De Valmer 521
Bayley *v.* Buckland 412
— *v.* Cook 369
Bayliffe *v.* Butterworth 106
Baylis *v.* A.-G. 613
Bays, *Re* 447
Beale, *Re* 61, 653
— *v.* Kyte 585
Beall, *Re* 198
Beamish, *Re* 432
— *v.* Beamish 145
Beard, *Re*, *Exp.* Lewis 584
— *v.* L. G. Omnibus Co. 99
Beardsley *v.* Beardsley 418
Beare *v.* Garrod 83
Beasley *v.* McGrath 230, 235
Beatson *v.* Skene 194, 195
Beatty *v.* Cullingsworth, 1896. *Times* 396
— *v.* — 1897, *Times* 66, 114
Beauchamp, *Re* 427
— *v.* Parry 240
Beaufort *v.* Aird 111, 675
— *v.* Crawshay 12, 438, 498
— *v.* Smith..297, 302, 304, 336, 337, 358, 359
Beaumont Peerage 436, 501
Beaumont *v.* Fell 651
Beavan *v.* McDonnell 152

PAGE
Bechuanaland Co. *v.* London Bk. 124
Beck *v.* Dyson 152
Beck *r.* Pierce 415
Beckett *v.* Mid. Ry. 434
Beckwith *v.* Benner 205
Beddy *r.* Smith 487
Beech *v.* Jones 471
Beechey *r.* R. 93
Beeson *r.* Darby 361
Beever *r.* Hanson 134
Behn *v.* Burness 617, 639
Beigtheil *v.* Stewart 582
Belbin *v.* Skeats 522, 563
Belfort, The 532
Bell *v.* Ansley 237
— *v.* Bell 217
— *v.* Ingestre 583, 600
Bellcairn, The 406
Bellerophon, The 195
Belmore *v.* Kent Council 130
Belt *v.* Lawes, 1882, *Times*, Nov., 9
— *v.* — 1882, *Times*, Dec. 387
Benjamin, *Re* 680
Bennett *v.* Bacon 577, 589
— *v.* Bennett 669
— *v.* Brumfitt 515, 516
— *v.* Griffiths 9
— *v.* Marshall 627, 660
Bennison *v.* Cartwright 59, 73
— *v.* Jewison 12, 14
Benson *v.* Olive 438
Beresford *v.* St. Albans 104, 121
— *v.* A.-G. 502
Berkeley Peerage, 4 Camp...295, 308, 309, 310, 311, 317, 437
— — 1891, *Times* 449, 463
Bermondsey Vestry *v.* Ramsey .. 415
Bernasconi *v.* Atkinson 652
Berney *v.* Read 562
Berry *v.* Banner 299
— *r.* Berry 114
Berryman *v.* Wise 110
Berthon *v.* Loughman 391
Berwick *v.* Horsfall 12, 15
— *v.* Murray 475
Beryl, The 385
Bessela *v.* Stern 2, 259, 487, 489
Best *v.* Woods 496
Betteley *v.* McLeod 446
Betts, *Re* 9
— *v.* Betts 216, 471
— *v.* Menzies 423, 427
Betty *v.* Nail 313
Bevan *v.* Waters 206
— *v.* Williams 110
Bew *v.* Reed 599
Bewley *v.* Atkinson 278, 282
Beynon, *Re* 680
Bickerton *v.* Walker 587
Bidder *v.* Bridges, 34 W.R...295, 297, 305, 347, 524, 525, 542
— *r.* — 26 Ch. D. 498
Biddle *v.* Bond 686
Biggar *v.* Rock Co. 99
Biggerstaff *v.* Rowatt 91
Biggs *v.* Brennan 573
Bigsby *v.* Dickenson 40, 392
Bingley *r.* Marshall 475

PAGE
Birch *r.* Birch 406, 684
— *v.* Depeyster 617, 638
— *r.* Ridgway 108
— *r.* Somerville 463
Birchall, *Re* 580
— *v.* Bullough 471, 531, 572
Bird *v.* Harris 487
— *r.* Keep 343, 356, 357
Birkenhead Co. *v.* Brownrigg.... 374
Birmingham, etc., Co. *v.* L. & N. W. Ry. 200, 209
— *v.* Ross 616
Birrell *v.* Dryer.22, 397, 617, 637, 662
Birt *v.* Rothwell 21
Bishop *v.* Chambré 529
Bispham *v.* Bispham 82
Bizzey *v.* Flight 526
Black *v.* Epping Union 411
Blackburn *v.* Hargreaves 441
— *v.* Haslam 95
— *v.* Mason 106, 123
— *v.* Vigors 95
— Bldg. Soc. *v.* Cunliffe 377
— Union *v.* Brooks 497
Blacker *v.* Lake 14
Blackett *v.* Lowes 300
— *v.* Royal Exchange Assur..... 663
Blackhall *v.* Gibson 684
Blackman, *Re* 651
Blackham's Case 432
Blackledge *v.* Blackledge 410
Blackmore *v.* Huxley 467
Blackstone *v.* Wilson 249
Blacquiere *v.* Hawkins 363
Blades *v.* Lawrence 23, 515
Blair *v.* Crawford 412
Blake *v.* Albion Soc...89, 97, 99, 160. 166, 172, 173, 174, 175, 181, 183
— *v.* Blake 489
— *v.* O'Kelly 417, 423
— *v.* Pilford 195
— *v.* Woolf 95
Blakemore, *Re* 9
— *v.* Glamorgansbire Co. ...419, 429
Blamey *v.* Blamey 496
Blandford *v.* Marlborough 380
Blandy-Jenkins *v.* Dunraven.112, 113, 129, 239, 240, 279, 284, 299, 358, 359
Blane *v.* Francis 123
Blankensee *v.* Mid. Ry. 10
Blayney's Trusts, *Re* 652
Bleakley *v.* Smith 516
Blewett *v.* Tregonning 483
Blewitt, *Re* 515, 529
— *v.* Tritton 532
Bloomenthal *v.* Ford 685
Blount *v.* Layard 361
Bluck *r.* Lovering 476
Blundell *v.* Howard 162, 169
Blyth *v.* Fladgate 90, 415
Boaler *v.* Power 427
Board *v.* Board 685
— of Trade *r.* Glenpark 364
Boddington, *Re* 642
Boddy *r.* Boddy 166
Boden *r.* Hensby 210
Bodman, *Re* 625

PAGE
Boileau *v.* Rutlin 251, 313
Bolckow *v.* Seymour 15
Bold *v.* Rayner 536
Boldron *v.* Widdows 118, 125
Bollard *v.* Spring 425
Bolton, *Re* 619
— *v.* O'Brien 175, 176, 612, 620
— *v.* Sherman 250
— *v.* Tomlin 471
Bonaparte *v.* Bonaparte.....406, 684
Bond *v.* Barrow Co. 387
— *v.* Evans 96
Bonelli, *Re* 389
Bonfield *v.* Smith 66
Bonham, *Exp.* 427
Bonhote *v.* Bonhote 345
Boon *v.* Cooper 243
Boosey *v.* Davidson 547, 573
Booth *v.* Rattle 614, 655
— *v.* Turle 580, 598
Bootle *v.* Blundell 330, 400
Boots *v.* Cowling 109, 380
Boston *v.* Boston 594
Bosvile *v.* A.-G. 678
Boswell *v.* Coaks 416
Bottomley, *Exp.* 42, 468
— *Re* 253
— *v.* Brougham 198
Boucher *v.* Boucher 19
Bouchier *v.* Taylor 408
Boughey *v.* Boughey 346
Boughton, *Re* 210
Boulter, *Re* 623, 631, 655
— *v.* Peplow 234, 538
Boulton *v.* Boulton 497
Bourke *v.* Warren 401
Bourn *v.* Debest 230
Bourne, *Re* 668
— *v.* Gatliff.....41, 106, 107, 491, 630, 664
— *v.* Swan 8, 65, 391, 394
Bournemouth Commrs. *v.* Watts. 518
Bowden *v.* Bowden 386
Bowen *v.* D'Orleans 89
Bowerbank *v.* Monteiro 592
Bowes, *Re* 281
— *v.* Shand 15
Bowker *v.* Williamson.....531, 532
Bowles *v.* Johnson 441
— *v.* Langworthy 522
Bowling, *Re* 408, 411
Bowman *v.* Bowman 472
— *v.* Hodgson 519, 522, 563
— *v.* Manzelman 546
— *v.* Norton 205
— *v.* Taylor 683
Bowsher *v.* Calley 254
Bowyer *v.* Morgan 126
Boyce *v.* Chapman 10
Boyes, *Re* 580
— *v.* Cook 618, 641
Boyle *v.* Mulholland 623, 648
— *v.* Smith 96
— *v.* Wiseman 12, 213, 548
Bracegirdle *v.* Bailey 191, 475
Bradburn *v.* Foley 124
Bradbury *v.* Foley 14
Bradford *v.* Young 432
PAGE
Bradford Corp. *v.* Pickles 149
— Corp. *v.* Romney 639
Bradlaugh *v.* Gossett 20
Bradley *v.* Arthur 20, 387
— *v.* Clayton 214
— *v.* James 279, 280, 281
— *v.* Riches 89
Bradshaw *v.* Murphy 213
— *v.* Waterloo 16
— *v.* Widdrington 281, 289, 689
Brady, *Re* 642
— *v.* Todd 94
Braid *v.* Braid 346, 554
Brailey *v.* Rhodesian Co. 388
Brain *v.* Preece.24, 288, 289, 293, 548
Braithwaite *v.* Kearns 475
Brake, *Re* 332, 646
Bramble *v.* Moss 530
Bramley, *Re* 619
Bramwell *v.* Lucas 206
Brandao *v.* Barnett 21
Brandford *v.* Freeman 39
Bray *v.* Briggs 601
— *v.* Ford 689
Brazier, *Re* 529
— *v.* Jones 562
Brembridge *v.* Osborne 117
Bremer *v.* Freeman 389
Bremner, *Re* 427
Brenda Co. *v.* Green 107
Brennan *v.* Moran 669
Breton *v.* Cope.235, 317, 348, 521, 543
Brett *v.* Beales...132, 296, 299, 302, 336, 372, 373, 433, 525
— *v.* Clowser 597
Brew *v.* Haren 113, 130, 405, 433
Brewery Assets Co., *Re* 92
Brewster *v.* Sewell 547
Brickell *v.* Hulse 251, 261, 402
Bridge *v.* Howard 368
Bridges *v.* Highton 132, 348, 557
Bridgewater's Case 381
Brier *v.* Evison 500
Brierley *v.* Brierley 234, 342
Brierly Board *v.* Pearsall 434
Briggs, *Re* 90
— *v.* Aynsworth 40
— *v.* Wilson 279
Bright *v.* Legerton.....98, 110, 286, 288, 289
Bright-Smith, *Re* 380, 626
Brighton Empire *v.* London & Cty. Bk. 376
— Syndicate *v.* London & Cty. Bk. 376
Brimble, *Re* 654
Brindley *v.* Woodhouse 539
Brine *v.* Bazalgette 156, 186
Bringloe *v.* Goodson 522
Brinkley *v.* A.-G. 343, 365
Brinsmead *v.* Harrison 415
Brisco *v.* Hamilton 327
— *v.* Lomax..161, 168, 295, 298, 301
Bristol Corp. *v.* Cox 204, 205
—, Mayor of, *v.* G. W. Ry. 501
Bristow *v.* Cormican..105, 112, 113 161, 360
— *v.* Miller 244

PAGE

Bristow *v.* Sequeville.....388, 389
Britannic Co. *v.* David 35
British Assoc., &c. *v.* Nettlefold. 369
— Burmah Co., *Re Exp.* Vickers 247
— Co. *v.* Cunliffe 99
— *v.* Sturge 537
— Home *v.* Royal Hosp....615, 653
— Mutual Bank *v.* Charnwood Ry. 88, 683
— & American Tel. Co. *v.* Colson 122
Briton Assoc. *v.* Jones 91
Brittain *v.* Kinnaird 405
Brittlebank *v.* Smith 24, 563
Broad *v.* Pitt 202
Brocas *v.* Lloyd 445
— *v.* London (Ld. Mayor) 555
Brocklebank *v.* Sugrue 96
— *v.* Thompson...229, 238, 296, 301
Broder *v.* Saillard 385
Broderick *v.* Higginson 162
Brodie *v.* Brodie 77
— *v.* Howard 242
Bromley *v.* Wallace 192
Brook *v.* Brook 28
Brooke *v.* Brooke 24
— *v.* Wigg 495
Brookes *v.* Tichborne 108
Brooks *v.* Bagshaw 410
— *v.* Steele 390, 393
— *v.* Torquay Council 518
Broome *v.* Gosden 401
Brougham *v.* Pattinson 170
Brounker *v.* Atkyns 381
Brown, *Re* 366, 539, 548, 643
— *v.* Armstrong 538
— *v.* A.-G. 33
— *v.* Brown, L.R. 3 P. & D. ... 217
— *v.* —, 1915, P. 217
— *v.* —, 116 L.T. 345
— *v.* Byrne 107, 125
— *v.* Capel 349
— *v.* Dean 436, 633
— *v.* E. & M. Ry..162, 165, 169, 171
— *v.* Foot 89, 95
— *v.* Foster 206
— *v.* Hawkes 16, 151
— *v.* Lambeth Corp. 165
— *v.* Langley 578, 592
— *v.* London Corp. 373
— *v.* Thornton 11, 363
— *v.* White 440
— *v.* Woodman 48, 542
— *v.* Wren 104, 121, 236
Browne, *Re* 643
— *v.* Crashaw 451
— *v.* Dunn 476, 479
— *v.* Hope 618
Browning *v.* Browning 119, 345
Bruce *v.* Garden 231, 235
— *v.* Hurley 74, 82, 143
— *v.* Nicolopulo 60, 547
Bruff *v.* G. N. Ry. 247
Bruin *v.* Knott 373
Brune *v.* Thompson 22
Bruner *v.* Moore.....105, 587, 622, 641, 642
Brünner, *Re* 253
Brunning *v.* Odhams ..599, 617, 636

PAGE

Brunsden *v.* Humphrey..417, 422, 425
Brunswick *v.* Harmer 399, 402
Brunton *v.* Dullens 657
Bryan, *Re* 327, 328
Bryant *v.* Foot 25
Brydges *v.* Dix 516
Buccleuch *v.* Met. Bd. Works.. 196, 197, 416
Buchart *v.* Buchart 190
Bucher *v.* Jarrett 534, 545
Buckland *v.* Johnson 415
Buckley *v.* Cooke 499
Buckton *v.* L. & N. W. Ry. 516
Budd *v.* Davison 40
— *v.* Lucas 95, 174, 183
Budden *v.* Wilkinson 209
Building Assoc. *v.* Smee 92, 530
Bullen *v.* Michel 48, 347, 359, 525
Bulley, *Re* 343
— *v.* Bulley 233, 538, 684
Bullivant *v.* A.-G. Victoria.....203, 204, 205
Bullock *v.* Corrie 204
Bunbury *v.* Bunbury 205
— *v.* Matthews 110
Bunting *v.* Marriott 653
Burbury *v.* Jackson 490
Burchard *v.* McFarlane 442
Burchell *v.* Clark 536, 612
Burford *v.* Burford 389
Burgess *v.* Bennett 471
— *v.* Wickham 579
Burghardt *v.* Angerstein 342
Burin *v.* Knott 363
Burke *v.* S. E. Ry. 147
Burkinshaw *v.* Hodge 669
Burkitt *v.* Blanshard 251
Burmester *v.* Barron 122
Burnaby *v.* Baillie..77, 118, 199, 216, 312, 548, 555, 678
Burnby, *Exp.* 57
Burnes *v.* Pennell 92
Burnside *v.* Dayrell 247
Burrell *v.* North 533
Burrough *v.* Martin....351, 469, 470
Burrowes *v.* Clonbrock 239, 603
Burrows *v.* Bedford School 353
Bursill *v.* Tanner 205, 207, 209
Burslem *v.* Burslem 497
Burstall *v.* Bianchi 595
Burton *v.* Agnew 385
— *v.* N. Staff. Ry. 497, 498
— *v.* Plummer 470, 471
Bury *v.* Bury 343, 345
Bustros *v.* White 208, 209
Buteshire, The 18
Butler *v.* Allnut 122
— *v.* Butler 429, 433
— *v.* Ford 110
— *v.* Mountgarrett 79, 295, 310, 533, 681
Butterworth *v.* Butterworth 216
Buxton *v.* Cornish 572
Byles *v.* Cox 521
Bynoe *v.* Bk. of England 448
Byrne *v.* Londonderry Co..19, 99, 127
— *v.* Nolan 520
Bywater, *Re* 326, 328, 332, 431

PAGE
CABALLERO *v.* Henty 147
Cade *v.* Daly 599
Cadge, *Re* 529
Cadogan, *Re* 619
Cahill *v.* L. & N. W. Ry. 336
Caine *v.* Palace Co. 418
Caird *v.* Moss 412, 417
Calcraft *v.* Guest 201, 204
Caldbeck *v.* Boon 204, 205
Calder *v.* Halket 405
Caley, *Re* 618
Calico Assn. *v.* Booth 29
Call *v.* Dunning 521, 522
Callaghan *v.* Society, &c. 126
Callan, *Re* 680
Callandar *v.* Dittrich 423
Callaway, *Re* 560
Calley *v.* Richards 202
Callow *v.* Young 249
Calvert *v.* Canterbury 284
— *v* Flower 477
Calypso, The 419, 422
Cambefort *v.* Chapman 414
Camden *v.* Inland Revenue Commrs...25, 379, 388, 390, 391, 394 622, 630, 665
Cameron *v.* Wiggins 620, 638
— *v.* Young 589
Cameron's Co., *Re* 201, 546
Camoys *v.* Blundell 612
Campbell, *Exp.*, *Re* Wallace 434
— *Re* 205
— *v.* Campbell 207
— *v.* French 619
— *v.* Loader 688
— *v.* Rickards 391
— *v.* Rothwell 261, 500
Canadian Pacific Ry. *v.* Frechette 126
Cann *v.* Gilmour 39
Cannam *v.* Farmer 682
Cannon *v.* Villars 635
Cantello *v.* Cantello 161, 136
Canterbury Co. *v.* Cooper 685
Capital Assoc., *Re* 613
— Fire Assoc., *Re* 210
— & Counties Bk. *v.* Henty 620
— — *v.* Rhodes 349, 580
Caratel Mines, *Re* 370
Cardiff, The 484
Careless *v.* Careless 659
Carey *v.* Cuthbert 205
— *v.* Pitt 402
Carlill *v.* Carbolic Co. 531
Carlin *v.* Carlin 389
Carlisle *v.* Graham 111
— *v.* Whaley 349
— Co. *v.* Bragg 584
— *v.* Muse 596
Carmarthen Ry. *v.* Manchester Ry.....57, 60, 66, 225, 572
Carnarvon *v.* Villebois 297, 298, 300, 302, 306
Carne *v.* Steer 261
Carpenter *v.* Buller 234, 683
Carpmael *v.* Powis 203
Carr *v.* L. & N. W. Ry. 685
— *v.* Lynch 517, 630, 631
— *v.* Mostyn 240, 299, 359

PAGE
Carritt *v.* Real, etc., Co. 580
Carroll *v.* Barry 658
Carruthers *v.* Graham 438
Carter, *Exp.* 587
— *Re* 612
— *v.* Boehm 382, 387
— *v.* Kimball 16
— *v.* Pryke 165
— *v.* Salmon 595, 600
Cartwright *v.* Cartwright 389
— *v.* Sculcoates 163
— *v.* Vawdry 611
Caryll *v.* Daily Mail 156
Case *v.* Case 544
Casement *v.* Fulton 515
Cash *v.* Taylor 97
Caspari, *Re* 462, 502
Castle *v.* Fox 641, 656
Castlebar Guardians *v.* Lucan.. 361
Castledon *v.* Turner 629, 659
Castrique *v.* Buttigieg 582
— *v.* Imrie 413, 418
Caterina Maria, The 353
Cathcart, *Re* 519
Cato *v.* Thompson 590, 591, 602, 616, 638
Caton *v.* Caton 516
— *v.* Hamilton 359, 360
Catt *v.* Howard 243, 469
Cauldwell *v.* Elger 638
Cavalier *v.* Pope 589
Cave *v.* Cave 89
— *v.* Harris 648
— *v.* Hastings 527, 632
Chadwick *v.* Bowman 208
— *v.* Burnley 617, 637
Chalmers *v.* Shackell 10
Chamberlain *v.* Stoneham 446
— *v.* Young 624
Chambers *v.* Bernasconi 288, 293
— *v.* Kelly 633
Chandler *v.* Grieves 20
— *v.* Horne 465
— *v.* Webster 617
Chandos Peerage 340
Chant, *Re* 245
— *v.* Brown 204
Chapel *v.* Washburne 243
Chapman *v.* Beard 134
— *v.* Callis 590
— *v.* Cowlan 301, 302
— *v.* Smethurst 582
— *v.* Walton 391
Chappell, *Re* 333, 652
Chaproniere *v.* Lambert 526
Charkieh, The 26
Charlesworth *v.* Mills 570, 572
Charlton *v.* Durham 242
Charnock *v.* Dewings 465
— *v.* Merchant 453, 454, 691
Charrington *v.* Wooder 605, 616, 617, 635
Charter *v.* Charter 328, 332, 333, 607, 608, 615, 624, 625, 628, 629, 646, 647, 651, 652
Chase *v.* Lowell 60, 65, 72
Chatenay *v.* Brazilian Co.....11, 15, 390, 605, 630

PAGE

Chatterton *v.* London & Cty. Bk. 377
— *v.* Sec. of State India 195
Chaurand *v.* Angerstein 661
Cheadle, *Re* Bishop *v.* Holt..641, 647
Cheese *v.* Lovejoy 688
Cheltenham Co. *v.* Price 374
Chenie *v.* Watson 46
Chennel, *Re* 500
Chenoweth, *Re*, 45 Sol. Jo. ..623, 644
— *Re*, 1902, 2 Ch. 21, 106
Cherry *v.* Heming 517
Chertsey Union *v.* Surrey Clerk.. 350
Cheshire *v.* Bailey 99
Chesmer *v.* Noyes 24, 366
Chesney *v.* Newsholme 114, 115
Chicago Ry. *v.* Chancellor 64
Chichester *v.* Coventry 667
— *v.* Quatrefages 326, 328, 330
Chilcott *v.* Chilcott 233
Child, *Exp. Re* Ottaway 473
— *v.* Grace 257, 260
Chilvers *v.* L. C. C. 176
Chisholm *v.* Doulton 96
Chism *v.* Lipsett 541
Cholmondeley *v.* Clinton 204
Christian *v.* Coombe 362
Christie *v.* Unwin 405
Christmas *v.* Whinyates 529
Christy *v.* Courtenay 670
Chubb *v.* Solomons 194
Church, *Exp.* 366
— *v.* Imperial Gas Co. 22, 25
Churchill, *Re* ...73, 76, 148, 328, 629
— *v.* Gedney 620
Chuter *v.* Freeth 91
— *v.* Ford 366, 371
Ciocci *v.* Ciocci 119
Citizens' Bank *v.* Bk. of N. Orleans 686
— Co. *v.* Brown 88, 91
City of London, The 361
— Mecca, The 403
Clack *v.* Clack 43
Clanricarde's Case 364
Clarence, *Re* 399, 400, 515
Clark, *Re* 618, 641
— *v.* Adie 393, 612, 620, 686
— *v.* Alexander 121
— *v.* Elphinstone 161
— *v.* Molyneux 17, 151, 156
— *v.* Mullick 11
— *v.* R. 57, 189
Clarke, *Re* 332, 516, 650
— *v.* Clarke 326, 329, 521
— *v.* Hall 683
— *v.* Imperial Gas Co. 374, 518
— *v.* Main 65
— *v.* Mid. G. W. Ry. 421
— *v.* Ramuz 590
— *v.* Saffery 469
— *v.* Yorke 421
Clarkson *v.* Woodhouse 113
Clayton *v.* Hardwick Colliery Co. 25
— *v.* Leech 590
— *v.* Nugent 614, 639, 640
Cleave *v.* Jones 12, 200, 207
Cleeland *v.* McCune 489
Clegg *v.* Dearden 421

PAGE

Cleland *v.* Cleland 464
Clements *v.* Carey 516
Clementson *v.* Gandy 626
Clennell *v.* Lewthwaite 670
Clever *v.* Kirkman 581, 583
Cleverton *v.* Uffernel 95
Cliff, *Re* 388, 390, 560
Clifford, *Re* 626
— *v.* Burton 248, 249
— *v.* Hunter 474
— *v.* Timms 362
Cloak *v.* Hammond, *Re* Taylor.. 624, 629, 644, 652
Cloake, *Re* 496
Clode *v.* L. C. C. 301, 304
Closmadeuc *v.* Carrol 532
Clothier *v.* Chapman 299
Clyde Navigation *v.* Laird...630, 664
Coates *v.* Bainbridge 247
— *v.* Moore 564
Coats *v.* Herefordshire Council.. 131, 168
Cobbett *v.* Grey 232
— *v.* Hudson 449, 465
— *v.* Kilminster 108, 109
Cobden *v.* Kendrick 205
Cochrane *v.* Moore 587
Cockman *v.* Mather 381
Cockrill *v.* Sparkes 244
Cocks *v.* Nash 578, 582, 589
— *v.* Purday 393
Codd *v.* Delap, 92 L.T. 406
— *v.* — 1906, W.N. 499
Coffey *v.* U. S. A. 418
Cointat *v.* Mayham 579
Colchester Co. *v.* Tendring Licensing J. J. 463
Coldwell *v.* Holme 61, 646, 647
Cole *v.* Kelly 123
— *v.* Manning 487, 490
— *v.* Parkin 518
— *v.* Ry. Co. 134
— *v.* Saqui 118
— *v.* Sherard 366
Coleman *v.* Coleman 540
— *v.* Kirkaldy 359, 360
Coleraine, etc., *Re* 496
Coles *v.* Coles..469, 472, 519, 522, 563
— *v.* Hulme 612
Colget *v.* Norris 95
Colledge *v.* Horn 250
Collett *v.* Keith 232
Collier *v.* Nokes 25, 136, 380, 477
— *v.* Simpson 391, 393, 395
Collins *v.* Bayntun 522
— *v.* Bishop 679
— *v.* Carnegie 354
— *v.* Collins 233
— *v.* L. G. Omnibus Co. 209
— *v.* Maule 373
Collis *v.* Amphlett 305, 360
Collman *v.* Mills 96
Colls *v.* Home Stores 385
Colonial Bank *v.* Cady 685, 686
Colpoys *v.* Colpoys 613, 618
Colsell *v.* Budd 118
Columbia Ry. *v.* Hawthorne ... 134
Colyer, *Re* 330

PAGE
Commissioners of Police *v.* Cartman 96
— *v.* Donovan 350, 558, 559
Commonwealth *v.* Blood 533
— *v.* Chance 58, 80, 144
— *v.* Cleary 114
— *v.* Gray 190
— *v.* Knapp, 9 Pick. 266
— *v.* — 10 Pick. 266, 272
— *v.* — 27 Mass. 428
— *v.* Morrell 533
— *v.* Piper 170, 397, 398
— *v.* Robinson 137, 173
— *v.* Trefethan 62, 64, 80
Compania Naviera *v.* Churchill.. 577
Components Co. *v.* Naylor.39, 92, 247
Concha *v.* Concha..238, 407, 409, 415, 417, 418, 420, 431, 432, 496, 500
— *v.* Murietta 389, 393
Connor *v.* Fitzgerald 280, 283
— *v.* Kent 691
— *v.* L. & P. Co. 99
Conradi *v.* Conradi.412, 427, 429, 438
Coode *v.* Coode 345, 346
Coogan *v.* Dublin Co. 96, 99
Cook *v.* North Met. Tram. Co... 209
— *v.* Ward 65, 384
Cooke *v.* Banks 297, 347
— *v.* Lloyd 309
— *v.* Maxwell 194, 195, 571
— *v.* Rickmace 417, 422, 423
— *v.* Sholl 407
— *v.* Tanswell 522
— *v.* Tomlinson 497
— *v.* Wilson 147
Coole *v.* Braham..87, 240, 241, 253, 254, 488
Coolgardie Co., *Re* 531
Coombe *v.* Coether 347
Coombs *v.* Coether 297, 542
Cooper, *Exp.* 670
— *Re*, 20 Ch. D. 145
— 1911, P. 208
— *v.* Cooper 20
— *v.* Ipswich 572
— *v.* Law 145, 258, 347
— *v.* Lloyd 78
— *v.* Marsden 375
— *v.* Met. Bd. Works...69, 247, 435
— *v.* Robinson 585
— *v.* Slade 10
— *v.* South 352
Cooper-King *v.* Cooper-King 389
Coote *v.* Boyd 666
— *v.* Ford 298, 305
Cope *v.* Bedford 364
— *v.* Cope 678
— *v.* Miller 600
— *v.* Mooney 432
— *v.* Rowlands 110
Copestake *v.* West Sussex..... 297, 304, 359
Copin *v.* Adamson 15, 16, 122
Coppen *v.* Moore 89
Coppinger *v.* Norton 682
Corbett, *Re* 668
Cork C. C. *v.* Harte 338
— Gas Co. *v.* Bible 163
Cormack *v.* Barragry 432
Cornelius *v.* Phillips 57
Cornwall *v.* Richardson 191
Corry *v.* Patton 537
Corsellis, *Re* 645
— *v.* L. C. C. 131
Cort *v.* Ambergate Ry. 588
Cossey *v.* Cossey 328, 333
Costa Rica Republic *v.* Erlanger. 463
Cotman *v.* Orton 207
Cotterill *v.* Hobby 128, 571
— *v.* Lempriere 29
Cottle *v.* Champion 257, 261
Cottrill *v.* Myrick 387
Coulson *v.* Disborough 484
Coulter *v.* Dublin Ry. 151
Counsell *v.* London Co. 612
County of Gloucester Bk. *v.* Rudry 91
Court Bureau, *Re* 23
Courteen *v.* Touse 96, 469
Coventry *v.* G. E. Ry. 685
Coward *v.* Hughes 601
Cowell *v.* Chambers 336
Cowen *v.* Truefitt 585, 602, 654
Cowie *v.* Witt 581
Cowley *v.* Cowley 200, 210, 420
Cowling *v.* Higginson 111
Cox *v.* Allingham 538, 560
— *v.* Bruce 577
— *v.* Couveless 12, 41
— *v.* English Bank 16. 31
— *v.* Midland Counties Ry. 98
Coyte, *Re* 669, 673
Crabtree *v.* Hole 96
Cracknall *v.* Janson 683
Crafter *v.* Met. Ry. 107
Craig, *Re* 624
— *v.* Boyd 530
— *v.* Lamoureux 33
Craston *v.* Craston 217
Craven *v.* Pridmore 131, 239, 378
Crawcour *v.* Salter 21, 206
Crawford *v.* Crawford 243
— *v.* Gillmor 686
— *v.* White City Rink 596
— Peerage 400, 539
Crawshay *v.* Crawshay 656
Crease *v.* Barrett.....240, 276, 280, 284, 295, 296, 298, 299, 300, 301
Crediton *v.* Exeter 528
Creevy *v.* Carr 474
Cresswell *v.* Cresswell 520
— *v.* Jackson 108
Crewe *v.* Field 446
Crichton *v.* Crichton 667
Cridlan *v.* Marler 125
Crippen, *Re*.....357, 413, 426, 428
Crispin *v.* Doglioni....309, 315, 548
Cromack *v.* Heathcote 202, 206
Cronk *v.* Frith 521
Cronmire, *Re* 411
Crook, *Re*, *Exp. Collins* 427
Croome *v.* Croome..580, 581, 671. 675
Cropper *v.* Smith 683, 686
Crosbie *v.* Hetherington 21
Cross *v.* Eglin 663
— *v.* Sprigg 668

PAGE
Crossfield *v.* Kyle Shipping Co... 147, 577, 612
— *v.* Techno Chemical Labs.... 65, 391, 393
Crossley *v.* Crowther 487
Crosthwaite *v.* Dean 619
Crouch *v.* Drury 230
Croughton *v.* Blake 524
Crowther *v.* Appleby 443
Croxton *v.* May 679
Cruckenden *v.* Fuller 77
Crumbie *v.* Wallasey Local Bd.. 421
Cruttenden, *Re* 326
Cubbon, *Re* 432
Cullier *v.* Cullier 212
Cumberland *v.* Bowes 637
Cundell *v.* Pratt 214
Cunningham, *Re*, 36 Ch. D. ...88, 98
— *Re*, 80 L.T. 472
— *v.* N. Y. Ry. 397
Curfew, The 616, 617, 637
Curry *v.* Walter 197
Curtice *v.* London, &c., Bk. 105
Curtis *v.* Beaney 204
— *v.* Curtis 487
— *r.* Marsh 25
— *v.* Peek 387, 399
— *r.* Rickards 122
Curtler *v.* London Tram Co. 8
Curzon *r.* Lomax 296, 297, 301
Cussons *v.* Skinner 519
Cuthbert *v.* Cumming 662
— *v.* Robinson 618
Cutler *v.* Turner 421, 423
— *r.* Wright 498
Cutts *v.* Taltal Ry. 587, 604

Da Costa *v.* Pym 400
D'Aglie *r.* Fryer 346
Daines *v.* Hartley 399
Daintrey, *Re*, *Exp.* Holt....200, 232
Daintry *v.* Brocklehurst 112
Dalgleish *r.* Lowther 207
Dallas, *Re* 91
Dalton *r.* Fitzgerald ...683, 684, 685
Daly *r.* Carroll 618
— *r.* Cork Herald 479
— *v.* Dublin Ry. 418
Damerell *v.* Prothero 300
Dan *r.* Browne 242
Dance *v.* Robson 20
Daniel *v.* Daniel 345
— *r.* Pitt 252
— *r.* Wilkin 297, 304, 358, 359
Daniell, *Re* 528
Daniels *r.* Potter 94
Darby *r.* Ouseley....39, 42, 43, 176, 229, 378, 383, 477, 478
Darcy-Evans *v.* Darcy-Evans .. 343, 388
Darcys, *Re* 199
Dare Valley Ry., *Re* 196
Darley Co. *r.* Mitchell 421
Dashwood *v.* Magniac ..105, 106, 124, 629, 663
Davey *v.* L. & S. W. Ry...16, 18, 234
Davidson *r.* Cooper 528
— *v.* Davidson 217

PAGE
Davidson *v.* Logan 196
Davies *v.* Humphreys 243, 285
— *r.* Lowndes ..295, 310, 312, 313, 316, 405
— *r.* Morgan 233, 236
— *v.* Otty 475
— *v.* Pearce 278
— *r.* Ridge 242
— *v.* Waters 200, 207
— *v.* White 376
Davis *v.* Artingstall 582
— *v.* Baird 542
— *v.* Curry 126, 155
— *v.* Hardy 11, 484
— *r.* Hedges 417, 422
— *v.* Jones 601
— *r.* Lloyd 291
— *v.* Morton 410
— *v.* Symonds 574
— *r.* Taff Vale Ry. 620
— *v.* Vass 562
Davis' Trusts, *Re* 24, 366
Davison, *Re* 415, 416
Dawkins *v.* Rokeby.194, 236, 448, 477
Dawson, *Re*, Johnston *v.* Hill... 618
— *Re*, 1919, 1 Ch. 667
— *v.* African Co. 91
— *r.* Dawson, 22 T.L.R. 289
— *r.* — 23 T.L.R. 399
Day *r.* May 595
— *r.* Spread 419
— *v.* Trig 625
Dayman *r.* Dayman 522
Deakin, *Re* 644
Deane *v.* Packwood 449
Dear *r.* Knight 472
Deasy *r.* Donoghue 584
De Bode's Case 284
Debtor, *Re* A, 1903, 1 K.B. ... 427
— — 43 Ir.L.T.R. 509
De Burgho's Estate, *Re*.299, 414, 437
Deeley's Patent, *Re* 409, 418
Deffell *v.* White 520
De Gruyther *r.* De Gruyther... 554
De la Pole *r.* Dick 249
De Lassalle *r.* Guildford...579, 595
Delmare *r.* Robello 623, 643
Delta, The 412
De Mora *r.* Concha, 29 Ch. D... 407, 415, 416
— *v.* — 32 Ch. D. 496, 497
Denaby Collieries *r.* Yorkshire Miners' Assoc. 101
Dench *r.* Dench 331
Dendy *r.* Simpson 168
Denham, *Re* 145
Denn *r.* Spray 298, 300
Dennis *r.* White 25
Dennison *r.* Ashdown..111, 129, 546
Dennys *r.* Dennys 217
Dent *r.* Dent 343, 345
— *v.* Moore 531
Department of Agriculture *r.* Burke 96
— *v.* Parker 190
Deprez, *Re* 526, 528
Derby Corp. *r.* Derbyshire Council 213

PAGE
De Rosaz, Re 613, 615, 639, 640
Derry v. Peek 149, 150, 151
De Rutzen v. Farr 286
De Salazar, Re 24, 563
Desportes, Re 213, 215
Devala Co., Re 246, 247
Devonald v. Rosser 106
Devonshire v. Gwynne 124
— v. Neill..255, 261, 281, 286, 295, 296, 299, 300, 301, 305, 306, 541
— v. Pattinson 634, 671, 675
Dewar v. Mintoft 527
Dews v. Ryley 561, 576
Dexter v. Hayes 110
Deybel's Case 22
Dibb v. Walker 245
Dickins v. Randerson 380
Dickinson v. Shee 474
Diederichsen v. Farquharson... 147
Dieppe, Re 643
Diestal v. Stevenson 583
Digby v. Stedman 230
Dillard v. Dillard 238
Dillon v. O'Brien 9
— v. Tobin 290
Director of P. P. v. Blady..94, 451, 455, 456
Di Sora v. Phillips 389, 390
Disraeli v. Jowett 351
Dixon v. Dixon 487
— v. Hamond 686
— v. Treasury Sol. 328
Djambi Rubber Estates, Re.... 246, 247, 262 ,283, 288, 289, 292
Doane, Re 653
Dodd, Re 352
— v. Norris 192
Dodds v. Tuke 243
Doe v. Allen, 8 T. R...324, 327, 330
— v. — 12 A. & E. 324, 325 629, 661
— v. Andrews 339, 340, 341
— v. Arkwright 111, 284, 361
— v. Bainbrigge 392, 395
— v. Barnes, 1 M. & R..... 341, 342, 344
— v. — 8 Q. B. 110
— v. Barton, 2 M. & R. 309
— v. — 11 A. & E. 684
— v. Benson 661
— v. Benyon 645
— v. Beviss 281, 285, 688
— v. Bird 249
— v. Boulter 433
— v. Bower 39, 40
— v. Brawn 110
— v. Bray 340, 341
— v. Burdett 524
— v. Burt 671, 675
— v. Calloway 298
— v. Cartwright 361
— v. Catomore 529
— v. Chambers 23, 518, 520
— v. Chichester 611, 612, 626, 648, 656
— v. Cleveland 522
— v. Clifford 546
— v. Date 200, 204, 209
PAGE
Doe v. Davies 12, 276, 281, 296, 309, 317, 403
— v. Derby 414, 437, 439
— v. Edwards 23
— v. Egremont 200
— v. Fleming.110, 128, 312, 384, 679
— v. Foster 437
— v. Fowler 525
— v. Francis 686
— v. Frankis 257
— v. Fuchau 105
— v. Gatacre 344
— v. Gillard 618
— v. Griffin 313
— v. Hardy 324, 327, 331
— v. Harlow 414
— v. Harris 482
— v. Harvey, R. & M. 309, 315
— v. — 8 Bing. 573
— v. Hawkins 281, 286
— v. Heakin 133
— v. Hertford 203, 205, 207
— v. Hiscocks..607, 608, 610, 611, 624, 625, 627, 628, 629, 651, 652
— v. Hodgson 477
— v. Holton 656
— v. Hubbard 608, 612, 618, 656
— v. James 207
— v. Jauncey 202
— v. Jersey 656
— v. Johnson 31
— v. Keeling 524, 525
— v. Kemp 161, 168
— v. Kett 618
— v. Lakin 239
— v. Langdon 210
— v. Langton 610
— v. Lea 661
— v. Litherland 239
— v. Lloyd 349, 530
— v. Martin, M. & Rob. 544
— v. — 4 B. & Ad. 618
— v. Mason 23
— v. Mew 560
— v. Michael 127, 276
— v. Miles 234
— v. Mills 685
— v. Morgan 659
— v. Morris 546
— v. Mostyn 562
— v. Murless 241, 436
— v. Needs 627, 658
— v. Oliver 113
— v. Palmer..325, 326, 327, 331, 529
— v. Paul 523
— v. Pembroke 317, 521
— v. Penfold 113, 522
— v. Perkins 470, 471
— v. Pettett 240
— v. Phillips 524, 525
— v. Pulman 112, 129
— v. Randall 310, 315
— v. Rickarby 35, 73
— v. Ridgway 62, 277
— v. Roberts 358
— v. Robson 281
— v. Roe 250
— v. Ross 48, 249, 250, 542, 546

PAGE
Doe *v.* Rouse 642, 652
— *v.* Seaton, 2 A. & E..203, 240, 361
— *v.* — 2 C. M. & R. 684
— *v.* Sisson 162, 165
— *v.* Skinner 291
— *v.* Steel 233
— *v.* Stephenson 192
— *v.* Suckermore 400, 402
— *v.* Tarver 311, 317
— *v.* Tatham 221
— *v.* Thomas 118, 203
— *v.* Turford ...280, 288, 289, 292
— *v.* Tyler 414
— *v.* Wainwright, 5 A. & E. .. 541
— *v.* — 8 A. & E. 237, 284
— *v.* — 1 N. & P. 48
— *v.* Watkins 203
— *v.* Webber 241
— *v.* Webster 234, 575, 633
— *v.* Westlake 629, 658
— *v.* Whitehead 36, 37
— *v.* Williams, Cowp. 73
— *v.* Williams, 6 B. & C. 241
— *v.* Wilson 10, 109
— *v.* Wittcomb 291, 292, 296, 302, 541, 542
— *v.* Wolley 523, 524
— *v.* Young 104
Doherty *v.* Dwyer 529
— *v.* Miles 576
Doker *v.* Hasler 210
Dolder *v.* Huntingfield 22
Domvile *v.* Callwell 239, 283
Donaghy *v.* Ulster Co. 83
Doncaster *v.* Day 438
Donnelly *v.* Ingram 368
Dorin *v.* Dorin 623, 643
Dorrett *v.* Meux 538, 560
Dorrian *v.* Heugh 425
Dost Aly Khan, *Re* 389, 539
Douce, *Re* 332, 516, 650
Doucet *v.* Geoghegan 77
Douglas, The 67
— *v.* Fellows 658
Dover *v.* Child 420
— *v.* Maestaer 43, 214
Dovey *v.* Corey 145, 149
Dowdell *v.* Australian Co. 445
Dowden *v.* Fowle 238
Dowlat Koer *v.* Ramphal Das.. 120
Dowling *v.* Dillon 406, 410
— *v.* Dowling 118, 140
— *v.* Pontypool Co. ..388, 380, 665
— *v.* Robinson 97, 236
Downing, *Re* 325, 328, 581, 598
— *v.* Butcher 191
Downs *v.* Cooper 252
Drake *v.* Marryat 366
— *v.* Mitchell 415
— *v.* Smyth 359
— *v.* Sykes 324, 325, 328, 333
Draupner, The 145, 147, 152
Dresser *v.* Stansfield 562
Drew *v.* Drew 345
— *v.* Harlow 556
— *v.* Norbury 516
— *v.* Prior 402
Drewitt *v.* Drewitt 497

PAGE
Dreyfus *v.* Allen 662
Drinkwater *v.* Porter 296, 301
Drughorn *v.* Rederiaktiebolaget. 582
Druiff *v.* Parker 574, 586
Du Barré *v.* Livette 201
Duberley *v.* Mace 19
Dublin (Archbp.) *v.* Trimleston. 357
— Corp. *v.* Bray 555
— Ry. *v.* Slattery 13
Du Bochet, *Re* 643
Du Bost *v.* Beresford..8, 65, 384, 402
Dudley, *Re* 448
— Co. *v.* Dudley Corp. 18
— Tramways, *Re* 369, 571
Dufferin Peerage 337, 346
Duffin *v.* Markham 42
Duffy, *Re* 331
Duke *v.* Wisden 28
Dummer *v.* Pitcher 626
Dunbar *v.* Harvie 365
Duncan *v.* Carleton 95
— *v.* Pope 149
— *v.* Toms 38
Duncombe *v.* Daniell 250, 544
Dundonald Peerage 289
Dunhill *v.* Dunhill 474
Dunlop *v.* Higgins 105, 122
— Co. *v.* New Garage Co. 583
Dunn *v.* Dunn 326, 520
— *v.* Flood 524
— *v.* Murray 416, 417, 422
Dunne *v.* English 475
Dunraven *v.* Llewellyn.....294, 296, 299, 300
Duplex, The 409
Durham *v.* Beaumont 482, 483
— *v.* Durham 32, 135, 401, 452
— *v.* Northern 528
Durrell *v.* Evans 516
Dwyer *v.* Collins 205, 206, 207. 544, 546
— *v.* Larkin 246, 248
Dyce Sombre, *Re* 386, 391
Dyer *v.* Best 469
— *v.* Green 632
— *v.* Munday 368
Dymoke's Case 229, 450
Dysart Peerage..57, 58, 60, 61, 78, 227, 240, 241, 310, 317, 470

E. W. A., *Re* 415
Eagleton *v.* Gutteridge 530
Eames *v.* Hacon 432
Earl *v.* Lewis 303
— of Dumfries, The ..251, 252, 352
Earl's Trusts, *Re* 24
Earwicker *v.* London Graving Co. 385
East Gloucestershire Ry. *v.* Bartholomew 374
— London Ry., *Re* 434
— — *v.* Thames Conservators.. 362. 380
— Union Ry. *v.* Symonds 288
— & West India Docks *v.* Kirk. 689
Eastman *v.* Compt. of Patents.. 619
Easton, *Re* *Exp.* Dixon 426
Eastwood *v.* Ashton 624, 634

PAGE
Eaton v. Swansea Waterworks.. 419, 427, 429
Eccles v. Louisville Ry. Co. 443
Eccleston v. Petty 160, 313
Economic Soc. v. Usborne...411, 421
Ecroyd v. Coulthard, 32 L. Jo.. 289
— v. — 1897, 2 Ch. 671, 675
Eddowes v. Argentine Co. 496
Eden v. Blake 572
— v. Eden 346
— v. Weardale 499
Edgar v. Fisheries Commrs..... 296
Edelstein v. Schuler 21, 124
Edie v. Kingsford 572
Edinburgh Life Assn. v. Y...173, 183
Edison v. Holland 427
Edmonds v. Challis 477
— v. Rowe 459
— v. Walter 469
Edmondson v. Amery,...159, 165, 187, 194, 378
— v. Birch 207
Edwards, *Exp.*, *Re* Tollemache.. 253, 278, 283
— v. Aberayron Soc. 526
— v. Fashion 581
— v. Hood-Bars 415
— v. Marcus 612
— v. Stokes 97
— v. Towels 258
— v. Walters 588
Egan v. Larkin 438
Egg v. Barnett 117
Elder v. Carter 442
Elias v. Griffith 475, 497
Elkin v. Janson 35, 36
Ellen v. G. N. Ry.....577, 578, 588, 589, 616, 638
Ellender v. Wood 251
Ellesmere Brewery v. Cooper .. 528
Elliott v. Longden 95
— v. S. Devon Ry. 15
— v. Totnes Union 384
Ellis v. Allen 18, 249
— v. Cowne 154
— v. Houston 643
— v. Robbins 497
Elmer v. Fessenden 61, 75
Elsam v. Faucett 192
Elton v. Larkins 249, 481
Ely, *Re* 623, 647, 651
— v. Caldecott 297, 298
Emary v. Nolloth 96
Embury, *Re* 643, 645
Emerson, *Re* 515
Emery v. Parry 639
Emma Mining Co., *Re* 442
Emmett, *Re* 231
Emmott v. Marchant 564
— v. Star Co. 376
Empress Assoc. v. Bowering .. 537
Enderwick v. Allden 385
Engall v. Bruce 544
Engelhardt v. Farrant 99
England, *Re* 74, 672. 673
— v. Downs 616, 632
— v. Slade 685
English v. Tottie 209
PAGE
English Co. v. Brunton 147
Enlayde v. Roberts 634, 663
Ennis v. Carrol 290
Enoch, *Re* 484, 689
Enticknap v. Rice 466
Equitable Office v. Ching.583, 587, 600
Ernest v. Loma Mines 518
Erskine v. Adeane 594, 595
Esch v. Nelson 288, 289
Eskell v. Eskell 429
Esparto Co., *Re* 146
Estate of L., In the 678, 679
Etna Co., *Re* 375
Europa, The 251
European Bank, *Re* 91
Evans v. Ball 340, 345, 554
— v. Beattie 243
— v. Birch, ...105, 122
— v. Bremridge 599
— v. Evans, 1904, P. ..200, 214, 216
— v. — 20 T.L.R. 77, 199, 678
— v. Getting 381
— v. Merthyr Tydfil Council.. 240, 251, 261, 296, 300, 358, 502
— v. Morgan 384, 571
— v. Nevill 600
— v. Norton 412, 447
— v. Roe 590
— v. Rees 298, 433, 524, 528
— v. Sweet 544
— v. Taylor 304, 356, 359
Eve, *Re* 644
Evelyn v. Haynes 422
Everest v. Wood 97, 225
Everett v. Lowdham 465
Everingham v. Roundell 542
Ewer v. Ambrose 480
Ewing v. Hanbury 602
Exchange Bk. v. Blethen 517
Exeter Corp. v. Heaman 29
— v. Warren 127
Eynon, *Re* 520
Eyre v. Eyre 329
— v. McFarlane 147

F. v. P. 119
Fairlie v. Denton 257, 261
— v. Fenton 582
Falck v. Williams 32, 608
Falconer v. Hanson 438
Faldo v. Lovett 40
Falkingham v. Victorian Rys. Commr. 196, 405, 434, 689
Falmouth v. Moss 442
— v. Roberts 528, 570
Fanshaw v. Knowles 197
Farquhar v. Newbury Council.. 131
Farrar v. Hutchinson 244
Farrell v. Maguire .291, 292, 341, 365
Farrington v. Knightly 671
Farrow v. Blomfield 234, 477
Farulli v. Farulli..8, 9, 16, 94, 134, 156, 441, 447, 466
Fasset v. Brown 521
Faulder v. Silk 357
Faulkner v. Brine 472
— v. Johnson 110
— v. R. 38, 189

PAGE
Faund *v.* Wallace 690
Fawke *v.* Miles 279, 283
Fawkes *v.* Lamb 579
Fazakerly *v.* M'Knight 632
Feldmann, *Re* 362
Fellowes *v.* Williamson 61, 75
Feltham, *Re* 612
Felthouse *v.* Bailey 498
Fengl *v.* Fengl 531, 532, 573
Fenn *v.* Griffith 571
Fennell *v.* Tait 444
Fenner *v.* S. E. Ry. 207
Fenwick, *Re* 92
— *v.* Bell 387, 392, 395
— *v.* Thornton 238, 243, 245
Ferguson *v.* Benyon 364
Fernandez, *Exp.*..214, 446, 447, 498
Ferrand *v.* Milligan 131, 688
Ferrer *v.* Oven 562
Ferris *v.* Goodburn 668
Fesenmayer *v.* Adcock 234
Fewings, *Exp.*, *Re* Sneyd 421
Ffinch *v.* Combe 394, 529
Filburn *v.* People's Palace 162
Finch *v.* Finch, L.R.I. P. & D. 328, 333
— *v.* — 23 Ch. D. 485, 487, 490
Finden *v.* Westlake' ..156, 220, 260
Findlater *v.* Lowe 626, 657
Finlay *v.* Finlay 363, 540
Finney *v.* Finney 416
Fiorgione *v.* Lewis 602
Fireproof Doors, *Re* 91, 516
Fish, *Re*..610, 612, 623, 627, 643, 644
Fisher, *Re* 680
— *v.* Samuda 229
Fishmongers' Co. *v.* Dimsdale.... 522
Fitch *v.* Jones 586, 602
Fitz *v.* Rabbits 547
Fitzgerald *v.* Fitzgerald 438
— *v.* McCowan 599
— *v.* Murphy 83
Fitzgibbon *v.* Greer 195
Fitzpatrick *v.* M'Donald 376
Fitzroy Co., *Re* 89
Fitzsimons *v.* Duncan 88
Fitzwalter Peerage....281, 311, 397, 400, 403, 536
Flanagan *v.* Fahy..475, 476, 488, 494
Flateau, *Exp.* 427
Fleet *v.* Murton 162, 169
— *v.* Perrins 234
Fleetwood, *Re* 520, 580, 624
Fleming *v.* Bk. of N. Zealand... 682
Fletcher, *Re*, 38 Ch. D. 667
— *Re*, 1917, 1 Ch. ..63, 64, 85, 154, 327, 580
— *v.* Froggatt 232
— *v.* L. & N. W. Ry. 13, 457
Flight *v.* Gray 574
Flinn *v.* Calow 595
Flitters *v.* Allfrey 416
Flood *v.* Flood 612
— *v.* Russell 282, 284, 331
Florence *v.* Jenings 421
Flower *v.* Young 352
Flynn *v.* Burgess 366
Foakes *v.* Webb 208

PAGE
Foley, *Re* 161, 167, 529
Foljambe *v.* Smith 298
Folkes *v.* Chadd..162, 169, 387, 392, 397, 398
Fonsick *v.* Agar 438
Forbes *v.* Samuel 48, 336, 443
— *v.* Watt 630
Ford *v.* Blest 194
— *v.* De Pontes 204
— *v.* Hopkins 45
— *v.* Miescke 366
— *v.* Wiley 126
— *v.* Yates 111, 575, 591
Fordham *v.* Wallis 238
Forget *v.* Baxter 106
Formby *v.* Formby 582
Forshaw *v.* Lewis 205
Fort *v.* Clarke 311, 317
Fortune *v.* Hanson 368
Foss *v.* G. E. Ry. 558
Foster, *Re*, *Exp.* Basan 435
— *v.* Globe Syndicate 22
— *v.* Jolly 593, 603
— *v.* Mackinnon 584
— *v.* M'Mahon 241, 278
— *v.* Plumbers' Co. 239, 524
Foular *v.* Sinclair 19
Foulkes *v.* Sellway 191
Foundling Hosp. *v.* Crane ..518, 583
Fountain *v.* Boodle 151, 156, 186
Fountaine, *Re* 281, 283
Fourth Bldg. Soc. *v.* East Ham.. 405
Fowke *v.* Berington 296, 299, 302, 381
Fowkes *v*, Pascoe..176, 668, 670, 674
Fowler *v.* Fowler 670
— *v.* Sugden 585
Fox *v.* Bearblock....291, 340, 354, 372, 679
— *v.* Pitt 525
— *v.* Star Co. 406
— *v.* Waters 238, 242, 244, 245
Fox's Case 374
Frankenstein *v.* Gavin 209
Franks, *Re* 213, 441
Fraser, *Re*, 1891, P. 560
— *Re*, 1892, 2 Q. B. 427
— *v.* Hopkins 352
Frazer *v.* Cuthbertson 352
Frederick *v.* A.-G. 317
Freel *v.* Bury Tram. Co. 99, 126
Freeman *v.* Arkell 198
— *v.* Baker 352
— *v.* Coke 682
— *v.* Cooke 685, 686, 687
— *v.* Cox 257
— *v.* Freeman 526
— *v.* Phillips 295, 296, 300, 301
— *v.* Read 297, 304, 358
Freind's Case 488
French, *Exp.* 338
— *v.* French, 1 Dick. 432
— *v.* — 1902, 1 I.R. 580
— *v.* Hope 587
Freston, *Re* 448
Friend *v.* L. C. & D. Ry. 208
Frisby, *Re* 245
Frith *v.* Frith, 1896, P. 398, 399

PAGE
Frith *v.* Frith, 94 L.T. 586
Frost *v.* Haywood 20
— *v.* Richardson 304, 359
Froude *v.* Hobbs 12, 523, 566
Fruerheerd *v.* Lond. G. O. Co... 208
Fryer *v.* Wiseman 495
Fulham Coun. *v.* Farmers' Co... 368
Fuller *v.* Chippenham, R. D. C....359
— *v.* Fotch 348
Fulton *v.* Andrew 33
Fung Ping Shan *v.* Tong Shun.. 516
Furness *v.* Cope 375
— *v.* Hall 416, 423
— *v.* Meek 15, 584
Furniss *v.* Phear 640
Fursden *v.* Clogg 282

G., *Re* 427
Gabay *v.* Lloyd 638
Gadd *v.* Manchester Corp....390, 393
Gaden *v.* Newfoundland Bank .. 376
Gale *v.* Harvey 595
Gallaher *v.* Murton 399
— *v.* Piper 95
Galvin *v.* Devereux 626
Galway Divorce Bill 557
Gandy *v.* Gandy 664, 683
Ganer *v.* Lanesborough 390
Gannet, The 385
Garbutt *v.* Durham Ctee 364
— *v.* Simpson 139
Gardner, *Re* 598
— *v.* Gardner 678
— *v.* Irvin 203
— *v.* Moult 251
— *v.* Wright 544, 550, 554
— Peerage 62, 84, 386, 397
Gardom, *Re* 580
Garland *v.* Jacomb 98
Garman *v.* Brighton Elect. Co... 380
Garner, *Re* 523
Garnet *v.* Ball 252
Garnett, *Re*, 31 Ch. D. 485
— *Re*, 1894, P. 528
— *Re*, 93 L.T. 642
— *v.* Ferrand 356
Garrard *v.* Lewis 530
Garrett *v.* Williamson 669
Garth *v.* Howard 248
Gaskill *v.* Skene 258, 261
Gatherscole *v.* Miall 547
Gaunt *v.* Johnson 445
Gavacan, *Re* 253
Gayer *v.* Gayer 497
Geary *v.* Physic 516
Gedge *v.* Gedge 202
Gee *v.* Ward 295, 301, 317
Geisel, *Exp.* 338
General Accident Corp. *v.* Robertson 37
— Finance Co. *v.* Liberator Soc. 683
— Financial Bk., *Re* 498
Genese, *Re* 213, 214, 215
Gent, *Re* 448
George, *Re* 588
— *v.* Davies 21
— *v.* Surrey 523

PAGE
Geralopulo *v.* Wieler....74, 366, 519, 538, 556, 573
Gerard, *Re* 689
Gerish *v.* Chartier..113, 117, 133, 261
Gery *v.* Redman....116, 134, 135, 285
Gething *v.* Keighley 258
Getty *v.* Getty 205, 233
Geyer *v.* Aguilar 407, 408, 410
Ghose *v.* Manickchund 106
Giants Causeway Co. *v.* A.-G. 130, 295, 297, 298, 305, 381
Gibbs, *Re* 618
— *v.* Phillipson 448
— *v.* Pike 688
Giblin *v.* McMullen 13
Gibson, *Re* 626
— *v.* Hunter 177
— *v.* Minet 609
Giffard *v.* Williams 359
Gilbert, *Re* 394
— *v.* Comedy Co. 40, 496
— *v.* Endean 689
— *v.* R. 81
Gilbey *v.* G. W. Ry. 62, 81, 83
Giles *v.* Siney 558
— *v.* Warren 328, 333
Gilford *v.* Davis 42
Gill *v.* Shelley 610, 643
Gillard *v.* Bates 205
Gillett *v.* Abbott 522, 538, 684
Gillies *v.* Smither 521
Gilligan *v.* National Bk. 391
Gills *v.* Gills 487, 497
Gingell *v.* Stepney Council ... 111
Ginger *v.* Ginger 487
Girdleston *v.* Brighton Co. 406
Gisborne *v.* Hart 562
Gladding *v.* Yapp 580
Gladman *v.* Johnson 95, 115
Gladstone *v.* Gladstone 429
Glamorgan Co. *v.* Standing Committee, etc. 171
Glassington, *Re* 610, 618
Gleadow *v.* Atkin 276, 280
Gleen *v.* Gleen 119, 351
Gleeson *v.* Hurley 47
Glendarroch, The 31, 32
Glendinning, *Exp.* 582
Glenie *v.* Bruce-Smith..582, 586, 602
Gliksten *v.* Gliksten 119
Glossop *v.* Heston Local Bd... 495
— *v.* Pole 356, 435
Glover *v.* Ellison 500
— *v.* Gales 369
Glyn *v.* Western, etc., Co...47, 533
Glynn *v.* Bk. of England 230
— *v.* Margetson 590, 614
Goblet *v.* Beechey.....387, 394, 665
Godefroy *v.* Jay 35, 559
Godfrey *v.* Davis 611
Godwin *v.* Francis 537
Goff, *Re* 668
— *v.* Mills 446
Golden Co. *v.* Buxton 8
Goldfoot *v.* Welch 596
Goldrei *v.* Sinclair 415
Goldshede *v.* Swan 586

PAGE
Goldstone *v.* Williams 207
Gompertz *v.* Cook 517
Gooch, *Re* 85, 670, 674
Good, *Re* 680
Goodered *v.* Armorer 545
Goodison *v.* Goodison 522
Goodlad *v.* Burnett 626, 657
Goodrich, *Re*, Payne *v.* Bennett 342, 343
Goodright *v.* Hicks 187
— *v.* Moss 198, 199, 309
Goodsell *v.* Lloyd 582, 599
Goodtitle *v.* Southern 656
Goodwin *v.* Parton 244
Gordon *v.* Bk. of Syria 376
— *v.* Chief Commissioner 9
— *v.* Gordon 199, 446, 678
Gore-Booth *v.* Gore-Booth 583
Gorham *v.* Brice 162, 171
Gornall *v.* Mason 497, 519, 521
Gorrissen *v.* Perrin 15
Gorton *v.* Dyson 560
Gosford *v.* Alexander 385, 386
Gosling *v.* Birnie 686
Goss *v.* Nugent 587, 603
Gould *v.* Lakes 324, 325, 326, 327, 329, 525
Goulder *v.* Rook 369
Gouldsworth *v.* Knights 686
Gourand *v.* Edison 203
Grace *v.* Baynton 232
Graham *v.* M'Cashin 431
— *v.* Ramuz 595
Grahame *v.* Grahame 636
Grand Trunk Ry. *v.* Robinson.. 147
Grant *v.* Bagge 21
— *v.* Grant 606, 623, 627, 660
— *v.* Maddox 661
Graphic Arts Co. *v.* Hunters 65
Gratwick, *Re* 619, 641
Graves *v.* Key 234
— *v.* Legg 617, 639
Gray, *Re* 626
Greeley *v.* Sampson 618
Great Kruger Co., *Re* 443
— N. W. C. Ry. *v.* Charlebois.. 406
— Northern Salt Wks., *Re*, *Exp.* Kennedy 374
— Southern Ry. *v.* Darby 368
— Western Ry. *v.* Bristol Corp. 605, 606, 607, 608, 609, 613, 614, 615, 616, 617, 634
— — *v.* Sutton 92, 145
— — *v.* Willis 248
Greaves *v.* Ashlin 591
— *v.* Greenwood 310, 312, 680
— *v.* Hunter 402
Green, *Re* 660
— *v.* Hewett 357
— *v.* New River Co. 404, 428
— *v.* Pensam 691
— *v.* Proude 557
— *v.* Sevin 40
— *v.* Symons 595
— *v.* Waller 23
Greenough *v.* Eccles 472
— *v.* Gaskell 200, 202, 205, 206
Greenslade *v.* Dare.146, 152, 153, 400
PAGE
Greenwood, *Re* 618
— *v.* Backhouse 96
— *v.* Greenwood 624
— *v.* Woodham 337
Gregory, *Re* 384, 612
— *v.* Tavernor 471
— *v.* Tuffs 109
Gregson *v.* Armstrong 9
Gregson's Trusts, *Re* 640, 661
Gremaire *v.* Le Clerk 110
Gresham Hotel *v.* Manning..58, 65, 75, 115, 135
Greswold-Williams *v.* Barneby.. 595, 634
Greville *v.* Chapman 393
— *v.* Hemingway 633, 649
— *v.* Tylee 529
Grey, *Re* 448
— *v.* Pearson 606
Grey's Brewery, *Re* 198
Griffin, *Re*, 1890, *Times* 57
— — 1899, 1 Ch. 668, 672
Griffin's Divorce Bill 439
Griffith *v.* Bourke 668
— *v.* Davies 208
— *v.* Fleming 633
Griffiths *v.* Dudley 418
— *v.* Griffiths 326
Griffits *v.* Payne 161, 167
Grigg *v.* National Co. 572
Grime *v.* Fletcher 356
Grimston *v.* Cuningham 594, 639
Grindall *v.* Grindall 418
Groom *v.* Lawrence 29
Grosvenor Hotel Co., *Re* 434
— — *v.* Hamilton 685
Grove, *Re* 77, 148
— *v.* Buluwayo Co. 66, 390
Guardhouse *v.* Blackburn..145, 325, 326, 574
Gudgen *v.* Besset 583, 600
Gueret *v.* Audony 433
Guest *v.* Warren 419
Guillet *v.* Guillet 343, 345
Gunn, *Re* 432
Gunter *v.* James 170
Gwynne-Vaughan *v.* Gwynne-Vaughan 217

Hackston *v.* Millar 457
Haddow *v.* Parry 282
Hadjipateras *v.* Weigall 614
Haes, *Re* 215, 449
Hagedorn *v.* Reid 291
Haggenmacher's Patents, *Re*.... 481
Haggitt *v.* Ineff 366
Haigh *v.* Belcher 53
— *v.* Haigh 689
— *v.* West 129
Haines *v.* Guthrie 47, 225, 308, 313, 342
Hales *v.* Kerr 165, 171
Halhead *v.* Young 575, 590
Halifax Co., *Re* 539, 542
Halkett *v.* Dudley 560, 561
Hall, *Exp.* 234
— *Re*, 1914, P. 428
— *Re*, 22 L.J. Ch. 554

PAGE
Hall *v.* Bainbridge 517
— *v.* Ball 525, 542
— *v.* Cazenove 585
— *v.* Hall, 1892, 1 Ch. 619
— *v.* — 25 T.L.R. 216, 217
— *r.* Hill 666, 667, 669, 671
— *r.* Levy 423
— *r.* Norfolk 239
Hallam *v.* Hallam 216
Haller *v.* Worman..249, 250, 255, 258
Hallet *v.* Cousens 469
Halliday *v.* Holgate 469, 470
Hallmark's Case 145, 146, 151 258, 372
Halston, *Re* 623, 647. 651
Hamber *v.* Roberts 523
Hamblin *v.* Shelton 110, 128
Hamilton *v.* Knott 208
— *r.* Ritchie 619
— *v.* Walker 29, 691
— *r.* Young 123
Hamlyn *v.* Houston 90, 98
— *v.* Talisker 11
Hammond, *Re* 619, 642
— *r.* Bradstreet 297, 303
— *r.* Schofield 414
Hampden *v.* Wallis 257
Hampshire *v.* Peirce 625
Handley *v.* Wolverhampton Co. 107, 127
Hankinson *v.* Bilby 620
Hanks *v.* Tottenham 327
Hansen *v.* Dixon 11, 388
Hanson *v.* Shackleton 25
Hardcastle *v.* Bielby 96
Harding, *Re* 680
— *v.* Crethorn 145
— *v.* Harding 427, 429
— *r.* Williams 375
Hardwick, *Re* 501
— *r.* Coleman 82, 83
— *v.* Hardwick 623, 626, 656
Hardwicke, The 18
Hardy, *Re* 325, 331
— *r.* Ryle 421
Hare, *Re* 597
— *r.* Waring 349
Hargrave *v.* Hargrave 199
Hargreave *r.* Spink 21
Hargreaves, *Re* 195
— *r.* Hilliam 42
Harker *v.* Edwards 106, 123
Harland *v.* Burstall 663
Harlock *v.* Ashberry 496
Harman, *Re* 580
Harmer *v.* Bean 569
Harnett, *Re* 485
Harnor *v.* Groves 591
Harper *v.* Vigors 582
Harratt *v.* Wise 338
Harrhy *v.* Wall 616, 632
Harries *v.* Thomas 36, 487, 489
Harris, *Re*, 44 L. J. Bpy. 231
— *Re*, 10 Ch. App. 496
— *Re*, 1909, 2 Ch. 626
— *v.* Dignum 74
— *r.* G. W. Ry. 147
— *v.* Harris, 39 L.J.P. & D.... 487

PAGE
Harris *v.* Harris, 27 L.T. 10, 166
— *v.* Knight 326, 329
— *v.* Rickett 572, 591
Harrison, *Re*, Turner *v.* Hellard 538, 560
— *Re*, 30 Ch. D. 613, 614, 624
— *r.* Barton .575, 581, 599, 630, 664
— *v.* Blades 438, 521
— *v.* Micks 663
— *r.* Turner 236
— *v.* Vallance 237
Harrod *v.* Harrod 32
Harrowby, *Re* 673
Harse *v.* Pearl Co. 99
Hart *r.* Duke 689
— *r.* L. & Y. Ry. ..107, 108. 126, 134, 171
— *r.* Macnamara 407
— *r.* Newman 235
— *v.* Standard Co. 617
Hartland *v.* Jukes 612
Hartley's Case 375
Hartley *v.* Cook 347
— *r.* Ellnor 189
— *v.* Harriman 162
— *v.* Hindmarsh 543, 557, 559
— *r.* Wharton 32
Harvey, *Exp.* 582, 599
— *Re* 445
— *v.* Anning 490
— *r.* Croydon Union 251
— *v.* Lovekin 213
— *v.* Mitchell 41, 43
— *v.* Ocean Co. 680
— *v.* Rex 357
— *r.* Truro Council 130
— *v.* Wilde 415, 419, 429
Haseldine, *Re* 613, 644
Haslam *v.* Cron 282, 309
— *v.* Hall 208, 209
Hassan *v.* Runciman 597
Hassard *r.* Smith 152, 357
Hatch *v.* Lewis 391
— *v.* L. & N. W. Ry. 89
Hatton *v.* Harris 584
Haughton *v.* Ewebank 96, 538
Hawes *v.* Draeger 199, 678
Hawker *v.* King 547
Hawkes, *Re* Ackerman *v.* Lockhart 210
Hawkins, *Re*, *Exp.* Troup 427
— *r.* Warre 572
Hawks *r.* Charlemont 162, 170, 397, 398
Hawksby *v.* Kane 326
Hawksford *v.* Giffard 411
Hay *r.* Moorhouse 570
Hayes *v.* Willis 497
Haynes, *Re* 384
— *v.* Commonwealth 114
— *r.* Davis 368
— *v.* Doman 390, 394
— *v.* Haynes 679
Hayslep *r.* Gymer 73, 80, 81, 256, 259
Hayton *v.* Irwin 125, 662
Hayward *v.* Stephens 366
Healy *v.* Healy 629, 660

PAGE
Goldstone *v.* Williams 207
Gompertz *v.* Cook 517
Gooch, *Re* 85, 670, 674
Good, *Re* 680
Goodered *v.* Armorer 545
Goodison *v.* Goodison 522
Goodlad *v.* Burnett 626, 657
Goodrich, *Re*, Payne *v.* Bennett 342, 343
Goodright *v.* Hicks 187
— *v.* Moss 198, 199, 309
Goodsell *v.* Lloyd 582, 599
Goodtitle *v.* Southern 656
Goodwin *v.* Parton 244
Gordon *v.* Bk. of Syria 376
— *v.* Chief Commissioner 9
— *v.* Gordon 199, 446, 678
Gore-Booth *v.* Gore-Booth 583
Gorham *v.* Brice 162, 171
Gornall *v.* Mason 497, 519, 521
Gorrissen *v.* Perrin 15
Gorton *v.* Dyson 560
Gosford *v.* Alexander 385, 386
Gosling *v.* Birnie 686
Goss *v.* Nugent 587, 603
Gould *v.* Lakes 324, 325, 326, 327, 329, 525
Goulder *v.* Rook 369
Gouldsworth *v.* Knights 686
Gourand *v.* Edison 203
Grace *v.* Baynton 232
Graham *v.* M'Cashin 431
— *v.* Ramuz 595
Grahame *v.* Grahame 636
Grand Trunk Ry. *v.* Robinson.. 147
Grant *v.* Bagge 21
— *v.* Grant 606, 623, 627, 660
— *v.* Maddox 661
Graphic Arts Co. *v.* Hunters 65
Gratwick, *Re* 619, 641
Graves *v.* Key 234
— *v.* Legg 617, 639
Gray, *Re* 626
Grealey *v.* Sampson 618
Great Kruger Co., *Re* 443
— N. W. C. Ry. *v.* Charlebois.. 406
— Northern Salt Wks., *Re*, *Exp.* Kennedy 374
— Southern Ry. *v.* Darby 368
— Western Ry. *v.* Bristol Corp. 605, 606, 607, 608, 609, 613, 614, 615, 616, 617, 634
— — *v.* Sutton 92, 145
— — *v.* Willis 248
Greaves *v.* Ashlin 591
— *v.* Greenwood 310, 312, 680
— *v.* Hunter 402
Green, *Re* 660
— *v.* Hewett 357
— *v.* New River Co. 404, 428
— *v.* Pensam 691
— *v.* Proude 557
— *v.* Sevin 40
— *v.* Symons 595
— *v.* Waller 23
Greenough *v.* Eccles 472
— *v.* Gaskell 200, 202, 205, 206
Greenslade *v.* Dare.146, 152, 153, 400
PAGE
Greenwood, *Re* 618
— *v.* Backhouse 96
— *v.* Greenwood 624
— *v.* Woodham 337
Gregory, *Re* 384, 612
— *v.* Tavernor 471
— *v.* Tuffs 109
Gregson *v.* Armstrong 9
Gregson's Trusts, *Re* 640, 661
Gremaire *v.* Le Clerk 110
Gresham Hotel *v.* Manning..58, 65, 75, 115, 135
Greswold-Williams *v.* Barneby.. 595, 634
Greville *v.* Chapman 393
— *v.* Hemingway 633, 649
— *v.* Tylee 529
Grey, *Re* 448
— *v.* Pearson 606
Grey's Brewery, *Re* 198
Griffin, *Re*, 1890, *Times* 57
— — 1899, 1 Ch. 668, 672
Griffin's Divorce Bill 439
Griffith *v.* Bourke 668
— *v.* Davies 208
— *v.* Fleming 633
Griffiths *v.* Dudley 418
— *v.* Griffiths 326
Griffits *v.* Payne 161, 167
Grigg *v.* National Co. 572
Grime *v.* Fletcher 356
Grimston *v.* Cuningham 594, 639
Grindall *v.* Grindall 418
Groom *v.* Lawrence 29
Grosvenor Hotel Co., *Re* 434
— — *v.* Hamilton 685
Grove, *Re* 77, 148
— *v.* Buluwayo Co. 66, 390
Guardhouse *v.* Blackburn..145, 325, 326, 574
Gudgen *v.* Besset 583, 600
Gueret *v.* Audony 433
Guest *v.* Warren 419
Guillet *v.* Guillet 343, 345
Gunn, *Re* 432
Gunter *v.* James 170
Gwynne-Vaughan *v.* Gwynne-Vaughan 217

Hackston *v.* Millar 457
Haddow *v.* Parry 282
Hadjipateras *v.* Weigall 614
Haes, *Re* 215, 449
Hagedorn *v.* Reid 291
Haggenmacher's Patents, *Re*.... 481
Haggitt *v.* Ineff 366
Haigh *v.* Belcher 53
— *v.* Haigh 689
— *v.* West 129
Haines *v.* Guthrie 47, 225, 308, 313, 342
Hales *v.* Kerr 165, 171
Halhead *v.* Young 575, 590
Halifax Co., *Re* 539, 542
Halkett *v.* Dudley 560, 561
Hall, *Exp.* 234
— *Re*, 1914, P. 428
— *Re*, 22 L.J. Ch. 554

PAGE

Hall *v.* Bainbridge 517
— *v.* Ball 525, 542
— *v.* Cazenove 585
— *v.* Hall, 1892, 1 Ch. 619
— *v.* — 25 T.L.R. 216, 217
— *v.* Hill 666, 667, 669, 671
— *v.* Levy 423
— *v.* Norfolk 239
Hallam *v.* Hallam 216
Haller *v.* Worman..249, 250, 255, 258
Hallet *v.* Cousens 469
Halliday *v.* Holgate 469, 470
Hallmark's Case 145, 146, 151, 258, 372
Halston, *Re* 623, 647. 651
Hamber *v.* Roberts 523
Hamblin *v.* Shelton 110, 128
Hamilton *v.* Knott 208
— *v.* Ritchie 619
— *v.* Walker 29, 691
— *v.* Young 123
Hamlyn *v.* Houston 90, 98
— *v.* Talisker 11
Hammond, *Re* 619, 642
— *v.* Bradstreet 297, 303
— *v.* Schofield 414
Hampden *v.* Wallis 257
Hampshire *v.* Peirce 625
Handley *v.* Wolverhampton Co. 107, 127
Hankinson *v.* Bilby 620
Hanks *v.* Tottenham 327
Hansen *v.* Dixon 11, 388
Hanson *v.* Shackleton 25
Hardcastle *v.* Bielby 96
Harding, *Re* 680
— *v.* Crethorn 145
— *v.* Harding 427, 429
— *v.* Williams 375
Hardwick, *Re* 501
— *v.* Coleman 82, 83
— *v.* Hardwick 623, 626, 656
Hardwicke, The 18
Hardy, *Re* 325, 331
— *v.* Ryle 421
Hare, *Re* 597
— *v.* Waring 349
Hargrave *v.* Hargrave 199
Hargreave *v.* Spink 21
Hargreaves, *Re* 195
— *v.* Hilliam 42
Harker *v.* Edwards 106, 123
Harland *v.* Burstall 663
Harlock *v.* Ashberry 496
Harman, *Re* 580
Harmer *v.* Bean 569
Harnett, *Re* 485
Harnor *v.* Groves 591
Harper *v.* Vigors 582
Harratt *v.* Wise 338
Harrhy *v.* Wall 616, 632
Harries *v.* Thomas 36, 487, 489
Harris, *Re*, 44 L. J. Bpy. 231
— *Re*, 10 Ch. App. 496
— *Re*, 1909, 2 Ch. 626
— *v.* Dignum 74
— *v.* G. W. Ry. 147
— *v.* Harris, 39 L.J.P. & D.... 487

PAGE

Harris *v.* Harris, 27 L.T. 10, 166
— *v.* Knight 326, 329
— *v.* Rickett 572, 591
Harrison, *Re*, Turner *v.* Hellard 538, 560
— *Re*, 30 Ch. D. 613, 614, 624
— *v.* Barton .575, 581, 599, 630, 664
— *v.* Blades 438, 521
— *v.* Micks 663
— *v.* Turner 236
— *v.* Vallance 237
Harrod *v.* Harrod 32
Harrowby, *Re* 673
Harse *v.* Pearl Co. 99
Hart *v.* Duke 689
— *v.* L. & Y. Ry. ..107, 108. 126, 134, 171
— *v.* Macnamara 407
— *v.* Newman 235
— *v.* Standard Co. 617
Hartland *v.* Jukes 612
Hartley's Case 375
Hartley *v.* Cook 347
— *v.* Ellnor 189
— *v.* Harriman 162
— *v.* Hindmarsh 543, 557, 559
— *v.* Wharton 32
Harvey, *Exp.* 582, 599
— *Re* 445
— *v.* Anning 490
— *v.* Croydon Union 251
— *v.* Lovekin 213
— *v.* Mitchell 41, 43
— *v.* Ocean Co. 680
— *v.* Rex 357
— *v.* Truro Council 130
— *v.* Wilde 415, 419, 429
Haseldine, *Re* 613, 644
Haslam *v.* Cron 282, 309
— *v.* Hall 208, 209
Hassan *v.* Runciman 597
Hassard *v.* Smith 152, 357
Hatch *v.* Lewis 391
— *v.* L. & N. W. Ry. 89
Hatton *v.* Harris 584
Haughton *v.* Ewebank 96, 538
Hawes *v.* Draeger 199, 678
Hawker *v.* King 547
Hawkes, *Re* Ackerman *v.* Lockhart 210
Hawkins, *Re*, *Exp.* Troup 427
— *v.* Warre 572
Hawks *v.* Charlemont 162, 170, 397, 398
Hawksby *v.* Kane 326
Hawksford *v.* Giffard 411
Hay *v.* Moorhouse 570
Hayes *v.* Willis 497
Haynes, *Re* 384
— *v.* Commonwealth 114
— *v.* Davis 368
— *v.* Doman 390, 394
— *v.* Haynes 679
Hayslep *v.* Gymer 73, 80, 81, 256, 259
Hayton *v.* Irwin 125, 662
Hayward *v.* Stephens 366
Healy *v.* Healy 629, 660

PAGE
Heath *v.* Crealock 683
— *v.* Deane 354
— *v.* Weaversham Overseess .. 416, 423
Heathcote's Divorce 351
Heather, *Re* 668
Heath's Garage *v.* Hodges..162, 169
Hebblethwaite *v.* Hebblethwaite. 216, 217
Hebditch *v.* Macilwaine 156
Hedley *v.* Bainbridge 98
Hedwig, The 362
Heffield *v.* Meadows 617, 636
Heilbut *v.* Buckleton ..579, 586, 597
Helliwell, *Re* 645
Helsham-Jones *v.* Hermen 642
Hemming *v.* Maddick 480
Hemphill *v.* McKenna 429
Henderson, *Re* 411
— *v.* Arthur 590, 596
— *v.* Bank of Australasia 374
— *v.* Coulson 370
— *v.* Henderson, 3 Hare..... 416, 417, 422
— *v.* — 1905, 1 I.R. 627, 659
— *v.* Stevenson 147
— *v.* Williams 686
Henkel *v.* Pape 537
Henman *v.* Berliner 595
— *v.* Lester 477, 478, 573
Hennessy *v.* Keating 8, 19, 65
— *v.* Wright, 21 Q.B.D..... 194, 195, 200
— *v.* — 24 Q.B.D. 156, 166
Henniker *v.* Howard 131, 248
— *v.* Wigg 633, 636
Henry *v.* Leigh ..339, 340, 349, 544
— Coxon, The...252, 280, 288, 290, 292, 352, 361, 440
— *v.* Smith 574, 578, 593
Hensen *v.* Dixon 488, 489
Hensley *v.* Hensley 216
Henthorn *v.* Fraser 105
Herbert *v.* Tuckell 307
Hercules Ins. Co., *Re* 369
Heseltine *v.* Simmons..593, 594, 597
Hetherington *v.* Hetherington.. 32, 199, 679
— *v.* Kemp 122
Hetley, *Re* 598, 615, 640
Hewat's Divorce Bill 198
Hewitt *v.* Att.-Gen. 345
— *v.* Spiers & Pond 94
— *v.* Taylor 368
Hewlett *v.* Allen 683
Hewson *v.* Cleeve 28, 183, 191
Heyne *v.* Fischel 348
Hibberd *v.* Knight 210
Hibbs *v.* Ross 36, 97, 352
Hickey *v.* Campion 489
Hickman *v.* Berens 462
— *v.* Haynes 587, 603
Hicks *v.* Faulkner 31
— *v.* Lond. Gen. Om. Co. 499
Hiddle *v.* National, &c., Co. 13
Higgins *v.* Dawson ...605, 608, 609, 610, 611, 615, 618, 641, 674
— *v.* Malyon 65
PAGE
Higgins *v.* Senior 581, 583
Higgs, *Re*, *Exp.* Leicester 443
— *v.* Higgs 346
— *v.* Snell 176
Higham *v.* Ridgway 278, 282
Highett, *Re* 117
Hill *v.* Clifford..355, 357, 361, 362, 407, 408, 426, 435
— *v.* Crook 623, 643, 645
— *v.* Denmark 490
— *v.* Hibbitt 317
— *v.* Hill 398, 399
— *v.* Manchester Co.....146, 258, 372, 373
— *v.* Philp 195
— *v.* Star Theatre 613
— *v.* Wilson 574
Hilliard *v.* Eiffe 433
Hilo Co. *v.* Williamson 92
Hilton, *Re*, *Exp.* March 417, 424
Hindley *v.* Haas 369
— *v.* Haslam 420
Hindmarch, *Re* 388
Hindmarsh *v.* Hindmarsh 466
Hindson *v.* Ashby 398, 540
Hine *v.* Free 577
Hinks *v.* Safety Co. 118
Hip Foong Hong *v.* Nestia 406
Hirth, *Re* 92
Hiscox *v.* Batchellor 225
Hitchin *v.* Groom 15, 602, 654
Hitchings *v.* Northern, etc., Co. . 593
Hitchins *v.* Eardly 12, 309
Hoare *v.* Allen 55, 78
— *v.* Lewisham 518
— *v.* Niblett 414
— *v.* Silverlock 19
Hobbs, *Re* 434
— *v.* Hudson 213
Hobern *v.* Fowler 448
Hobman *v.* Greenwich Bd. ..47, 69
Hobson *v.* Blackburn 610
Hockin *v.* Cooke 25
Hocking, *Re* 679
Hodds *v.* Palfrey 488, 490
Hodge *v.* Matlock U. D. C...28, 91
Hodges *v.* Bennett 490
— *v.* Horsfall 633, 658
Hodgkinson *v.* Fletcher 132
Hodgson, *Re*, Beckett *v.* Ramsdale 414, 485
— *v.* Davies 662
Hoe *v.* Nathorp 554
Hogarth Co. *v.* Blythe Co. ..147, 612
Hogg *v.* Norris 241
Holcombe *v.* Hewson.....75, 159, 160, 161, 167
Holding *v.* Piggott 124
Holdsworth *v.* Dartmouth Corp.. 373
— *v.* Dimsdale 231, 232, 235
Holland, *Re*, Gregg *v.* Holland. 253 586
— *v.* Bennett 105
— *v.* Manchester Co. 376
Hollingham *v.* Head 164
Hollingshead, *Re* 238, 239
Hollinshed *v.* Devane 579, 597
Hollis *v.* Burton 257

PAGE
Hollis *v.* Goldfinch 161
Holloway, *Re* 206, 209
Holmes *v.* Custance 623, 643
— *v.* Wilson 421
Holt *v.* Collyer 629, 662
— *v.* Squire 249
Holtby *v.* Hodgson 559
Home *v.* Bentinck 194
— Insur., &c., Co. *v.* Victoria &c., Co. 526
Homer *v.* Homer ..379, 607, 610, 648
Hood *v.* Anchor Line 147
— *v.* Beauchamp 308, 311
Hooke *v.* Hooke 466
Hooley, *Re* 448
Hooper, *Re* 651
— *v.* Furness Ry. 147
Hope *v.* Beadon 544
— *v.* Hope 239
Hopwood *v.* Hopwood ..176, 668, 673
Hordern *v.* Commercial Union..15, 632, 633
— *v.* Commonwealth Line 612
Horlock *v.* Wiggins 668
Horn *v.* Noel 573
Hornbuckle, *Re* 432
Horncastle *v.* Equitable Soc..592, 596
Horne *v.* Mackenzie 470
— *v.* Struben 624
Horner, *Re* 644
Horniblow, *Re* 434
Hornsey *v.* Plater 43
Horrocks *v.* Stubbs 418
Horsey *v.* Graham 632
Horsfall, *Re* 517, 684
Horsford, *Re* 394, 529
Horton *v.* Walsall Ctee 361
Horwood *v.* Griffith ...623, 624, 648
Hotchin *v.* Hindmarsh 89
Hough *v.* Guardian Co. 99
Houghton *v.* Koenig 545
Houlden *v.* Smith 405
Houliston *v.* Smyth 63
Household Fire Co. *v.* Grant.... 122
Houston *v.* Burns 615
— *v.* Sligo 412, 416, 417, 434
Howard *v.* Beall 375
— *v.* Canfield 471
— *v.* Clarke 16
— *v.* Howard 166
— *v.* Sheward 94, 123
Howarth *v.* Howarth 519
Howatson *v.* Webb 584
Howe, *Re* 642, 652
— *v.* Burchardt 120
— *v.* Malkin 59, 72, 239, 284
— *v.* Newington 435
Howell, *Re* 670
Howes *v.* Bishop 33
Howgate, *Re* 528
Howlan, *Re* 536, 538
Howlett *v.* Tarte 417, 422
Hoyle, *Re* 234
Hubbard *v.* Alexander..325, 326, 327, 328, 330, 432
— *v.* Lees 311, 343, 525
Hubbuck, *Re* 613, 627, 661
Hubert *v.* Turner 516
Huckle *v.* L. C. C. 589
Hucklesby *v.* Hook 516
Huddersfield Co. *v.* Lister 406
Huddleston, *Re* 618
— *v.* Furness Ry. 576
Hudson *v.* Ashby 385
— *v.* Bridge 364, 368, 369, 380
— *v.* Eve 616
— *v.* Revett 530
— *v.* Tabor 299
Huet *v.* Le Mesurier 345
Huggins *v.* Ward 35, 37, 551
Hughes *v.* Dinorbin 108
— *v.* Metropolitan Ry. 587
— *v.* Vargas 195
— *v.* Wilson 352
Hugo *v.* Larkins 385
Huish, *Re* 668
Hull, *Re* 413
— *v.* Horsnell 369
Hulton *v.* Jones 620
Humble *v.* Hunt 347, 542
— *v.* Hunter 582
Humfrey *v.* Dale 663
Humphery *v.* Wake 201
Humphrey *v.* Humphrey 207
Humphreys *v.* Humphreys..417, 423
Hunt, *Re* 326, 329
— *v.* Andrews 133
— *v.* Fineburgh 20
— *v.* Luck 147
— *v.* Wimbledon Local Board.. 682
Hunter *v.* Edney 400, 452
— *v.* Stewart 416, 417, 424
Huntington *v.* Lewis 387
Huntley *v.* Donovan 339, 342, 351, 362
— *v.* Gaskell 406
Hurpurshad *v.* Sheo Dyal 19
Hurst *v.* Beach 669, 674
— *v.* Evans 10, 31, 186, 190
Hutcheson *v.* Eaton 433, 582
— *v.* Smith 258
Hutchins *v.* Scott 528, 602, 654
Hutchinson, *Re* 326, 329
— *v.* Bernard 439, 499
— *v.* McKinnon 17
Hutchison *v.* Bowker 14, 16
Huth *v.* Huth 25
Hutley *v.* Grimstone 19, 38
Hutt *v.* Haileybury College..208, 209
Hutton *v.* Ras SS. Co. 360, 408
— *v.* Warren 105, 106
Hux, *Re* 521
Huxtable, *Re* 580, 598, 640
Hyde *v.* Palmer 58, 73, 75, 80, 87, 118
Hyslop, *Re* 668, 669, 672

Ibrahim *v.* R. ..22, 263, 264, 266, 267, 271, 273
Iggulden *v.* May 664
Ilderton *v.* Ilderton 363, 365
Imperial Cold Storage Co. *v.* Rex 442
— Loan Co. *v.* Stone 32
— Press *v.* Johnson 578
Ince, *Re* 586
Inchiquin *v.* French 619

PAGE

Indian Zoedone Co., *Re* 349, 374
Ingestre *v.* A.-G. 679
Ingle, *Re* 652
Ingleby *v.* Slack 536
Inglis *v.* Buttery.....575, 616, 617, 637, 638
— *v.* G. N. Ry. 374, 571
Ingram *v.* Little 238
Inland Revenue Commrs. *v.* Driver Holloway 501
Insurance Co. *v.* Moseley 60
Interleaf Publishing Co. *v.* Phillips 476, 480, 531
Ionides *v.* Pacific Co. 537
Ireland *v.* Powell 301
Irish Land Commrs. *v.* Ryan.406, 410
— Society *v.* Crommelin 206
— — *v.* Derry...133, 228, 339, 341, 347, 349, 355, 356, 359, 531, 542, 688
Irvine *v.* Sullivan 580, 581
Irving *v.* Bodie 134, 262
Irwin *v.* Lever 543
Isaac *v.* Gompertz 308, 310, 314
Isaacs *v.* Salbstein 414
Ivat *v.* Finch 240
Ivory, *Re*, Hankin *v.* Turner.. 410, 420, 431
Ivy's Case 120

JACKER *v.* International Cable Co. 688
Jackman *v.* Jackman 39
Jackson, *Re*, 34 Ch. D. 581
— *Re*, 1907, 2 Ch. 680
— *v.* Gaton 564
— *v.* Irvin 104
— *v.* Jackson, 9 Ves. 581
— *v.* — 1908, *Times* 400
— *v.* Thomason 472
— *v.* Williamson 197
— *v.* Woolley 244
Jacob *v.* Lee 544
Jacobs *v.* Humphrey 254
— *v.* Lindo 446
— *v.* Morris 516
— *v.* Tarleton 39, 40, 118
Jacobson, *Exp.*, *Re* Pincoffs..13, 457
Jacomb *v.* Turner 434
Jacques, *Re* 667, 668
— *v.* S. Essex Co. 38
Jaederen, The 662
Jaeger's Co. *v.* Walker 91
Jaggers *v.* Binnings ...242, 244, 245
Jago *v.* Jago 242
James *v.* Biou 134
— *v.* Evans 421, 422, 423
— *v.* Frearson 580
— *v.* James 469
Jameson, *Re* 625, 626, 657
— *v.* Drinkald 391, 395
Janson *v.* Poole 616, 633
Jardine, *Exp.*, *Re* McManus 624
Jarrett *v.* Hunter 630
Jayes *v.* Harris 57
Jayne *v.* Hughes 585
— *v.* Price 112
Jeans, *Re* 643
— *v.* Cooke 670

PAGE

Jefferies *v.* Austin 599
Jefferson *v.* Paskell 35
Jeffery *v.* Walton 577, 591
Jeffree *v.* Jeffree 43
Jeffrey, *Re* 659
Jenkins *v.* Norden 369
Jenks *v.* Ditton 444
Jenkyns *v.* Bushby 208
— *v.* Gaisford 515
Jenner *v.* Finch ...325, 326, 328, 334
— *v.* Morris 501
Jennings, *Re* 525
Jervey *v.* Styring 72, 633
Jervis *v.* Berridge 590
Jessop, *Re* 231
Jesus College *v.* Gibbs 546
Jewison *v.* Dyson 162, 168, 349
Jewsbury *v.* Mummery 413, 416, 418, 423
Johnson, *Exp.* 564
— *Re* 680
— *v.* Barnes 556
— *v.* Bragge 585
— *v.* Clark 583
— *v.* Crédit Lyonnaise 686
— *v.* Dodgson 516
— *v.* Hudson 542
— *v.* Kershaw 467
— *v.* Lawson 308, 309, 315
— *v.* Lindsay 248, 689
— *v.* Lyford 324, 327
— *v.* Marlborough 529
— *v.* Oceanic Co. 435
— *v.* O'Neill 112, 113, 161, 168
— *v.* Raylton 124
— *v.* Rees 580
— *v.* Thompson 61, 72, 361
— *v.* Trinity Church 257
— *v.* Tucker 204
— *v.* Ward 352, 362
Johnstone *v.* Spencer 67, 106, 298
Joint Committee *v.* Croston.... 410, 416, 423
— Stock Co. *v.* Brown 151
Jolliffe, *Exp.* 431
Jolly *v.* Jolly 119
— *v.* Young 661
Jones, *Re*, 95 L.T.Jo. 500
— *Re*, 21 T.L.R. 210
— *v.* Brewer 521
— *v.* Carrington 239
— *v.* Edwards 544
— *v.* Fort 41
— *v.* Frost 684
— *v.* G. C. Ry. 201, 209
— *v.* German 405
— *v.* Gibbon 531
— *v.* Goodrich 205
— *v.* Gordon 147, 150
— *v.* James 186, 187, 191
— *v.* Jones, 22 Q.B.D. 213
— *v.* — 1895, P. 13, 457
— *v.* — 9 M. & W. 523
— *v.* — 24 T.L.R. 472
— *v.* Lavington 595, 596
— *v.* Newman 627
— *v.* Perry 153
— *v.* Randall 335, 336, 557

PAGE
Jones *v.* Richards 163
— *v.* S. E. Ry. 84, 114, 488, 491
— *v.* Stroud 470, 471
— *v.* Tarleton 79, 533, 548
— *v.* Waslay 594
— *v.* White 357
— *v.* Williams 109, 161, 168
Joseph *v.* Joseph 487
Joy v. Phillips 138, 162, 165, 169
Joyce *v.* Capel 97, 225
— v. Joyce 166, 201
Joynson *v.* Hunt 124
Judd *v.* Judd 491
Judge *v.* Cox 152
— *v.* Horrell 361
Juffrouw Elbrecht, The 55
Justice *v.* Elstob 555, 573

KAINES *v.* Knightly 589
Kay *v.* Cotesworth 15
Kearley *v.* Tylor 95
Kearney *v.* King 22, 25
Kearns *v.* Durrell 600
Kearsley *v.* Phillips 204
Keegan *v.* Smith 419
Keele *v.* Wheeler 536
Keeling *v.* Ball 521
Keen *v.* Keen—324, 325, 327, 328, 333
Kegan *v.* Grim 238
Keighley, *Re* 689
— *v.* Durant 90
Kell *v.* Charmer 387, 614, 640
Keller, *Re* 23, 202, 446
Kellett *v.* Stockport 588
Kelly *v.* Colhoun 213
— *v.* Hammond 406, 415
Kelsey, *Re* 586, 603, 669
Kemp v. Elisha 577, 588
— *v.* Neville 405
Kempshall *v.* Holland, 14 R...251, 462
— *v.* — 1895, Times 119, 489
Kempson *v.* Boyle 536
Kempton *v.* Cross 23
Kendall *v.* Hamilton 414
Kennard *v.* Ashman 385, 595
Kennedy *v.* Dodson 90, 160, 166, 478, 499
— *v.* Doyle 291
Kennon *v.* Gilmer 169
Kent *v.* Fittal 689
— *v.* Mid. Ry. 37
Kepitigalla Co. *v.* National Bank of India 377
Kerin *v.* Davoren 292
Kerr *v.* Shedden 352
Kerry Council *v.* Liverpool Assoc. 200, 202, 204, 209
Kestrel, The 385
Kettlewell *v.* Refuge Co. 91
Kevil *v.* Lynch 516
Keys *v.* Keys 199
Kilgour *v.* Owen 548
Killick *v.* Price 582
King, *Re* 580
— *v.* Badeley 615, 640, 641, 642
— *v.* George 624
— *v.* Henderson 407. 411
— *v.* Hoare 414, 415

PAGE
King *v.* King, 13 L.R.I. 648
— *v.* — 1897, *Times* 343, 345
— *v.* — 1901, *Times* 166
— *v.* London Cab Co. 97, 225
— *v.* Norman 404
— *v.* Smith 587
— *v.* Waring 186
— *v.* Watts 82
— Charles' Trial 212
King's College Hospital *v.* Wheildon 653
Kingston *v.* Cooper 446
Kingstown Council *v.* Carson... 556
Kinlen *v.* Ennis U.D.C. 635
Kinnis *v.* Graves 407, 420
Kirby *v.* Cowderoy 111
— *v.* Hickson 22
Kirchner *v.* Venus 106
Kirk, *Exp.* 599, 637
— *v.* Eddowes 59, 324, 666, 668, 672
Kirkstall *v.* Furness Ry. 247
Kirkwood *v.* Carroll ...531, 592, 601
Kissam *v.* Link 376
Kitcat *v.* Sharp 232
Kitson *v.* Playfair 393
Klingeman, *Re* 389
Knapp, *Re* 618
— *v.* Harvey 207
Knaresborough Bkg. Co. *v.* Lorimer 205
Knatchbull *v.* Fowle 495
Knight *v.* Campbell 12
— *v.* Clements 530
— *v.* Cox 686
— *v.* Halliwell 691
— *v.* Martin 543, 544
— *v.* Waterford 285
— *v.* Young 400
Knowles, *Re* 671
Kops *v.* Reg. 453
Krell *v.* Henry 617
Kronprintz, The 406
Kurtz *v.* Spence 232

L. *v.* L. 38
La Cloche *v.* La Cloche 344
Lacon, *Re* 667, 669
— *v.* Higgins 389, 549, 550
Ladies' Dress Assoc. *v.* Pulbrook 369
Laffan, *Re* 618
Lafone *v.* Griffin 542
Lake George Mines, *Re* 198
Lalor *v.* Lalor 241, 281, 285, 575
Lamb *v.* Munster 213, 214
— *v.* Orton 207, 208
Lambert, *Re*, L.R. 1 P. & D... 366, 462, 502
— *Re*, 56 L.J.Ch. 317, 521
— *v.* Home 207, 208
— *v.* Smith 242
L'Amie *v.* Wilson 376
Lampson *v.* Corke 234
Lamson *v.* London Docks 247
Lancum *v.* Lovell..132, 281, 286, 291, 299, 306, 340
Land Corporation *v.* Puleston .. 208
Lander, *Re* 573

PAGE
Landes *v.* Marcus 582
Lands Allotment Co., *Re* 151
Lane *v.* Bryant 72, 481
Lane's Case, 2 Co. Rep. 22
— — 1 De G. J. & S. 146
Langham *v.* Sandford 670, 671
Langley *v.* Oxford 249
Lapsley *v.* Grierson 104
Lart, *Re* 412, 413, 427, 430, 683
Last *v.* Hucklesby 526
Latimer *v.* Birmingham 186, 419
Latkow *v.* Eamer 356, 435
La Touche *v.* Hutton 283
La Trinidad *v.* Browne 500
Latter *v.* Goolden 195
Lauderdale Peerage ..291, 340, 354, 372, 373
Laurie *v.* Scholefield 636
Law *v.* Capron 66
Lawder *v.* Lawder 468
Lawes, *Re* 667, 668
Lawrence *v.* Clarke 545
— *v.* Ingmire 490
— *v.* Maule 437, 438
Lawrie *v.* Lees 517
Lawson *v.* Quare 495
Laxon, *Re* 369
Layard, *Re* 618
Lea, *Re* 501
— *v.* Charrington 558
— *v.* Thursby 154, 580
Leach *v.* Rex 451, 456
— *v.* Simpson 569, 576
Leader *v.* Barry 346
Leake *v.* Portsmouth Corp...161, 168
Leame *v.* Bray 21
Learoyd, *Exp.* 338
— *v.* Halifax Co 208
Leather Co. *v.* Hieronimus 587
Leathley *v.* Spyer 617
Le Caux *v.* Eden 408
Lechmere *v.* Fletcher 415
Leduc *v.* Ward 590, 616, 638
Lee *v.* Alexander 616
— *v.* Angas 442
— *v.* Bent 369
— *v.* Birrell 195
— *v.* Harrison 241
— *v.* L. & Y. Ry. 234, 577, 589
— *v.* Meecock 341
— *v.* Merest 210
— *v.* Pain 612, 666, 667, 669
Leeds *v.* Cook 546
— *v.* Lancashire 592
— Bank *v.* Walker 528, 529
Leeming, *Re* 626
Lees *v.* Marton 59, 76
Lefebure *v.* Worden 230
Legatt *v.* Tollervey 404
Legge *v.* Edmonds....77, 119, 199, 220, 235, 238, 243, 245, 678
Leggott *v.* Barrett..575, 590, 595, 634
— *v.* G. N. Ry. 413, 418
Leidemann *v.* Schultz 662
Leigh, *Re* 127
— *v.* Jack 112
Leighton *v.* Leighton, 18 Eq..... 668
— *v.* — 1 Str. 356

PAGE
Leite, *Re* 232
Le Lievre *v.* Gould 150
Lemme, *Re* 548
Lemon, *Re* 515
— *v.* Lemon 345
Lench *v.* Lench 118, 669
Lennon *v.* Meegan 411
Lennox, *Exp.* 427
Leonard's Case 584
Leslie *v.* De la Torre 589
— *v.* Sheill 682
Lester *v.* Hickling 604
Lever *v.* Goodwin 118, 479
Leverington, *Re* 584
Leverson *v.* Reg. 619
Levitt *v.* Levitt 366
Levy *v.* Pope 205
Lewes's Trusts, *Re* 680
Lewis, *Re*, 32 T.L.R. 326
— *Re*, 1904, 2 Ch. 686, 687
— *v.* Clay 584, 601
— *v.* Fermor 126, 155
— *v.* G. W. Ry...126, 145, 152, 612, 616, 638, 664
— *v.* Harris 266, 267
— *v.* James 500
— *v.* Jones 169
— *v.* Lane 670
— *v.* Lewis, 45 Ch.D. 251
— *v.* — 1908, P. 329
— *v.* — 1912, P. 217
— *v.* Marshall 12, 106
— *v.* Poole 525
— *v.* Sapio 402
Ley *v.* Peter 248, 249
Leyfield's Case 48
Leyman *v.* Latimer 404, 418
Lidderdale, *Re* 680
Liebmann *v.* Pooley 542
Lilly *v.* Smales 662
Limerick *v.* Limerick 345
Limond, *Re* 371, 520
Limpus *v.* L. G. Omnibus Co. .. 99
Lincoln *v.* Wright 580
Lindgren *v.* Lindgren...626, 656, 657
Lindley *v.* Lacey 594
Lindo *v.* Belisario 390
Line *v.* Taylor 8
Lishman *v.* Christie 125, 662
Lister *v.* Mackenzie 478
— *v.* Perryman 16
— *v.* Smith 326, 330
— *v.* Varley 375
Little Lizzie, The.....252, 361, 440
Littledale *v.* Liverpool College... 112
Liversedge *v.* Whiteoak 123
Llanelly Ry. *v.* L. & N. W. Ry. 594, 671
Llanharry Co., *Re*, Roney's Case 151
— *Re*, Stock's Case 372
Llanover *v.* Homfray 414, 418, 437, 440
Llewellyn *v.* Jersey 623, 648
— *v.* Winckworth 97, 491
Lloyd *v.* Finlayson 432
— *v* Grace 88, 94
— *v.* Lloyd 466
— *v.* Mostyn 201, 544

PAGE
Lloyd *v.* Powell ..6, 60, 62, 63, 75, 77, 276, 278, 279, 280, 282, 284
— *v.* Sturgeon Falls Co..... 594, 624, 649
— *v.* Willan 252
— *v.* Woodall 365
Lloyd's Bank *v.* Pearson 91
Loader *v.* London Docks 107
Lobb *v.* Stanley 516, 585
Locke-King *v.* Woking Council... 336, 337
Lockett *v.* Cary 210
— *v.* Nicklin 572, 591
Lockhart *v.* Jelly 383
Lockwood *v.* Lockwood 115
— *v.* Smith 242
Lockyer *v.* Ferryman 412
Lodge *v.* Prichard 258
Login *v.* Coorg (Princess) 390
Lohre *v.* Aitchison 21
Lomas *v.* Barff 663
London *v.* Lynn 373
— Asphalte Co., *Re* 563
— Chartd. Bk. of Australia *v.* White 21
— Corp. *v.* Kaufman 447
— County Coun. *v.* Clode 304
— — *v.* South Met. Gas Co..642, 664
— Freehold Co. *v.* Suffield 583
— Gas Co. *v.* Chelsea 207, 209
— Gen. Omnibus Co. *v.* Lavell.. 8
— Joint Stk. Bk. *v.* Simmons.. 147, 149
— School Board *v.* Harvey..558, 559
— & General Bank, *Re* 253, 502
— & Northern Bank, *Re* ...198, 206
— — *Exp.* Jones 122
— & Tilbury Ry. *v.* Kirk 209
— & Westminster Bank *v.* Button 253, 375
— & W. Loan Co. *v.* Bilton .. 104
Long *v.* Long 16, 93, 217
— *v.* Millar 526, 527
Longmore *v.* G. W. Ry. 107
Longstaffe, *Re* 495
Long-Sutton, *Re* 680
Lord *v.* Colvin 390, 474
— *v.* O'Leary 198
— Advocate *v.* Blantyre...161, 168, 676
— — *v.* Walker's Trustees 630
— Seaton, The 252, 361
Loughboro' Bd. *v.* Curzon 247
Louis, *Re* 526, 598
Lovat Peerage 308, 310
Lovatt *v.* Tribe 152, 392, 395
Love *v.* Gaze 670, 674
Loveland, *Re* 618
Lovell *v.* Wall....394, 585, 602, 606, 616, 665
— *v.* Wallis 495
Low, *Re* 411
— *v.* Bouverie 91, 150, 682, 686
Lowden *v.* Blakey 205
Lowe *v.* Darling 532
— *v.* Fox 528
— *v.* Howarth 413

PAGE
Lower Rhine Assoc. *v.* Sedgwick 537, 612, 633
Lowery *v.* Walker 576
Lucas *v.* Beach 531
— *v.* Bristow 663
— *v.* Cooke 348
— *v.* Delacour 228, 245
— *v.* Novosolieski 105, 122
— *v.* Williams....6, 8, 47, 108, 399, 400, 573
Lucy *v.* Mouflet 257, 258
Luke *v.* S. Kensington Co. 599
Lumley *v.* Gye 499
— *v.* Oshorne 500
Lutterell *v.* Reynell 114, 224, 488
Lyall *v.* Edwards 616, 617, 637
Lyell *v.* Kennedy, 23 Ch. D. ... 208
— *v.* — 27 Ch.D. 204, 207, 233
— *v.* — 56 L.T. ..287, 288, 291, 339
— *v.* — 9 App. Cas. ..200, 201, 206, 207
— *v.* — 14 App. Cas...20, 287, 288, 313, 317, 340, 341, 345, 347, 405, 435, 555
Lygon *v.* Strutt 525
Lyle *v.* Elwood 384
— *v.* Richards 14, 15, 623
Lynch *v.* Clerke 554
Lyndica, The 362
Lynn *v.* Beaver 671
Lyon *v.* Reed 684
Lyons *v.* Wilkins 619
Lyttleton Times Co. *v.* Warners 616, 635, 637

M. *v.* D. 216
Maas *v.* Pepper 580
McAllum *v.* Reed 361
Macalpine *v.* Calder 9
Macassey *v.* Thompson 619
McAttee *v.* Hogg 453
Macaulay *v.* Polley 249
McBride *v.* McGovern 225
McCance *v.* L. & N. W. Ry..... 685
McCarthy *v.* Kennedy ...97, 336, 552
McClean *v.* Kennard 599, 664
M'Clory *v.* Wright 486
McCollin *v.* Gilpin 581, 582
M'Combie *v.* Anton 438
McConnell *v.* Brennan 57
M'Cormick *v.* Garnett 390
M'Corquodale *v.* Bell 208
M'Cowan *v.* Baine 617
M'Craw *v.* Gentry 520, 521
McCue, *Re* 150
McCullough *v.* Munn 108, 125, 397, 542
M'Devitt *v.* Connolly 123
MacDonald, *Re*, Dick *v.* Fraser.. 242, 244
— *v.* Antelme 497
— *v.* Longbottom 617, 636
— *v.* Whitfield ...579, 582, 592, 599
M'Donnell *v.* Alcorn ...408, 410, 418
— *v.* Conry 204
Macdonnell *v.* Evans 477
Macdougal *v.* Young.....129, 543, 557, 565

PAGE
Macdougall *v.* Knight, 14 App. Cas. 688
— *v.* — 25 Q.B.D. ...412, 416, 422
McDougall *v.* Field 593
McDowall *v.* G. W. Ry. 127
Macduff, *Re* 624
M'Elveney *v.* Connellan, ... 195
M'Fadden *v.* Murdock 387, 398
M'Gahey *v.* Alston 110
M'Gingle *v.* M'Gingle 641
M'Gorman *v.* Kierans 375
Macgregor *v.* Dover Ry. 25
McGregor *v.* Telford 411
McGrory *v.* Alderdale Co. 591
McGuffie *v.* Burleigh 526
Machell *v.* Ellis 250
M'Hugh *v.* M'Hugh 623, 644
M'Iver *v.* Humble 352
M'Kenna, *Re* 409, 432
— *v.* Howth 239, 378
McKenna *v.* Eager 560
Mackay *v.* Robinson 522
Mackenzie, *Re* 618
McKenzie *v.* British Linen Co... 97, 685, 687
Mackintosh *v.* Marshall 146
M'Knight *v.* Gardner 571
Maclaren *v.* Davis 18, 41, 690
McLeod *v.* Power 414
M'Loughlin *v.* Dwyer 214
M'Mahon *v.* Lennard 110
McManus *v.* Bark 578
McMullen *v.* Hickman Co. 532
McMurray *v.* Spicer 631
Macpherson *v.* Warner 604
McQueen *v.* Phipps 399
McVity *v.* Tranouth 531
Maddock, *Re* 584
Maden *v.* Catanach 451, 458
Magdalen Hosp. *v.* Knotts...37, 104. 112, 120, 129, 130
Magee, *Re* 366
— *v.* Lavell 649
— *v.* Mark 10, 119, 486
Magnay *v.* Knight 569
Magnus *v.* Nat. Bk. of Scotland. 406
Magrath, *Re* 646
Maguire's Case 374
Mahalm *v.* M'Cullagh 485, 490
Maher, *Re* 585
— *v.* Linigan 673
Mahon, *Re* 562
— *v.* Dublin Co. 25
Mahony *v.* East Halford Co. 146
— *v.* Waterford Ry. 37
Maillard *v.* Page 578, 592
Maingay *v.* Gahan 408
Maisel *v.* Financial Times 186
Makeown *v.* Ardagh ...623, 625, 651
Makin *v.* A.-G. N. S. Wales.... 158, 163, 164, 172, 174, 175, 180, 184
Malcolm *v.* Armstrong 592
Malcolmson *v.* Morton 629, 663
— *v.* O'Dea 112, 113, 132, 299, 372, 435
Malins, *Re* 329
Malone *v.* Lestrange 290
— *v.* O'Connor 290
PAGE
Malone *v.* Spillessy 474
Maloney *v.* Laskey 589
Malpas *v.* L. & S. W. Ry...577, 589
Malton *v.* Nesbit 392, 395
Man *v.* Ricketts 523
Manchester, The 251
— Brewery *v.* Coombs....58, 65, 75, 115, 135, 160, 167, 384, 516
— Corp. *v.* Lyons 359
— Trust *v.* Furness 147
Mander *v.* Ridway 532
Mangena *v.* Wright 191
Mangerton, The 356, 361
Manley *v.* Berkett 582
— *v.* Palache 689
— *v.* Shaw 19, 449
Mann *v.* Nunn 595
Manning *v.* Lechmere 278
— *v.* L. & N. W. Ry. 171
Mansell *v.* Clements 82, 400, 403
Manser *v.* Dix 206
Maplin Sands, *Re* 473
Marchant, *Re* 526, 580
Marconi *v.* British Co. 385
Marcus, *Re* 520
Maria das Doreas, The 353
Marianski *v.* Cains 251
Marine Invest. Co. *v.* Haviside .. 532
Marks *v.* Beyfus 195, 196
— *v.* Lahee 286
Marlborough, *Re* 580, 671
Marriage *v.* Lawrence 132, 230, 372, 373
Marriott *v.* Chamberlain 207
— *v.* Hampton 419
— *v.* Marriott 409
— *v.* Stanley 126
— *v.* Yeoward 147
Marsden, *Re* 501
Marsh *v.* Collnett ..348, 524, 535, 543
— *v.* Darley 257
Marshall *v.* Berridge...630, 664, 683
— *v.* Cliff 249
— *v.* Ford 136, 545
— *v.* Lamb 110
— *v.* Lynn 603
— *v.* Marshall 343
— *v.* Orient Co. 9
Marsham, *Re* 463
— *v.* Prince 238
— *v.* Skett 167
Marshfield, *Re* 375
Marston *v.* Downes 546
Martin *v.* Butchard 209
— *v.* Drinkwater 674
— *v.* Johnston 135, 289, 392, 395
— *v.* Loef 620
— *v.* Pridgeon 29
— *v.* Spicer 596
— *v.* White 136, 545
Marzetti *v.* Smith 125
Mash *v.* Darley ..260, 413, 428, 490, 543, 557, 558
Maskelyne *v.* Stollery 14, 15
Mason, *Re* 203
— *v.* Motor Co. 531
— *v.* Schuppisser 590
— *v.* Wood 122, 564

PAGE
Masper v. Brown 413
Massey v. Allen....278, 282, 287, 289
— v. Massey 479
Mathew v. Purchings 379
Matthews, *Re* 680
— v. Bloxsome 586
— v. Foulshaw 625, 653
— v. Munater 251
— v. Smallwood 536
Maugham v. Hubbard 470
Maughan v. Sharpe 625
Maunsell v. Ainsworth 445
Mawson v. Heartsink 482
May, *Re*, 28 Ch. D. 416
— *Re*, L.R. 1 P. & D. 586
— v. Belleville 516
— v. Kelly 119, 489
— v. May 341
— v. Newton 501
— v. Platt 585, 591, 602
— v. Taylor 237
Maybank v. Brooks 610, 618, 639
Mayell, *Re* 654
Mayhew, *Re* 619
— v. Nelson 248
Maynard v. Con. Kent. Corp.... 531
Mayo, *Re*, Chester v. Keirl..625, 653
Meagoe v. Simmons 470
Mears v. Western Co. 66
Meath v. Belfield 300
— v. Winchester..234, 240, 524, 525
Mechelin v. Wallace 601
Medley v. London Trams 43
Mee v. Parren 624
— v. Reid 460
Meering v. Grahame-White Co... 505
Meinhertzhagen v. Walters 668
Melbourne Co. v. Brougham 239
Melen v. Andrews 260
Melhuish v. Collier.....113, 116, 134
Mellona, The 71, 251
Mellor v. Denham 531
— v. Thompson 464
— v. Walmesley 289, 624
Meluish v. Milton 431
Melville's Case 22
Mercantile Agency v. Flitwick Co. 597
— Bk. of Sydney v. Taylor..578, 582, 589, 599, 636, 637, 647, 649
—Trust v. River Plate Trust.. 414, 419, 427
Mercer v. Denne..194, 287, 288, 289, 290, 295, 296, 297, 299, 300, 301, 304, 305, 355, 356, 358, 359, 525
— v. Whall 38
Mercier v. Mercier 669
Meredith v. Footner 248, 249
Meres v. Ansell 568, 591
Merrick v. Wakley 339, 349
Mersey Docks Board v. Liverpool Gas Co. 72
Metropolitan Asylums v. Hill... 159, 162, 170, 387, 397
— Ry. v. Jackson 13, 17
Metters v. Brown 130, 238, 245
Meunier, *Re* 486
Meux's Exors.' Case 247

PAGE
Mexborough v. Whitwood 213
Meyer, *Re* 517
— v. Sefton 467
Meyrick v. James 496, 500
Michell v. Rabbetts 525
Micklethwaite v. Newlay Co. .. 675
Micklethwart'a Case 197
Middleton v. Melton 47, 243, 282
Midland Ry. v. Martin 420
— v. Robinson 380
Midlothian, The 251
Mighell v. Johore (Sultan).... 23, 26, 364, 463
Milbank v. Milbank 207, 209
Miles v. Bough 571
— v. Haselhurst 608
Millard v. Bailey 612, 647
Miller, *Re* 427
— v. Appleton 446
— v. Babu Madho Das 689
— v. Johnson 251
— v. Kimbray 95
— v. Kirwan 209
— v. Salomons 458
— v. Tetherington 663
— v. Travers..332, 601, 642, 651, 655
— v. Waterford 213
— v. Wheatley...110, 113, 126, 281, 288, 291, 299, 344, 365, 538, 541, 562
Milles v. Lamson 399
Mills, *Re* 618
— v. Barber 31
— v. Colchester Corp. 336
— v. Mills 289
— v. Oddy 546
Milne v. Leisler..6, 59, 60, 61, 71, 74, 84, 133, 291, 488, 491, 688
Milner, *Re* 619
— v. Harewood 684
Milton v. Pronk 127
Milward v. Forbes 232
Minton v. Geiger 591
Mitchell v. Croyden 20
— v. Henry 662
— v. Stephens 9
Moffett v. Gough 541
Mohamidu v. Pitchey 431
Mohan v. Broughton 427, 430
Moises v. Thornton ..354, 365, 518
Mollett v. Robinson 579
Molloy v. Kilby 499
Molyneux v. Hawtrey 146
Monarch Synd. v. Pollock 597
Monkton v. A.-G.....295, 308, 309, 310, 311, 316
Monroe v. Twistleton 210
Montifore v. Menday, &c., Co..... 20
Montreal Co. v. Robert 91
Moons v. De Bernales 432
Moore v. Campbell 536, 664
— v. Garwood 15
— v. Knight 244
— v. Moore 331
— v. Ransome 171
— v. Trulock 151
— v. Terrell 207
— v. Ulster Co. 43

PAGE
Moosebrugger *v.* Moosebrugger.. 464
Mordne *v.* Palmer 584
Morewood *v.* Wood 294, 307
Morgan, *Exp.*, *Re* Simpson..... 13, 588, 683
— *v.* Brydges 475
— v. Griffith 579, 595, 597
— *v.* Nicholl 437, 439
— *v.* Thorne 412
Moriarty *v.* L. C. & D. Ry..... 98, 113, 116, 134, 238
Morison *v.* L. & C. W. Bank.. 90
Morley *v.* Loughnan 33
— *v.* Morley 475
Morrell *v.* Cowan 586, 617, 636
— *v.* Fisher 649
— *v.* Frith 14
— *v.* Morrell 327, 332
— *v.* Studd 587, 642
Morris, *Re* 29
— *v.* Baron 587, 603, 604
— *v.* Bethell 97, 491
— *v.* Davies 77, 199, 312, 678
— *v.* Delobbel-Flipo 570
— *v.* Edwards 209, 210
— *v.* Hauser 544
— *v.* Salberg 94
— *v.* Watson 632
Morrison *v.* Lennard 465
— *v.* M'Ferran 670
— *v.* Moat 202
Morrow *v.* Morrow 78, 484, 487
Mortimer *v.* M'Callan ..75, 348, 400, 535, 548, 552, 554
Morton *v.* French 516
— *v.* Tewart 580
Moseley *v.* Davies 296, 300
— *v.* Victoria Co. 202, 203
Mossam *v.* Ivy 294, 381
Mostyn *v.* Fabrigas 390
— *v.* Mostyn 651
— *v.* West Mostyn Co. 205
Motteram *v.* Eastern Cties. Ry... 556
Monflet *v.* Cole 360, 379
Mould *v.* Williams 405
Moult *v.* Halliday 21, 107
Moulton *v.* Edmonds 541
Mounsey *v.* Blakmire 611, 643
Mourmand *v.* Le Clair 624, 632
Mousell *v.* L. & N. W. Ry. 89
Mowatt *v.* Castle Steel Co. 518
Muirhead *v.* Commercial Cable Co. 686
Mulholland *v.* Killin 429
Mulliner *v.* Florence 21
Mumford *v.* Gething 616, 633
Muncey *v.* Dennis 124
Mundell, *Re*, Fenton *v.* Camberlege 447, 475, 479
Munster *v.* Cox 415
Murly *v.* McDermott 634
Murphy, *Re*, 7 L.R.I. ..325, 332, 650
— *Re*, I.R. 8 Eq. 520
— *v.* Manning 126
Murray *v.* Gregory 234
— *v.* Mahon 470
— *v.* Milner 199, 309
— *v.* Stair 583, 600

PAGE
Musgrave *v.* Emmerson 286
— *v.* Inclosure Commrs. 132
— *v.* M'Avey 411
Mutual Co. *v.* Hillmon ..62, 64, 79
Myers *v.* Sarl 629, 662

NADIN *v.* Bassett 497, 498
Nagle *v.* Shea 200, 522
Narracott *v.* Narracott 187, 191
Nash *v.* Ali Khan 458, 460
— *v.* Inman 17
— *v.* Stokvis 225
— *v.* Turner 522
Nason *v.* Clamp 475
Nassau Co., *Re* 369
Natal Co. *v.* Good 425
— *v.* Pauline Synd. 92
Nathan *v.* Ogdens 577
National Assoc. *v.* Smithies 214
— Bk. *v.* Falkingham..531, 575, 616
— Debt Corp., *Re* 369
— Folding Co. *v.* National Co.. 118
— Provl. Bk. of England *v.* Jackson 517
— Society, etc. *v.* Scottish National Society, etc. 621, 623, 627, 646, 658
Naylor *v.* Goodall 633, 658
Neal *v.* Devenish 28
— *v.* Irving 96
Neale *v.* Fry 381
— *v.* Gordon-Lennox 251
— *v.* Neale 610, 640, 642
Neave *v.* Hatherley 690
Neaverson *v.* Peterborough Coun. 663
Needham *v.* Bremner.....407, 408, 419, 433
Neile *v.* Jackle 256
Neill *v.* Devonshire..113, 132, 161, 168, 298, 299, 358, 426, 541
Neilson *v.* Harford 15
Neison *v.* Walters 435
Nelson *v.* Bridport 389, 393
— *v.* Couch 416, 417, 420, 422
— *v.* Whittall 519
Nesbitt *v.* Parrett 197
Nevill *v.* Fine Art Co. 15
New Chinese Co. *v.* Ocean Co.... 577
— London Credit Synd. *v.* Neale. 592
— Romney Corp. *v.* New Romney Commrs. 357
New's Trustee *v.* Hunting..231, 237, 238, 245, 253, 677
Newbold & Met. Ry., *Re* 434
Newbould *v.* Smith 279, 283
Newby *v.* Sims 369
Newcastle *v.* Broxtowe 295, 300
Newell *v.* Radford 631
Newen, *Re* 250
Newington *v.* Levy 423
Newis *v.* Lark 534
Newland *v.* Steere 442
Newlands *v.* National Assoc. ... 99
Newlove *v.* Shrewsbury 572
Newman *v.* Belsten 64, 85, 153
— *v.* Gatti 579, 586, 594, 596
— *v.* Jones 96
— *v.* Piercey 625, 653

PAGE
Newmark *v.* National Co. 542
Newsom *v.* Carr 191
Newton *v.* Chaplin 204, 546
— *v.* Harland 446
— *v.* Newton, 5 L.T. N.S. 324
— *v.* — 12 Ir. Ch. R..327, 328, 333
— *v.* Ricketts 386
Nichol *v.* Godts 591
Nicholl *v.* Jones 208
Nichols *v.* Dowding 468
— *v.* Downes 235
— *v.* Parker 299
Nichols *v.* Kingdom Co. 542
Nicholson *v.* Mulligan 670
Nickall *v.* Fawkes 619
Nielsen *v.* Wait 662
Nifa, The 125, 614, 637, 662
Nightingall *v.* Smith 618
Nisbett, *Re* 146
Noble *v.* Kennoway 162, 169
— *v.* Ward 587, 603, 604
Nodin *v.* Murray 537, 540
Nokes *v.* Milward 291, 345, 365
Nolloth *v.* Simplified Soc. 530
Norden SS. Co. *v.* Dempsey 662
Nordon *v.* Defries 208
Norman *v.* Mathews 464
— *v.* Strains 431
Normanshaw *v.* Normanshaw ... 201
North *v.* Miles 94, 254
— *v.* North 38. 333
— Australian Co. *v.* Goldsborough Co.....198, 208, 479, 480, 481, 504, 508
— Cheshire Co. *v.* Manchester Co. 65, 382, 394
— Eastern Ry. *v.* Hastings..615, 630, 663, 664
— — *v.* Dalton 421
North Stafford Ry. *v.* Hanley Corp. 288, 289, 305, 555
North Western Salt Co. *v.* Electrolytic Co. 20
Northen's Estate, *Re* 624
Northumberland Co., *Re* 369
Norwich Equitable Co., *Re* 253
Norwood *v.* Stephenson 363
Nosworthy, *Re* 326, 329
Nothard *v.* Pepper 252, 361
Nottingham Guardians *v.* Tomkinson 198, 199, 216, 457
Nouvion *v.* Freeman 406
Nutting *v.* Page 58, 72
Nye *v.* Macdonald 366
— *v.* Nihlett 25

OAKES *v.* Turquand 369
O'Brien *v.* Condon 520
— *v.* Sheil.85, 148, 153, 281, 670, 674
— *v.* Tyssen 328, 580
O'Connor *v.* Malone.290, 433, 464, 501
— *v.* Marjoribanks 210, 211
O'Donnell *v.* O'Donnell.....25, 622, 629, 661
Ofner, *Re* ...610, 611, 623, 647, 650
Ogden *v.* Gas Co. 171
Ogilvie *v.* Foljambe 631
Ogle *v.* Vane 587

PAGE
O'Gorman *v.* O'Gorman.....78, 84, 488, 491
O'H. *v.* O'H. 114
Ohlsen *v.* Terrero 499
O'Keefe *v.* Walsh 43, 93, 94
Oldenburgh, *Re* 389
O'Leary *v.* Douglass....327, 328, 333
Oliver *v.* Hunting 526, 527
— *v.* Nautilus Co. 231, 577, 589
Olley *v.* Fisher 585
O'Loughlin *v.* Bellew 644
Olympia Co. *v.* Produce Co ... 107
Omealy *v.* Newell 366
Omichund *v* Barker ..364, 365, 451, 458, 463
Ommaney *v.* Butcher 671
Omychund *v.* Barker (S.N. Omichund *v.* B.) 48, 230
O'Neill *v.* Read 230
— *v.* Drohan 90
Onward Bldg. Soc. *v.* Smithson.. 683
O'Reilly *v.* Weldon 38
Orianada, The 460
Orient, The 417
Oriental Co. *v.* Surat 10, 225
O'Rourke *v.* Commrs. for Railways 196, 585
— *v.* Darbishire 203
Orrell, *Re* 406
Orrett *v.* Corser 278, 282
Orsman *v.* Robinson 592
Osborn *v.* Thompson 31
Osborne *v.* Chocqueel 162, 169
Osgood *v.* Manhattan Co. 238
O'Shea *v.* Wood 203, 442
Ottos Kopje, *Re* 685
Otway, *Re* 623
Outram *v.* Morewood 422
— *v.* Outram 465
Ovens, *Re* 521, 522
Over *v.* Harwood 33, 36
Overend *v.* Oriental Corp. 582
Ovey, *Re* 623
Owen *v.* Moberley 488, 490
— *v.* Wynn 203
Owner *v.* Beehive Co. 548
Oxford *v.* Gill 149
— Rate, *Re* 25
— Tram. Co. *v.* Sankey 29
Oxley *v.* Pitts 462

P. *v.* N. 679
Pacific, The 22
Paddock *v.* Forrester 231
— *v.* Fradley 631, 633
Page *v.* Mid. Ry. 591
Paget *v.* Marshall 585
— *v.* Paget 671
Painter *v.* Austin 242
Palermo, The 195, 198, 208
Palmer, *Re*, 58 L.J.P. ..326, 328, 334
— *Re*, 1898, 1 Q.B. 433
— *v.* Flack 689
— *v.* Johnson 590
— *v.* Maclear 471, 477
— *v.* Mallett 415
— *v.* Newell 176, 668, 672
— *v.* Palmer 313

PAGE
Palmes, *Re* 309
Pankhurst *v.* Hamilton 262
— *v.* Howell 668
Pape *v.* Driscoll 156
Papendick *v.* Bridgwater...239, 240, 279, 284
Paria *v.* Lymington Council 131
Parisian, The 475, 496
Parker, *Re* 623, 644
— *v.* Alder 89, 95
— *v.* Briggs 588
— *v.* Lewis 415, 427
— *v.* Morrell 243, 245
— *v.* S. E. Ry. 147, 148
— *v.* Sutherland 29
Parkin *v.* Moon 476
Parkinson *v.* Simon 393
Parmeggiana *v.* Sweeney 523
Parnell *v.* Wood 376
— Commission 60, 67, 75
Parrott, *Re*, *Exp.* Cullen 520
— *v.* Watts.....60, 61, 72, 284, 616, 631, 633
Parry *v.* May 543
Parsons, *Re* 678
— *Exp.*, *Re* Townsend 570
— *v.* London C.C. 418
— *v.* Mitchell 624
— *v.* New Zealand Co. 577, 589
— *v.* Parsons 646
Partridge *v.* Coates 543
Pasmore *v.* Bousfield 110
Patman *v.* Harland 146
Paton *v.* Ormerod, 1892, *Times*.. 521
— *v.* — 1892, P. 526, 528, 657
Patrickson *v.* Patrickson 345
Patterson *v.* Patterson 499
Pattle *v.* Anstruther 630
— *v.* Hornibrook 583, 600
Paul, *Re*, 24 Q.B.D. 124
— *Re*, 23 T.L.R. 560
— *v.* O'Reilly 145
Payne, *Re* 91
— *v.* Bennett 309, 311
— *v.* Ibbotson 471
Payton *v.* Snelling 65
Peace *v.* Brookes 520
— *v.* Hains 668
Peaceable *v.* Watson 284
Peacock *v.* Harper 231, 496
— *v.* Harris.....59, 60, 63, 74, 76, 85, 153
Pearce, *Re* 623, 643, 644
— *v.* Foster 203, 204
— *v.* Hooper 522
— *v.* Lonsdowne 16, 18
— *v.* Whale 110
Pearl Co. *v.* Johnson 600
Pearson *v.* Dublin Corp. 91, 150
— *v.* Lemaitre 175, 176
— *v.* Pearson 579, 590, 594
Pease *v.* Phelps 242
Peat *v.* Clayton 685
Peck *v.* Peck 285, 471
Peckforton Castle, The 353
Pedley *v.* Dodds 648
Peek *v.* N. Staff. Ry. ..152, 612, 638
— *v.* Ray 242
PAGE
Peel, *Re* 623, 646
— *Re*, *Exp.* Crossley 146
Peel's Case 369
Pegge *v.* Neath Co. 530
Pell *v.* Daubeny 446
Pemberton *v.* Hughes 406
Pendrell *v.* Pendrell 190
Penn *v.* Bibby 688
— *v.* Jack 39
Penniman *v.* Hill 465
Penny *v.* Hanson 126, 155
— *v.* Wimbledon Council 88
Penruddock *v.* Hammond 205
People *v.* Cole 475
— *v.* Molineux 164
— *v.* Sharp 140
— *v* Zucker 137, 141
Percival *v.* Nanson 280, 282, 285
Percy Supper Club *v.* Whyte ... 122
Perkins *v.* Jeffery..163, 170, 172, 173, 185, 488, 492
— *v.* Vaughan 60, 74, 225
Permanent Trustee Co. *v.* Fels.. 366, 538, 548, 550, 557
Perrott *v.* Perrott 59
Perry *v.* Barnett 106, 123
v. Gibson 462, 474
— *v.* Perry 345
— *v.* Phosphor Co. 376
— *v.* Smith 202
Persse *v.* Mitchell 679
Perth Peerage 347
— Trams, *Re* 530
Perton, *Re*..12, 104, 233, 236, 278, 279, 282, 309, 311, 315, 316, 679
Peruvian Ry. *v.* Thames Co. 91
Petch *v.* Lyon 249
Petition of Right, *Re* 21
Peto *v.* Hague 246
Petrie *v.* Nuttall.....306, 426, 428
Peverett, *Re* 521
Peyton *v.* St. Thomas' Hosp. 247
Pfiel *v.* Vanbatenberg 117, 118
Pharmaceutical Soc. *v.* Mercer... 354
Phelan *v.* Slattery 629, 659
Phelps *v.* Prew 210, 546
Phene's Trusts, *Re* 104, 680
Phibbs, *Re* 521
Phillips, *Re* 91
— *v.* Briard 106, 125
— *v.* Bury 408
— *v.* Cole 240
— *v.* Davis 472
— *v.* Eamer 473
— *v.* Hudson 239, 356, 358, 378
— *v.* Im Thurn 682
— *v.* Probyn 642
— *v.* Royal Co. 99
— *v.* Ward 415
— *v.* Warren 117
Philpot *v.* Bath 112, 129
Phosphate Sewage Co. *v.* Molleson 416
Pickard *v.* Sears 685
Pickavance *v.* Pickavance 410
Pickering, *Re* 203
— *v.* Barkley 223
— *v.* Noyes 209

PAGE
Pickersgill *v.* Rodger 626
Pickett *v.* Packham 104, 121
Pickford *v.* Corsi 425
Pickles *v.* Sutcliffe 21
Pickup *v.* Thames Ins. Co.....30, 31, 32, 104
Pierce *v.* Corfe 527
— *v.* Gardner 526
Piers *v.* Piers 679
Piggott *v.* Eastern Counties Ry... 170
Pike *v.* Ongley 123
— *v.* Street 603
Pilkington *v.* Gray 522
Pilley *v.* Robinson 414
Pilot *v.* Craze 94
Pim *v.* Coyle 414
— *v.* Curell 298
Pink, Re 668
Pinney, *Re* 330, 618, 674
— *v.* Hunt 431, 538, 560
— *v.* Pinney 431, 560
Pipe *v.* Fulcher 297, 299, 303
Pirie *v.* Anderson 352
Pitcher *v.* Bourn 461
Pitman *v.* Maddox 230, 287
Plaice *v.* Allcock 106, 162, 169
Planché *v.* Braham 15
Plancq *v.* Marks 163, 171, 486
Plant *v.* Bourne 616, 632
— *v.* Taylor ..296, 308, 309, 310, 317
Platt *v.* A.-G. 77
Plaxton *v.* Dare 296, 297, 525
Playfair *v.* Playfair 346
Plevins *v.* Downing 587
Pluckrose *v.* Edwards 497
Plumer *v.* Briscoe 523
— *v.* Plumer 243
Plummer *v.* Bentham 363
Plunkett *v.* Cobbett 194
— *v.* Lewis 667, 672
Plymouth Soc. *v.* Trades Assoc... 207
Pneumatic Co. *v.* Leicester Co... 427
Pocock *v.* Billing 241
Polini *v.* Gray 288, 336
Pollard *v.* Pollard 161, 166
— *v.* Scott 303, 378
Pollastrini *v.* Pollastrini ...487, 497
Pollock, *Re* 668, 673
— *v.* Garle 376
Pomero *v.* Pomero 16
Pomeroy *v.* Baddeley 465
Pommeroy *v.* Malvern Council .. 420
Pontifex *v.* Hartley 111, 575, 590
— *v.* Jolly 38
Poole *v.* Dicas 24, 288, 290
— *v.* Griffith 357, 538
— *v.* Warren 522
— Harbour Commrs. *v.* Pike.... 620
Popple *v.* Sylvester 421
Portal *v.* Emmens 373
Porter, *Re* 554
— *v.* Moore 686
Portland *v.* Hill 296, 298, 301
Portsmouth, The 147
Postlethwaite *v.* Freeland 617
— *v.* Rickman 203
Potez *v.* Glossop 681
Potter *v.* Peters 527

PAGE
Poulett Peerage 198, 199, 678
Poulton *v.* Adjustable, &c., Co. 409, 410, 418
— *v.* Moore 683
Pound *v.* Wilson 472
Powell, *Exp.*, *Re* Matthews..21, 146
— *v.* Adamson 414
— *v.* Browne 587
— *v.* Crewe 119
— *v.* Edmunds 597
— *v.* Fall 170
— *v.* Harper 73, 81
— *v.* Heffernan 112, 132
— *v.* Hodjetts 94
— *v.* Kempton Park Co. 619
— *v.* Lond. & Pro. Bk. 518, 530
— *v.* M'Glynn.....35, 36, 97, 231, 234, 236
— *v.* Nevitt 447
— *v.* Powell 333
Power *v.* Freeman 200
Powers, *Re* 244
Powis Peerage 356
Poynton *v.* Poynton 386
Praed *v.* Graham 151
Prager *v.* Prager 344
Prescott *v.* Flinn ..97, 159, 160, 166, 167, 181
Preston *v.* Luck 583, 585
— *v.* Peeke 585
Price *v.* Burva 256, 259
— *v.* Hollis 252, 549
— *v.* Littlewood 300, 347
— *v.* Manning 469, 472
— *v.* Mouat 631
— *v.* Seaward 38
— *v.* Torrington...287, 288, 290, 292
— *v.* Woodhouse 234, 261, 538
— *v.* Worwood 36, 104, 121
Priestman *v.* Thomas, 9 P.D... 406, 410, 416, 418, 422, 431
— *v.* Thomas, 1883, *Times*..... 324, 326, 331
Prince *v.* Samo 233, 236, 483
Prince of Wales Assoc. *v.* Palmer 356
Prindle *v.* Glover 141
Prinsep *v.* Dyce Sombre....357, 680
Printing Co., *Re*, *Exp.* Cammell 145, 374
— *v.* Drucker 436, 439
Prioleau *v.* U.S.A. 463
Prison Commrs. *v.* Clerk of Peace 639
Pritchard *v.* Bagshaw 251, 538
— *v.* Draper 243, 245
— *v.* Hitchcock 404
— *v.* Walker 110
Pritchett *v.* Honeyborne 300
Pritt *v.* Fairclough 291
Proctor *v.* Lainson 238
— *v.* Raikes 208
— *v.* Smiles 201, 206, 208
Procurator-Gen. *v.* Williams.309, 315
Produce Brokers Co. *v.* Olympia Co. 105
Property Ins. Co., *Re* 198
Prosser *v.* Lancashire Co.....532, 577, 589
— *v.* Wagner 408

PAGE

Proudfoot *v.* Hart 635
Provis *v.* Reed ...192, 327, 330, 575
Prudential Assoc. *v.* Curzon..... 409
— Co. *v.* Edmonds 680
Pryor *v.* Petre 675
Pullen *v.* White 43
Purcell *v.* Macnamara 157, 404
Purgold *v.* Purgold 216
Putnam *v.* Bates 238
Pwlbach Co. *v.* Woodman 107
Pye *v.* British Synd. 583
— *v.* Butterfield 213
Pyke *v.* Crouch 282, 438
Pyle Works, *Re* 69, 374, 588, 592, 599
Pym *v.* Campbell 583, 600
Pyper *v.* Manchester Liners.... 361, 435, 502

QUARTZ Co., *Re*, *Exp.* Young... 473
Queen's Case, The.....98, 134, 270, 458, 482, 483
— Proctor *v.* Fry 309, 346, 554
Queensland Co., *Re*, Davis *v.* Martin 518, 530
Quihampton *v.* Going.....526, 548, 603, 669
Quin *v.* Quin 153, 162
Quinlan *v.* Evison 368
Quinn *v.* Leathem 94, 149

R. *v.* Abbott 322
— *v.* Abergavenny 485
— *v.* Abergwilly 226, 440
— *v.* Abraham 58, 73, 81
— *v.* Abramovitch 137, 140
— *v.* Acaster 456
— *v.* Ackroyd 267
— *v.* Adams 138
— *v.* Adamson 578, 589
— *v.* Adderbury 238
— *v.* Adey 200
— *v.* Adlington 178
— *v.* Aickles 545
— *v.* Albutt 375, 537
— *v.* Aldridge 271
— *v.* Alexander 181
— *v.* Allen 47
— *v.* Althausen 344, 384, 573
— *v.* Anderson 25, 502
— *v.* Angel 174
— *v.* Anker 489
— *v.* Antrim, 1895, 2 I.R.....19, 483, 691
— *v.* — 1901, 2 I.R. 19
— *v.* Antrobus 299
— *v.* Appleby 260
— *v.* Applegate 487
— *v.* Armagh 213, 214
— *v.* Arnall 270
— *v.* Ashdown 93
— *v.* Attenbury 82
— *v.* Aubrey 35
— *v.* Audley 33, 34
— *v.* Aughet 417
— *v.* Austin.....319, 322, 438, 507
— *v.* Badash 30, 35
— *v.* Bailey 174, 181, 183

PAGE

R. *v.* Baines 447
— *v.* Baird 172, 182
— *v.* Baker, 2 M. & Rob.....318, 319
— *v.* — 1895, 1 Q.B. ...14, 53, 482
— *v.* — 7 Cr. App. R. 177
— *v.* — 11 Cr. App. R. 136
— *v.* — 28 T.L.R. 269
— *v.* Baldry 264, 271
— *v.* Ball, R. & R. 173, 178
— *v.* — 6 Cr. App. R...137, 454, 493
— *v.* — 1 Moo. C.C. 177
— *v.* — 1911, A. C.....42, 137, 140, 141, 158, 160, 161, 164, 165, 166, 185
— *v.* — 1915, A.C. 180
— *v.* Ballard 175
— *v.* Balls 173
— *v.* Bamberger 260
— *v.* Banks 102, 477
— *v.* Barker 248, 269
— *v.* Barnard, 19 How. St. Tr. 141, 163, 488, 491
— *v.* — 43 J.P. 399, 401
— *v.* Barnes, 1906, *Belfast News Letter* 352
— *v.* — 10 Cox 563
— *v.* — 74 J.P.Rep. 691
— *v.* Barris 545
— *v.* Barron ..173, 185, 417, 424, 425
— *v.* Barron (No. 2) 425
— *v.* Barstow 268
— *v.* Bartlett 211
— *v.* Baskerville 485, 486
— *v.* Bate 266, 272, 273
— *v.* Bateman 268
— *v.* Bates 190, 505, 506
— *v.* Bathwick 365, 524
— *v.* Baylis 452
— *v.* Baynton 211, 212
— *v.* Beacall 110, 128
— *v.* Beard 149, 154, 677
— *v.* Beards 141
— *v.* Beck 9, 139, 144, 164
— *v.* Beckett 401, 403
— *v.* Bedfordshire 294, 299
— *v.* Bedingfield 58, 80, 319
— v. Beeston 437, 438, 505
— *v.* Beezley 473
— *v.* Beighton 167, 173
— *v.* Bell 450
— *v.* Bellis 342, 343
— *v.* Benjamin 488, 494
— *v.* Benson, 151 C.C.C. Sess. Pap. 195
— *v.* — 2 Camp 563
— *v.* — 3 Cr. App. R. 454
— *v.* Berenger 21
— *v.* Berger.....138, 295, 296, 297, 299, 301
— *v.* Bernadotti 319, 321
— *v.* Bernard 70, 142, 398, 478
— *v.* Berry 490
— *v.* Best 266
— *v.* Bexley 260
— *v.* Bickley 486, 487
— *v.* Biggin 454, 455
— *v.* Birch 559
— *v.* Bird, 5 Cox 93, 438

PAGE

R. v. Bird, 19 Cox 44, 268, 453
— v. Birdseye 67
— v. Birmingham.....278, 280, 284
— v. Birtles 344
— v. Bjornsen 352
— v. Blaby 559
— v. Black 512
— v. Blackburn 266, 272
— v. Blake 101
— v. Blatherwick 485, 489
— v. Bleasdale 68, 174
— v. Blick 428
— v. Blind 387
— v. Bliss....58, 72, 119, 239, 240, 284, 295, 296, 301
— v. Bloodworth 487
— v. Blount 425
— v. Boaler 109, 110, 128
— v. Bodle 473
— v. Bond, 4 Cox 509
— v. — 9 C. & P. 477
— v. — 1906, 2 K.B..57, 82, 159, 172, 173, 174, 175, 181, 184, 185
— v. Bono 376
— v. Booth.....180, 266, 267, 268
— v. Boswell 266, 272
— v. Bottomley, 1893, *Times* ... 478
— v. — 118 L.T. Jo. 320, 321
— v. Boughton 275
— v. Boulton 100, 119
— v. Bourdon 543, 557, 558, 569
— v. Bovy 488
— v. Bowden 265, 272
— v. Bower 13
— v. Bowes 100
— v. Boyes 214
— v. Boyle, 20 T.L. 44, 268
— v. — 1914, 3 K.B...160, 166, 184
— v. Brackenridge 425
— v. Bradlaugh 375, 486
— v. Bradley 33, 584
— v. Bradshaw 126
— v. Brailsford 14
— v. Brain 35
— v. Braintree 218, 547
— v. Brambre 211
— v. Bramley 199
— v. Brampton 389
— v. Brandreth 93
— v. Brannagan 144
— v. Brasier 452
— v. Brewer 202
— v. Brice 38
— v. Brickhall 29
— v. Bridgwater 454, 455, 690
— v. Briggs 40, 137, 163
— v. Bright 140, 484, 513
— v. Brightside Bierlow...133, 161, 298, 299, 419
— v. Bristol JJ. 419
— v. Britton 260
— v. Brixton 549
— v. Broadhurst 187
— v. Bromhead 175, 260
— v. Brooke 473
— v. Bros 503
— v. Broughton 269
— v. Browhill 139, 144

PAGE

R. v. Brown, 7 E. & B. 425
— v. — 2 F. & F. 173, 177
— v. — L.R. 1 C.C. 482
— v. — 9 Cox 203
— v. — 68 J.P. Rep. 272
— v. — 6 Cr. App. R. 487
— v. — 7 N.S.W. 197
— v. Browne 464
— v. Bryant 175
— v. Buckingham 342
— v. Buckley..64, 79, 138, 139, 143, 221, 287, 288, 292, 508
— v. Budd 104
— v. Bull, 12 Cox 507
— v. — 9 C. & P. 473, 484
— v. Bundy 399
— v. Burdett 105
— v. Burke 116, 425, 465, 481
— v. Burley 266, 272
— v. Burlison 163, 492
— v. Burns 45
— v. Bushell 223, 224, 467
— v. Butcher, 1 Lea 270
— v. — 64 J.P. 507, 508, 512
— v. Butler, 2 C. & K.....67, 82, 179, 269
— v. — 142 C.C.C. Sess. Pap... 322
— v. Buttery 409, 432
— v. Cain 265, 270, 272
— v. Campbell 253
— v. Cambrian Ry. 434
— v. Cantwell 75, 85, 154
— v. Capping 42
— v. Cargill 41, 53, 190, 483
— v. Caroubi 33
— v. Carpenter 132, 195, 196
— v. Carrol 506
— v. Carter 175, 178, 179
— v. Cartwright 399
— v. Casement 100
— v. Cason 167
— v. Cass 271
— v. Castleton 9, 137
— v. Castro 352
— v. Caton 100
— v. Cattermoul 391, 398
— v. Cavendish 33, 34
— v. Chambers 483
— v. Chandler 445
— v. Chantler 455
— v. Chapman, 471 C.C.C. Sess. Pap. 180
— v. — 29 T.L.R. 268, 273, 510
— v. — 7 Cr. App. R. 399
— v. — 8 C & P. 473
— v. Chapple 89, 95, 101
— v. Charles 89, 93
— v. Charlesworth 425, 452
— v. Cheadle 577, 578, 589
— v. Cherry 215, 268, 273
— v. Cheshire 179
— v. Chidley 268
— v. Child 438
— v. Childs 505
— v. Chitson..163, 488, 491, 492, 494
— v. Chomaten Yabu 140
— v. Christian 539

PAGE

R. v. Christie..41, 58, 59, 64, 72, 79, 80, 81, 114, 255, 256, 259, 260, 321, 462, 487, 488, 494
— v. Christopher..437, 505, 506, 509
— v. Clapham 291, 342
— v. Clapton 110, 128
— v. Clarke, 2 Stark 190, 482
— v. — 119 L.T.Jo. 39
— v. Cleary 319
— v. Clement 446, 447
— v. Clewes..137, 138, 140, 265, 274
— v. Cliburn 484
— v. Coady 15
— v. Cobbett 86,194
— v. Cobden 68
— v. Cockburn 507
— v. Cockroft 190
— v. Cohen 455, 507
— v. Colclough 173, 178
— v. Cole...159, 160, 161, 165, 166, 187, 269
— v. Coleman 388
— v. Coles 559
— v. Coley 271
— v. Coll....483, 488, 494, 508, 569
— v. Colpus 273
— v. Compson 274
— v. Conde 84
— v. Coney 486
— v. Conning 502
— v. Connolly 100
— v. Connor 93
— v. Cook, 34 T.L.R. 267, 273
— v. — 147 C.C.C. Sess. Pap... 386, 474
— v. Cooke, 1 C. & P. 446
— v. — 8 C. & P. ——173, 177, 197
— v. Cooper, 5 C. & P. 274
— v. — 1 Q.B.D.—9, 82, 102, 138, 143, 148, 181, 257
— v. — 2 Q.B.D. 15
— v. — 1905, *Times* 171
— v. — 3 Cox 174, 184, 185
— v. — 10 Cr. App. R. 166
— v. Coote 267, 268
— v. Cope 100
— v. Cork JJ., 15 Cox 236
— v. — 43 Ir.L.T.R. 416, 425
— v. — 1914, 2 Ir. 104, 121
— v. Cotton, 3 Camp. 298, 433
— v. — 12 Cox 180, 508
— v. Coulter 165, 170
— v. Court 268, 271
— v. Courvoisier 39
— v. Cowle 322, 439, 512
— v. Cowper, 13 How. St. Tr... 64, 80, 139, 143, 167
— v. — 24 Q.B.D. 516
— v. Cox, 1 F. & F. 256, 260, 269, 274
— v. — 14 Q.B.D. 203
— v. — 1898, 1 Q.B...8, 46, 47, 117, 401, 403
— v. — 62 J.P. 452
— v. Coyle 250, 257, 488, 494
— v. Cramp 260
— v. Crane 150
— v. Craven 319

PAGE

R. v. Crean 38, 89, 139
— v. Crediton 342
— v. Cresswell 109, 681
— v. Crickmer 70
— v. Crippen 41, 139, 142
— v. Crockett 321
— v. Crossfield 263
— v. Crouch, 1 Cox 39, 393
— v. — 4 Cox.....388, 400, 402
— v. Croucher 507
— v. Croydon 265, 270
— v. Cuffey 100
— v. Culliford 41, 189
— v. Curgenwen 104, 146
— v. Curnock 255, 256, 259, 260
— v. Curtis 41, 269. 504
— v. Dale, 7 C. & P. 83
— v. — 16 Cox 38, 185
— v. Davies, 1897, 2 K.B..... 57
— v. — 85 L.J.K.B. 462
— v. — 29 T.L.R. 677
— v. Davis, L.R. 1 C.C. 36, 175
— v. — 6 C. & P. 146, 174
— v. — 7 C. & P. 38
— v. — 149 C.C.C. 484
— v. — 85 L.J.K.B. 485
— v. Dawson 29
— v. Day, 6 Cox 505, 506, 507
— v. — 147 C.C.C. Sess. Pap. 271
— v. Daye 443, 514, 546
— v. Debenham ...230, 339, 347, 372
— v. De Berenger 335, 336
— v. Dent, 1 C. & K. 389
— v. — 71 J.P.Rep. 452, 462
— v. Derrick 399, 515
— v. Derrington 266
— v. De Salvi 424
— v. Desmond 93
— v. Devereux 79, 161, 167, 225
— v. Dexter 190, 469
— v. Dibble 269, 428, 480
— v. Dickman 44, 399
— v. Dillon 569
— v. Dilmore 437, 505
— v. Dimes 487
— v. Dingley 266, 272
— v. Dixon 95
— v. Dodson 110, 128
— v. Doherty, 13 Cox 274
— v. — 16 Cox 44, 45
— v. Donnall 141
— v. Donnellan ...142, 153, 174, 454
— v. Doolin 438, 475
— v. Doran 573
— v. Dossett 183
— v. Dossi 487
— v. Dougal 266
— v. Dove 395
— v. Dowling 39
— v. Downer 98, 203
— v. Dowse 44
— v. Drabble 367
— v. Drage 175, 178, 179
— v. Drake 523
— v. Drew 265
— v. Drummond 276, 319
— v. Drury 425
— v. Dublin 405

PAGE

R. *v.* Duffy 39, 86
— *v.* Duguid 92
— *v.* Duncombe 471
— *v.* Dunn 174, 178, 179
— *v.* Dunton 513
— *v.* Dwyer 93, 100, 691
— *v.* Dykes 33
— *v.* Dyson 27, 149
— *v.* Dytche 139, 144, 449
— *v.* Eastern Counties Ry..... 689
— *v.* Edge 533, 548
— *v.* Edmunds 505
— *v.* Edwards 80, 140, 143
— *v.* Egerton 71, 141, 488, 492
— *v.* Ellicombe 545
— *v.* Elliott 33
— *v.* Ellis, 6 B. & C.....57, 67, 492
— *v.* — 1 M. & S. 162
— *v.* — 1899, 1 Q.B. 56
— *v.* — 1910, 2 K.B. 143, 182, 256, 454
— *v.* Ellsom 487
— *v.* Ellwood 137
— *v.* Elrington 424
— *v.* Elworthy 537, 545
— *v.* Ely 22, 25
— *v.* Emmett 178
— *v.* Enoch 265
— *v.* Entrehman 460
— *v.* Erdheim....215, 229, 268, 509, 543, 569
— *v.* Eriswell 226, 300, 307, 438, 440
— *v.* Erith 226, 308, 313
— *v.* Errington 321
— *v.* Esdaile 28
— *v.* Essex 259
— *v.* Evans 70, 573
— *v.* Everett 44, 45
— *v.* Exeter ..112, 118, 120, 280, 284
— *v.* Fagent 319, 320
— *v.* Fairie..159, 170, 233, 427, 429
— *v.* Farley 203
— *v.* Farnborough 14
— *v.* Farquharson 264
— *v.* Farr 533, 545
— *v.* Farrell 507
— *v.* Farringdon 524
— *v.* Farrington 188
— *v.* Faulkes 146
— *v.* Feigebaum 488
— *v.* Fennell, 7 Q.B.D. 270
— *v.* — 98 C.C.C. Sess. Pap... 178, 179
— *v.* Fenton 533
— *v.* Ferguson 454
— *v.* Fermanagh 29
— *v.* Ferrers 392
— *v.* Ferry Frystone...225, 437, 440
— *v.* Firth 68
— *v.* Fisher, 1910, 1 K.B. 182
— *v.* — 43 Sol. Jo. 454
— *v.* Fitzgerald, Ir. Cir. Rep... 320, 323
— *v.* — Tay 449
— *v.* — 1 Lea 351
— *v.* Fitzpatrick, 3 How. St. Tr. 212
— *v.* — 129 L.T. Jo. 319

PAGE

R. *v.* Fitzpatrick (1910), 46 Ir. L.T.R. 320, 322
— *v.* Fitzsimons 545
— *v.* Flaherty 233
— *v.* Flannagan 170, 173, 180
— *v.* Flavell 441, 444, 447
— *v.* Fleming 271
— *v.* Flemming 506
— *v.* Fletcher, 51 L.T. 445
— *v.* — 1 Lew. C.C. 268, 483
— *v.* Flintshire 585
— *v.* Flutter 275
— *v.* Follett 386
— *v.* Folley 114
— *v.* Fontaine Moreau..418, 426, 429
— *v.* Forbes 173, 174, 177
— *v.* Fordingbridge....110, 111, 117, 128, 521, 541, 547
— *v.* Forster 174, 177
— *v.* Forsyth 452
— *v.* Foster, 24 L.J.M.C. 177
— *v.* —6 C. & P. 61, 81
— *v.* —1 Lew. C.C. 268
— *v.* Fowkes 59, 80, 488
— *v.* Fox 15, 102
— *v.* France 506
— *v.* Frances 392, 395
— *v.* Francis 47, 172, 174, 175, 179, 181
— *v.* Francklin 335, 337
— *v.* Franklin 47, 189
— *v.* Frantz 138
— *v.* Fraser 13
— *v.* Frewin 265
— *v.* Friel 424
— *v.* Froggatt 40
— *v.* Frost 92, 100
— *v.* Fry 29, 691
— *v.* Fryer 118
— *v.* Fuidge 181
— *v.* Fursey 70
— *v.* Gadbury 188, 189
— *v.* Gallagher 453
— *v.* Galvin 504
— *v.* Galway, 31 Ir. L.T.R. ... 19
— *v.* — 1906, 2 I.R. 407
— *v.* Gandfield 82
— *v.* Garbett 200, 214, 268
— *v.* Gardner, 2 Camp. 337
— *v.* — 9 Cox 267, 269
— *v.* — 1899, 1 Q.B. 44, 509
— *v.* — 85 L.J.K.B.....260, 266, 269, 275
— *v.* Garner, 3 F. & F. 180
— *v.* — 54 J.P. 480, 504, 508
— *v.* Garnet 212
— *v.* Garrett-Pegge 518
— *v.* Gaunt 411
— *v.* Gay 486
— *v.* Gazard 196
— *v.* Geering 170, 180
— *v.* George 13
— *v.* Gibbons, 1 C. & P.....202, 265
— *v.* — 31 L.J.M.C. 139, 190
— *v.* Gibson, 18 Q.B.D. ..59, 80, 255
— *v.* — Car. & M. 198
— *v.* Gilham 265, 266, 271
— *v.* Gilkes 405

PAGE
R. v. Gillis ..265, 266, 268, 272, 273
— v. Gilmore 424
— v. Gilson 409, 432, 573
— v. Girod 38, 173, 175, 179
— v. Gloster ..62, 84, 102, 321, 397
— v. Glynne 419
— v. Goddard, 15 Cox....59, 80, 321
— v. — 60 J.P. 261, 275
— v. Godhino 140, 180, 265, 267
— v. Goldstein 492
— v. Goodfellow 507
— v. Gordon, 21 How. St. Tr.....59, 63, 79, 99, 552
— v. — 1781, 2 Doug. 478, 553
— v. — 8 Cr. App. R. 468
— v. Gorrie 681
— v. Gould 270, 275
— v. Governor of Lewis Prison 337, 464
— v. Graham 66, 487
— v. Grant 118, 140
— v. Gray, Ir. Cir. Rep...143, 225, 269, 275, 320
— v. — 4 F. & F.....173, 180, 184
— v. — 68 J.P.Rep.....10, 488, 491
— v. — 6 Cr. App. R..232, 253, 371
— v. Green, 6 C. & P. 270
— v. — 63 J.P. 456
— v. — 30 T.L.R. 33
— v. Greenaway 442
— v. Greenberg 448
— v. Greene 335
— v. Greenley 70
— v. Greenway 487
— v. Greenwich 250
— v. Gregory 356
— v. Griffin, Rus. & Ry.....270, 275
— v. — 6 Cox 202
— v. Grimwood, 1 Price ...348, 352
— v. — 41 Sol. Jo. 425
— v. Grimberg 30, 35
— v. Grout 455
— v. Guerin 42, 464
— v. Guinea 470
— v. Gully 364
— v. Gunnell....65, 86, 146, 152, 215
— v. Gurney 38
— v. Gutteridge 116
— v. Gwyn 554, 555
— v. H. 456
— v. Haeker 19
— v. Hadwen 453, 455
— v. Hagan, 8 C. & P. 438
— v. — 12 Cox 140
— v. — 9 Cr. App. R. 35
— v. Hailey 495
— v. Haines 229, 542, 553
— v. Hall, 57 L.T. 411
— v. — 12 Cox 547
— v. — N.Z.L.R...142, 164, 170, 172, 173, 180, 398
— v. — 1 Lew. C.C. 268
— v. Hamilton 481
— v. Hampson 143
— v. Hancox 197
— v. Handcock 213
— v. Harborne 104
— v. Harding, 1 Cr. App. R. .. 357

PAGE
R. v. Harding, 3 Cr. App. R. .. 179
— v. — 1 Arm. M. & O. 272
— v. Hardwick, 11 East 94, 238
— v. — 1 C. & P. 265
— v. Hardy, 24 How. St. Tr... 63, 64, 79, 85, 102, 154, 196, 229, 476
— v. — 74 J.P.Rep. 179
— v. Hare 142
— v. Hargreaves 41
— v. Harney 508
— v. Harris, 4 Cox 507
— v. — 10 Cox 37
— v. — 1 Moody C.C. 509
— v. — Joy 270, 275
— v. — 7 C. & P. 474
— v. — 4 F. & F. 141, 184
— v. — 82 J.P. 505, 510
— v. Hartel 38
— v. Hartington 407
— v. Harvey, 8 Cox 196
— v. — 11 Cox 8, 108, 388, 470
— v. — 115 C.C.C. Sess. Pap.. 321
— v. Haslam 454, 487
— v. Haslingfield 562
— v. Hatts 271
— v. Havard 173
— v. Hawden 457, 474
— v. Hawes 342
— v. Hawkins 224
— v. Haworth 545, 547
— v. Hay 202
— v. Hayward 203
— v. Hazy 47
— v. Head, Peake Ev. 341, 372
— v. — 67 J.P.Rep. 179
— v. Heal 268, 269
— v. Healihy 81
— v. Heaphy 691
— v. Heard 189
— v. Hearn 266, 272
— v. Heaton 141
— v. Hedges 115, 231
— v. Heesom....140, 148, 173, 175, 180, 507
— v. Hemingway 41
— v. Hendy 399, 402, 506, 620
— v. Hennessy 479
— v. Herlihy 196, 479
— v. Hertford College 619
— v. Heseltine 387, 391, 392, 398
— v. Heuser 486
— v. Hewgill 83
— v. Hewitt 265, 274
— v. Hicks 173, 184
— v. Hickey 259
— v. Higginbottom 142
— v. Higginson 395
— v. Hilditch 40
— v. Hill, 2 Den. 400, 452
— v. — 1 Cr. App. R. 71, 182
— v. — 7 Cr. App. R. 43, 136
— v. — 10 Cr. App. R. ..68, 69, 185
— v. Hillam 215
— v. Hinckley 547
— v. Hind 319, 320, 321
— v. Hinley 533
— v. Hirst 261, 269, 275

PAGE

R. *v.* Hobinstock 179
— *v.* Hockham 556, 569
— *v.* Hodge 10
— *v.* Hodgkinson 453
— *v.* Hodgkiss 188
— *v.* Holchester 44
— *v.* Holcroft 424
— *v.* Holden 473
— *v.* Holloway 503, 506, 512
— *v.* Holmes, L.R. 1 C.C. 190
— *v.* — 1 Cox 271
— *v.* — 2 F. & F. 452
— *v.* — 43 Sol. Jo. 454
— *v.* Holt, 5 T.R. 26, 337
— *v.* — 30 L.J.M.C....166, 173, 181
— *v.* — 14 Cr. App. R. 386
— *v.* Holtham 266
— *v.* Holy Trinity 573
— *v.* Hoodless 114
— *v.* Hooley 142
— *v.* Hopkins 174, 190
— *v.* Hopper 483
— *v.* Horn 33
— *v.* Hornbrook 271
— *v.* Horne Tooke 55, 86, 402
— *v.* Horner 274
— *v.* Horsford 42, 79, 80, 83, 180
— *v.* Horton 176
— *v.* Hough 177
— *v.* Houghton Le Spring 571
— *v.* Howard 110, 563
— *v.* Howarth 484
— *v.* Howell 321
— *v.* Howes 274
— *v.* Hubbard 319
— *v.* Hube 573
— *v.* Hucks 15
— *v.* Hudson 454
— *v.* Hughes, 1 C. & K. ...197, 198
— *v.* — Ros. Cr. Ev. 480, 503
— *v.* Hulet 450
— *v.* Hull 138
— *v.* Hulton 457
— *v.* Hunt, 3 B. & Ald...59, 60, 71, 79, 100, 101, 120, 533, 538, 548
— *v.* — 1 How. St. Tr. 212
— *v.* — 13 Cr. App. R. 150
— *v.* Hunter 541, 543
— *v.* Hurley 47
— *v.* Hurrell 569
— *v.* Hutchings ..407, 409, 411, 421
— *v.* Hyde 506
— *v.* Imrie 465
— *v.* Ibrahim 267
— *v.* Income Tax Coms. 387
— *v.* Inger 271
— *v.* Ings 8
— *v.* Ingrey 115
— *v.* Ivimy 180, 504, 505, 507
— *v.* Jackson 100, 268, 463
— *v.* Jacobs 266, 272
— *v.* Jakeman 107, 120
— *v.* James, 1902, 1 K.B. 33
— *v.* —2 Cr. App. R. 271
— *v.* Jameson 378, 483
— *v.* Jarvis, L.R. 1 C.C....266, 271
— *v.* — 7 Cox 176
— *v.* Jefferson 34

PAGE

R. *v.* Jeffreys 42
— *v.* Jenkins, L.R. 1 C.C...319, 322
— *v.* — Rus. & Ry...265, 270, 275
— *v.* Jessop 64, 80, 92, 102
— *v.* Johnson, 2 C. & K.....62, 83
— *v.* — 103 L.T.Jo. 233
— *v.* — 7 East 122
— *v.* — 1914, *Times* 9
— *v.* Joiner 13
— *v.* Jones, Rus. & Ry. 271, 275
— *v.* — 2 Camp. 23, 110
— *v.* — 1 Den. 203
— *v.* — 2 C. & K. 553
— *v.* — 12 Cox 271
— *v.* — 14 Cox 173, 178
— *v.* — 15 Cox 104, 679
— *v.* — 19 Cox 118, 121
— *v.* — 27 L.T. 272
— *v.* — 49 J.P. 265, 505, 506
— *v.* — 114 C.C.C. Sess. Pap... 45
— *v.* — 26 T.L.R. 454
— *v.* — Best 19
— *v.* — 1905, *Times* 43, 44
— *v.* Joyce 98
— *v.* Kain 45
— *v.* Katz 503, 504, 511
— *v.* Kay 65, 87
— *v.* Kea 198, 199
— *v.* Kelly 257, 260
— *v.* Kenilworth, 2 T.R. 409
— *v.* — 7 Q.B. 547
— *v.* Kennaway 488, 492
— *v.* Kent 405
— *v.* Kerry 691
— *v.* Kersey 264
— *v.* Kershaw 266
— *v.* Ketteridge 197
— *v.* Kiddle 115
— *v.* King, 1782, 2 T.R. 535
— *v.* — 1897, 1 Q.B. ..15, 83, 400, 403, 425
— *v.* — 151 C.C.C. Sess. Pap... 271
— *v.* — 111 L.T. 487
— *v.* — 10 Cr. App. R. 454
— *v.* Kingham 115
— *v.* Kinghorn 375
— *v.* Kinglake 201, 214, 690
— *v.* Kingsland 399
— *v.* Kingston, 20 How. St. Tr. 407, 408, 410, 412, 418, 425, 426
— *v.* — 4 C. & P. 265
— *v.* Kinloch 470
— *v.* Kirkham 137
— *v.* Kitson 545, 573
— *v.* Klosowski 180
— *v.* Knaptoft 576
— *v.* Knight, 20 Cox 267, 268
— *v.* — 32 L.Jo. 691
— *v.* — 41 Sol. Jo. 42
— *v.* Knill 485
— *v.* Knollys 20
— *v.* Knox 224
— *v.* Krause 102
— *v.* Kright 266
— *v.* Kurasch 101, 186, 190
— *v.* Labouchere ..6, 113, 133, 156, 262, 481
— *v.* Lai Ping 460

PAGE

R. v. Lambert 86
— v. Lamson 83, 398
— v. Lang 271
— v. Langbridge 504, 505
— v. Langton 109, 469, 470, 571
— v. Langunnor 578
— v. Laud 224
— v. Laugher 265
— v. Laurence 42
— v. Laurent 268, 273
— v. Lawson 109, 110
— v. Lawton 541
— v. Layer 194
— v. Layton 392, 395
— v. Lea 67
— v. Leach 120
— v. Leatham 201, 216, 270
— v. Lee, 4 F. & F. ..437, 505, 506
— v. — 24 T.L.R. 10
— v. — 1 Cr. App. R. 41
— v. — 7 Cr. App. R. 114, 115
— v. Lee Kun 465
— v. Lees, 71 J.P..503, 504, 508, 510
— v. Leigh 299, 305, 357
— v. Lemoine 513
— v. Leppard 321
— v. Letenosk 154
— v. Leverson 201, 204
— v. Lewis 35, 573
— v. Liebling 266, 503
— v. Lightfoot 453
— v. Lidburn 212
— v. Lillyman 81, 113, 115, 483
— v. Lindsay 33, 233
— v. Lingate 273
— v. Little 472
— v. Livock 454
— v. Llanfaethly..442, 535, 537, 546
— v. Lloyd, 4 C. & P. 320
— v. — 6 C. & P. 270, 271
— v. — 7 C. & P. 67, 185
— v. Loake 167, 400
— v. Lockley 681
— v. Loettun 464
— v. London (Bishop) 619
— v. — C.C. 435
— v. — JJ. 690
— v. — (Lord Mayor) 451, 456
— v. Long 70, 269, 271
— v. Longman 81
— v. Lordesmere 133, 426, 428
— v. Loughran 448
— v. Lovegrove 491
— v. Lovett 34
— v. Lowe 22, 338
— v. Lower Heyford 279
— v. Lubbenham 342
— v. Luckhurst 265
— v. Luffe 199, 678
— v. Lumley 104, 680
— v. Lunny 81
— v. Lushington 9
— v. Lydon 178
— v. M'Cafferty 93
— v. Macarthy 190
— v. McCann 47
— v. McCarthy 337, 338
— v. Macclesfield 691

PAGE

R. v. McCormack 195
— v. M'Cue 404, 428
— v. M'Donagh 126
— v. Macdonald 563
— v. McDonald 461
— v. McDonnell, 5 Cox 172, 184
— v. — 25 T.L.R. 457
— v. McGrath 70, 398
— v. M'Hugh 266, 273
— v. M'Kenna 264, 432
— v. Mackenzie 56
— v. McKenzie 29, 584
— v. McNamara 114
— v. McNicholl 264
— v. M'Naghten 392, 395
— v. Macrae 691
— v. Madden 44
— v. Madhub Giri 676
— v. Mahony 368
— v. Mainwaring 554
— v. Males 271
— v. Mallory 211, 253, 256, 257, 260, 262, 269
— v. Mallow 523
— v. Malvisi 137
— v. Mann ..260, 469, 471, 506, 508
— v. Manning 93
— v. Mansfield, 14 Cox 271
— v. — Car. & M. 82, 89, 179
— v. — 1 Q.B. 678
— v. Marriott 512
— v. Marsella 507, 508
— v. Marsh 197
— v. Marshall, Car & M....438, 507
— v. — 63 J.P.Rep. 454
— v. Marsham 42, 691
— v. Martin, 6 St. Tr. N.S. 86
— v. — 2 Camp 347
— v. — 12 Cox 8, 9
— v. — 17 Cox 13
— v. — 5 Cr. App. R. 491
— v. Mason 392, 396
— v. — 10 Cr. App. R. 148, 173, 174, 177
— v. Masters 45
— v. Mawhey 366
— v. May 504
— v. Maybrick 44
— v. Mead 149, 154, 319, 320
— v. Meade 677
— v. Mean ..56, 57, 68, 69, 160, 166
— v. Meath 81
— v. Medley 99
— v. Megson 116, 319, 321
— v. Melik 197
— v. Melville 552
— v. Merry 115
— v. Merthyr Tydvil 573
— v. Metcalfe 41, 269
— v. Metz 190, 464
— v. Mildrone 459
— v. Miles 410, 424
— v. Millard 173, 177
— v. Millen 265
— v. Miller, 1 Lea 364
— v. — 65 J.P. Rep. 68, 185
— v. Millhouse 44, 45
— v. Millington 150

PAGE
R. v. Mills 270
— v. Milton, 1 C. & K. 297, 303
— v. — Ir. Cir. Rep. 452
— v. Mirams 215
— v. Miskin Higher 186
— v. Mitchell....255, 257, 260, 319, 320, 321, 323, 439, 506, 508
— v. Mobbs 140
— v. Mohr 66
— v. Monahan 518
— v. Monks 259, 487
— v. Moore, 2 Den. 265, 270
— v. — 61 L.J.M.C. ..452, 458, 460
— v. — 14 T.L.R. 126
— v. — 10 Cr. App. R. 71
— v. Moors 545, 572
— v. Morgan, 6 Cox 438
— v. — 14 Cox 319
— v. — 1 Lea. C.C. 459
— v. — 5 Cr. App. R. 118, 455
— v. — 13 Cr. App. R. 182
— v. Morley 450
— v. Morris 424
— v. Morrison 43, 454
— v. Mortimer 57, 69, 120, 159
— v. Mosley 320, 321
— v. Mothersell 372
— v. Murphy, 8 C. & P...93, 94, 100, 101, 110, 392
— v. — 1 Arm. M. & O. 475
— v. — 1 Lea. C.C. 452
— v. — Ir. Cir. Rep. 321
— v. — 49 Ir. L.T.R. 30, 33
— v Murray 462
— v. Murton 320
— v. Murtrie 259
— v. Mylius 345, 351, 449, 463
— v. N. E. Ry. 421
— v. Naguib 33, 34, 128, 233, 343, 346, 389
— v. Neal 486
— v. Neill Cream..141, 143, 180, 322
— v. Netberthong 525
— v. Neville, Craw. & Dix..400, 403
— v. — 1 Pea. N.P.C.....170, 233
— v. Newman, 3 C. & K. ..465, 562
— v. — 1 E. & B....133, 134, 262
— v. — Dears, C.C. 540
— v. — 2 Den. C.C. 559
— v. Newton, 2 Moo. & Rob. .. 233
— v. — Wills Circ. Ev. 396
— v. — 1 C. & K. 110
— v. — 1 F. & F. 504
— v. — 147 C.C.C. Sess. Pap.. 93
— v — 109 L.T. 150
— v. — 7 Cr. App. R. 197
— v. Nicholas 84, 116, 452
— v. Nicholls, 1 F. & F. 179
— v. — 10 Cox 342
— v. — 128 C.C.C. Sess. Pap. 84, 506, 512
— v. Nicolas 322
— v. Noakes, 5 C. & P. 486
— v. — 1917, 1 K.B. 507
— v. Noble 47, 116
— v. Noel 215
— v. Norbury 503
— v. Norcutt 115

PAGE
R. v. Norfolk 297, 303
— v. Norris 35
— v. Northampton 133
— v. North Petherton 342
— v. Norton 255, 256, 259
— v. Nuncham Courtney 225
— v. Oates 336, 337
— v. O'Brien 63, 86, 93, 142
— v. O'Connell..59, 79, 86, 102, 107, 108, 127, 148, 150, 155, 174, 184, 547, 548
— v. — Arm. & Trev. 236
— v. Oddy.....159, 163, 174, 178, 179,, 469
— v. O'Donnell 13, 102, 142
— v. Oliphant 56
— v. Ollis 167, 173, 174, 179, 182, 185
— v. Olsen 43
— v. Omant 507
— v. Oneby 320, 323
— v. Onslow 448
— v. Oppenheimer 16, 335
— v. Orchard 473
— v. Orton 136, 216, 378
— v. Osborn 44
— v. Osborne, Car. & M. 81
— v. — 1905, 1 K.B.....59, 81, 113, 114, 115, 255
— v. Osman 319
— v. Owen 462
— v. Oxford (Bishop) 619
— v. Oxfordshire 240
— v. Page 569
— v. Palmer 140, 398, 399
— v. Pamenter 201, 211, 269
— v. Parker, 3 Doug. ..114, 488, 494
— v. 8 Cox 265
— v. — 11 Cox 506
— v. Parratt 265
— v. Parsons 553
— v. Partridge 138, 271
— v. Patch 74, 141, 142, 144
— v. Pataney 115
— v. Pateman 139, 141
— v. Paul 462, 474
— v. Payne, L.R. 1 C.C....453, 486
— v. — Sol. Jo. 205
— v. — 8 Cr. App. R. 486
— v. Peacock 503, 505
— v. Pearce ..140, 163, 488, 491, 543
— v. Pearcy 490
— v. Pearson 13, 89, 136, 259
— v. Peel, 2 F. & F. 321
— v. — 50 Sol. Jo. 165, 183
— v. Pembridge 292, 347, 577, 588, 592
— v. Pembroke 318, 450
— v. Penfold 38, 42, 189
— v. Perfitt 44
— v. Perkins 319, 322, 452
— v. Perry 318, 319, 322
— v. Perryman, 112 C.C.C. Sess. Pap. 191, 478
— v. — 147 C.C.C. Sess. Pap.. 380
— v. Petcherini, ... 59, 63, 79, 85, 154, 229
— v. Peters 379, 380

PAGE

R. v. Petricks 495
— v. Petrieus 563
— v. Phillips, 1 Lew. C. C. 177
— v. — Rus. & Ry. 569
— v. Philp 233
— v. Piekersgill 321
— v. Picton 8, 16, 337, 381
— v. Pike, 3 C. & P. ..276, 319, 452
— v. — 1902, 1 K.B. 216
— v. Pitts 487
— v. Plumb 43
— v. Plumer 60, 68, 74, 82, 122, 143, 225, 261
— v. Plummer 93
— v. Pook 64, 79, 255
— v. Pope, 18 T.L.R. 45
— v. — 2 Cr. App. R. 269
— v. Posnett 29
— v. Pounteney 265
— v. Powell, 63 J.P.Rep. 525
— v. — 3 E. & B. 556
— v. — 3 Cr. App. R. 150, 175
— v. Power 13
— v. Preston, 1 Salk. 447
— v. — 1909, 1 K.B. 454, 455
— v. Prestridge 504, 506
— v. Price 93, 136
— v. Pridmore 94, 100
— v. Priestly 40
— v. Pritchard 89
— v. Probats 167
— v. Proud 178
— v. Pruntey 505
— v. Qualter 321
— v. Quilter 172, 184
— v. Quin 43
— v. Quinn 93, 100
— v. Quigley 320, 321, 508, 510
— v. Raleigh 224
— v. Randell 15
— v. Ransford 102
— v. Rappolt 455
— v. Raudnitz 338
— v. Rawden 571, 573
— v. Reading 212
— v. Reaney 321
— v. Rearden 67
— v. Reason, 1 Str. 320
— v. — 12 Cox 271
— v. — 1 Cr. App. R. 89
— v. Rees, 6 C. & P. 110
— v. — 1888, *Times*...504, 505, 506
— v. Reeve 266, 271
— v. Reffit 381
— v. Regan 537
— v. Remnant 483
— v. Reynolds 109
— v. Rhodes, 1 Lea. C.C. 351
— v. — 1899, 1 Q.B. 173, 175, 181, 453
— v. Richards, 1 F. & F....392, 395
— v. — 5 C. & P. 271, 274
— v. Richardson, 2 F. & F..175, 178
— v. — 3 F. & F. 196
— v. — 1 Cox 218
— v. — 8 Cox 38
— v. — Wills 141, 142
— v. Rickard 8, 108, 388, 400

PAGE

R. v. Riddsdale 114
— v. Rigby 340, 345
— v. Rigg 512
— v. Riley, 18 Q.B.D. 190
— v. — 4 F. & F. 504
— v. — 18 Cox 19
— v. Rimes 439, 464, 473
— v. Rishworth 219, 226, 313, 343, 467
— v. Roberts, 1 Camp 67
— v. — 14 Cox 110, 128, 561
— v. — 98 C.C.C. Sess. Pap.268, 512
— v. Robinson, 1898, 1 Q.B..... 411
— v. — 86 L.J.K.B. 513
— v. — 1915, 2 K.B. 137
— v. — 1917, 2 K.B. ..263, 269, 275
— v. Roden 174, 181
— v. Rodney 161, 166, 185
— v. Rogan 188
— v. Rogers, 111 L.T. 46, 47, 342, 343
— v. — 10 Cr. App. R..... 167, 185, 487
— v. Rome 266
— v. Rose 264, 271
— v. Rosenson 15
— v. Rosier 274
— v. Rosser 19, 449
— v. Rouse, 137 C.C.C. Sess. Pap. 38
— v. — 194, 1 K. B. 455
— v. Rowland, 1 F. & F. 569
— v. —62 J.P.Rep. 83, 115
— v. — 1910, 1 K.B.....140, 175, 179, 457
— v. Rowlands 177
— v. Rowton 159, 186, 187, 188, 189
— v. Rubens 100
— v. Rudd, 1 Lea. C.C. 263
— v. — Cowp. 486
— v. Rue 274
— v. Rusby 485
— v. Rush 115
— v. Russell, Car. & M. 198
— v. — 9 How. St. Tr. 224
— v. Rutherford 83, 386
— v. Ryland 424
— v. Ryton 524
— v. Sadler.....319, 441, 444
— v. Saffron Hill 547
— v. Sagar 120
— v. St. George 483
— v. St. Giles 521, 523
— v. St. Katharine 342
— v. St. Martin's 470, 471
— v. St. Mary 288, 290
— v. St. Marylebone 128
— v. St. Mauriee 22
— v. St. Paneras 407
— v. St. Paul 518
— v. St. Peter's 347
— v. Salisbury 57, 68
— v. Sanders 35, 690
— v. Sansome 509
— v. Saunders, 1899, 1 Q.B.. 219, 220, 225
— v. — 63 J.P.Rep. 453

PAGE
R. v. Savage, 13 Cox 233, 389
— v. — 5 C. & P. 438
— v. Sbarra 175
— v. Seaife, 1 Moo. & Rob...320, 322
— v. — 17 Q.B. 438, 507
— v. Scammonden 578
— v. Scanlon 505
— v. Scarlet 197
— v. Schama 30, 34, 35
— v. Schofield 269
— v. Scott, 1 Dears. & Bell... 264
— v. — 2 Q.B.D. 559, 563
— v. Scroop 212
— v. Seale 375
— v. Searle 395
— v. Seberg 571
— v. Seddon 411
— v. Seham Yousry 481
— v. Seigley 484
— v. Sellers 320
— v. Senior 454
— v. Serné 45, 424
— v. Sexton 265, 270
— v. Shaftesbury 212
— v. Shakespeare 268
— v. Sharman 463, 689
— v. Shaw, 6 C. & P. 266
— v. — 16 Cox 482
— v. — 1 Lew. C.C. 141
— v. — 104 L.T. 461
— v. Shearfield 223
— v. Sheean 454
— v. Shellaker ..160, 167, 173, 185. 491, 493
— v. Shepherd 265
— v. Sheridan 572
— v. Sheriff, 35 L. Jo. 453
— v. — 20 Cox 45
— v. Shimmin 45
— v. Shippey 103, 139
— v. Shrimpton 44, 188, 189
— v. Shurmer 510, 511
— v. Silverlock 386, 388
— v. Simmonds, 1 C. & P. 473
— v. —4 Cox 236, 251
— v. Simmons 361, 484
— v. Simmonsto 233
— v. Simons, 117 C.C.C. Sess. Pap. 110, 458
— v. — 6 C. & P. 211, 231, 269
— v. Simpson, 1 Moo. C.C. 265
— v. — 15 Cox 344, 384
— v. — 62 J.P. Rep. 504, 510
— v. — 1914, 1 K.B. 407, 425
— v. Sippett 269
— v. Skeen 215
— v. Slade 584
— v. Sleeman 265, 271
— v. Smith, 1 East. P.C. 46
— v. — Rus. & Ry. 437
— v. — Russ. Cr. 2284*n* 266
— v. — 2 Russ. Cr. 2183 274
— v. — 8 B. & C. 557, 559
— v. — 65 J.P.Rep. ..320, 321, 323
— v. — 1 Lea. C.C. 428
— v. — 10 Cox 320, 323
— v. — 17 Cox 443
— v. — 18 Cox 255, 259

PAGE
R. v. Smith, 20 Cox ...173, 180, 181
— v. — 1 Cr. App. R. 399
— v. — 2 Cr. App. R. 472
— v. — 3 Cr. App. R. ...108, 109
— v. — 6 Cr. App. R. 33
— v. — 8 Cr. App. R. 400
— v. — 11 Cr. App. R. 41, 136, 148, 170, 172, 203, 206. 256, 396
— v. — 47 L. Jo. 40
— v. — 1915, 84 L.J.K.B...13, 38, 173, 181, 453
— v. — 87 L.J.K.B. 41
— v. — 1918, 2 K.B. 173, 179
— v. — 92 L.T. 120, 175, 182
— v. Smithies 211
— v. Spencer, 3 F. & F. 191
— v. — 7 C. & P. 265
— v. — 20 Cox 107, 108, 127 150, 155, 174
— v. Spilsbury 266, 319, 321
— v. Spitzell 478
— v. Spoden 39
— v. Sporton 175
— v. Stacey.....69, 111, 128, 570
— v. Stannard 44
— v. Stanton 271, 424
— v. Staunton 391, 396
— v. Stephens, L.R. 1 Q.B. 99
— v. — 16 Cox 173, 175, 180
— v. Stephenson, 31 L.J.M.C... 507
— v. — 68 J.P. Rep. 57, 71, 126, 155
— v. Stevens..19, 139, 140, 144, 164
— v. Stewart 41, 189, 502, 507
— v. Stimpson 40, 143
— v. Stoddart 30, 31, 34
— v. Stokes 266
— v. Stone 160, 161, 166, 487
— v. Stonyer 68
— v. Stourton 199
— v. Strafford 534
— v. Stratton 41
— v. Stripp 509
— v. Stroner 116, 473
— v. Stroud 259
— v. Stuart 443
— v. Stubbs 486
— v. Sullivan, 16 Cox 47, 264
— v. — 22 L.R.I. 691
— v. — 24 L.R.I. 67
— v. Summers 47, 189
— v. Surrey 559
— v. Sutton, 8 A. & E. 299, 305
— v. — 4 M. & S...19, 335, 336, 549
— v. Swendsen 188, 212
— v. Swinnerton 260
— v. Sykes 264
— v. Syme 197, 620
— v. Tabrum 518
— v. Tait 507
— v. Tancock 424
— v. Tanner 104
— v. Taplin 190
— v. Tate ..256, 259, 260, 486, 491
— v. Taylor, 8 C. & P. 265
— v. — 5 Cox 180, 184
— v. — 9 Cox 393

PAGE

R. v. Taylor, 10 Cox 110, 128
— v. — 13 Cox 39
— v. — 96 L.T.Jo. 342
— v. — 37 Ir. L.T.R. 268, 269
— v. Tepper 505
— v. Thanet 196
— v. Thomas, 1892, 1 Q.B. 419
— v. — 11 Cox 561
— v. — 13 Cox 509, 569
— v. — Dyer 224
— v. Thompson, L.R. 1 C.C.... 453
— v. — 13 Cox 507
— v. — 70 J.P. 33
— v. — 1893, 2 Q.B.—89, 263, 264, 266, 270, 272
— v. — 1912, 3 K.B...59, 64, 79, 80, 84, 139, 143, 144, 153, 154
— v. — 1918, A.C. 138, 143
— v. — 4 Cr. App. R..255, 256, 260
— v. — 7 Cr. App. R. ...174, 185
— v. — 33 T.L.R. 9, 42
— v. Thornhill 19
— v. Thornton 267, 271
— v. Thurtell 275
— v. Tibbits 94, 100
— v. Tillard 178
— v. Tolson, 23 Q.B.D. 146, 151
— v. — 4 F. & F. 343, 398
— v. Tomey 453
— v. Tomlinson 379
— v. Tong 485
— v. Tonks 424
— v. Topham 424
— v. Torpey 33
— v. Towell 141
— v. Tranter 125, 402
— v. Treloar 139, 144
— v. Trevelli 45
— v. Trowbridge 467
— v. Tubby 268
— v. Tuberfield 191, 392
— v. Tucker 620
— v. Turner, 1 Moo. CC...257, 260, 269, 274, 428
— v. — 6 How. St. Tr. 187, 450
— v. — 1910, 1 K.B.—8, 24, 47, 189, 190, 229, 233, 236, 264
— v. Twelve Bishops 212
— v. Twiss 138, 143
— v. Twyn 450
— v. Tyler, 1 C. & P. 265
— v. — 1891, 2 Q.B. 531
— v. Tyrone 20, 410, 576
— v. Udall 212
— v. Ulmer 507
— v. Unkles 264
— v. Upchurch 265, 270, 271
— v. Upper Osgoldcross 419
— v. Van Butchell 321
— v. Varley 399
— v. Veltheim 471
— v. Verelst 110
— v. Vernon 265
— v. Viasani 8
— v. Vidil 505, 506
— v. Vincent, 9 C. & P. 84, 383
— v. Voisin 109, 267

PAGE

R. v. Voke 68, 70
— v. Wade 452
— v. Wainwright.....42, 58, 64, 79, 138, 220, 255
— v. Wakefield 456
— v. Walford 182
— v. Walker, 1 Cox 236, 251
— v. — 1 F. & F. 508
— v. Walkley 271
— v. Wall 438
— v. Wallace 338
— v. Waller 189, 190
— v. Walters and Sachs 180
— v. Waltho 265, 268
— v. Wanklyn 45
— v. Ward 34
— v. Warden of the Fleet..418, 429
— v. Wardle 420
— v. Warickshall 264, 270
— v. Wark 92, 93, 94, 102
— v. Warner 41, 266, 272
— v. Warren, 25 T.L.R. 453
— v. — 147 C.C.C. Sess. Pap.94, 100
— v. — 14 Cr. App. R. 42
— v. Warren Hastings 381
— v. Warringham 265
— v. Waterford 691
— v. Watson, 2 Stark. R.....194, 468, 537
— v. — 6 C. & P. 483
— v. — 32 How. St. Tr..93, 196, 199
— v. — W.N. 1916 138
— v. — 8 Cr. App. R...342, 455, 487
— v. Watt 116, 134, 180
— v. Watts 505, 506
— v. Wealand 462
— v. Weaver 554
— v. Webb, Ry. & M. 465
— v. — 11 Cox 449
— v. — 37 Sol. Jo. 109
— v. Wedge 342
— v. Weeks 177
— v. Wellings 507
— v. Wells.....84, 86, 167, 173, 176, 181
— v. Welman 68
— v. Welsh 269
— v. Welton 507
— v. Wenham 353
— v. West 188
— v. Westacott 139
— v. Westfall 455
— v. Westminster, etc., Committee 105
— v. Westwood 189, 253
— v. Whalley 8
— v. Wheatley 40
— v. Wheeler 53, 453, 484, 513
— v. Wheeling 264
— v. Wheelock 576
— v. Whelan 480, 483
— v. Whiley 68, 173, 177
— v. Whitaker 92, 94, 101
— v. White, 2 Cox 41, 82, 141
— v. — 4 F. & F. 10
— v. — Rus. & Ry. 92
— v. — 17 How. St. Tr. 263
— v. — 1 Lea. C.C. 452

PAGE

R. v. Whitehead, 1 Dow. & Ry.. 101, 102, 103, 155
— v. — 3 C. & K. 159, 165, 170
— v. — L.R. 1 C.C. 452
— v. Whiting 44
— v. Whitley 238
— v. Whitmarsh 320, 323
— v. Whitworth 320, 321
— v. Wick St. Lawrence...407, 409
— v. Wicker 507
— v. Wickham 578
— v. Widdop 445
— v. Wilbourne 115
— v. Wild 266
— v. Wilde 21
— v. Wilkins 220, 225
— v. Wilkinson 509
— v. Wilks 182
— v. Willetts 348
— v. William 388
— v. Williams, 7 C. & P. 452
— v. — 8 C. & P. 387
— v. — 6 Cox 469
— v. — 11 Cox 264
— v. — 12 Cox 437, 440, 505
— v. — 4 F. & F. 507
— v. — 29 T. L. R. 469, 472
— v. — 36 T.L.R. 41
— v. — 8 Cr App R. 399, 480
— v. Williamson 165, 170
— v. Willis, 1916, 1 K.B...486, 573
— v. Willmott 197, 461
— v. Willshire 34, 104, 417
— v. Wilowski 347
— v. Wilson, 8 Cox 507
— v. — 12 Cox 507, 508
— v. — 3 F. & F.....110, 128, 384, 571
— v. — 26 L.J.M.C. 455
— v. — 1 Lew. C.C. 154
— v. — 11 Cr. App. R. 454
— v. — 55 L. Jo. 34
— v. Wilton 507, 508
— v. Wink 114
— v. Winslow 42, 139, 180
— v. Winsor 265, 271
— v. Wiseman 58, 76
— v. Withers 26
— v. Woburn 238
— v. Wong 267
— v. Wood, 5 Jur. 188, 379
— v. — 1907, *Times* 9
— v. Woodcock 318, 320, 508
— v. Woodley 207
— v. Woods 483
— v. Woodward 25
— v. Wookey 453
— v. Wooldale 614, 649
— v. Worth 284, 287, 289
— v. Wrangle 571, 572
— v. Wright, Rus. & Ry. 395
— v. — 4 F. & F. 504
— v. — 1 Lew. C.C. 271
— v. — 5 Cr. App. R.....454, 455
— v. — 1905, *Times* 61
— v. Wroxton 87
— v. Wyatt 173, 175, 182
— v. Wye 407, 409

PAGE

R. v. Wylde 543
— v. Yeoveley 558
— v. Yorkshire 691
— v. Young 505
— v. Zulueta 143
R.'s Trusts, *Re* 199
Rabey v. Birch 459
Radcliffe v. Buckley 611
— v. Marsden 296, 302
— v. Pacific Co. 411
— v. Union Insce. 335
Radford v. Risdon 327
Raffles v. Wichelhaus 583, 585, 628, 657
Raggett v. Musgrave 258
Railway Co. v. Maples 533
Rainbow v. Kittoe 499
Rajah Venkata v. Inuganti 532
Ramadge v. Ryan 385, 391, 393
Ramsbotham v. Senior 205
Ramsbottom v. Mortley.....572, 597
— v. Tunbridge 572, 597
Ramsden v. Dyson 685
Randall v. Hill's Dock Co. 683
Randle v. Blackburn 236
Rapp v. Latham 244
Ratcliffe v. Ratcliffe 346, 554
Rattenberry, *Re* 667
Rattenbury v. Munro 204, 443
Ravee, Farmer 417
Raven, *Re* 328, 627, 653, 658
— v. Stevens 353
Ravenga v. Mackintosh 149, 157
Rawlins v. Rickards 289
Rawlinson v. Scholes 485
Rawson v. Haigh 76
Rawstone v. Preston Corp. 208
Ray, *Re* 627, 658
— v. Mansfield 67
Raymond v. Raymond 594
— v. Tapson 447
Rayner, *Re* 379, 610, 619
Read v. G. E. Ry. 418
— v. Lincoln (Bishop).....378, 381, 411
— v. Perrett 691
— v. Price 244
Rearden v. Minter 522
Reay, *Re* 523
Recepta, The 352, 577, 584, 588
Recher v. North British, etc., Co. 196
Redfern v. Redfern 216
Reece v. Tyre 205
Reed v. Jackson...298, 299, 306, 584
— v. James 474
— v. King 472
— v. Nutt 368
— v. Passer 344
Rees v. Watts 414
Reeve v. Berridge 146
— v. Whitmore 236
— v. Wood 456
Reffell v. Morton 490
— v. Reffell 586
Refuge Co. v. Kettlewell 99
Regan v. Regan 346, 554
Reichardt v. Shard 99
Reichel v. Magrath 412, 414, 418

PAGE
Reid *v.* Batte 572
— *v.* Margison 539
— *v.* Rigby 516
Reigate *v.* Union, etc., Co. 582
Reilly *v.* Fitzgerald 432
Remon *v.* Hayward 15
Renner *v.* Tolley 587
Rennie *v.* Clarke 69, 128, 570
Renshaw *v.* Dixon 348, 557
Reusse *v.* Meyers 352
Revell, *Exp.*, *Re* Tollemache.... 253
Revill, *Re* 501
Reynolds, *Re* 214
— *v.* Fenton 20
— *v.* Wheeler 582
Rhodes, Re, 36 Ch. D. 680
— *Re*, 37 Ir.L.T.Jo. 680
— *v.* Airedale Commrs. 417, 453
Rice, *Re* 523
— *v.* Howard 469
Rich *v.* Johnson 132
— *v.* Pierpont 391, 395
Richards *v.* Bassett 298, 301, 305
— *v.* Davies 619
— *v.* Gellatly 256, 258
— *v.* Gogarty 286
— *v.* Hough 463, 499
— *v.* Morgan 251
— *v.* Sanders 366
Richardson *v.* Anderson 549, 550
— *v.* Dunn 258
— *v.* Mellish 352
— *v.* Neaves 69
— *v.* Peto 250, 251
— *v.* Rowentree 147
— *v.* Watson 629, 662
— *v.* Willis 367
— *v.* Younge 242
Riches *v.* Riches 487
Rickards *v.* Lothian 95
Ricketts *v.* Turquand 612, 656
Rickman *v.* Carstairs 606
Riding *v.* Hawkins 38
Ridley *v.* Gyde 59, 76, 77
— *v.* Plymouth Bkg. Co. 247
— *v.* Ridley 475
Ridsdale *v.* Clifton 381
Rigg *v.* Manchester Ry. 66
Rigge *v.* Burbidge 422
Rimmer *v.* Webster 587
Ringer *v.* Fogossa 484
Rio Tinto Co. *v.* Société des Métaux 416
Ripley, *Re* 329
— *v.* Arthur 18, 406, 416
Rippingall *v.* Rippingall 119
Riseley *v.* Shepherd 343
Rishton *v.* Nesbitt 79, 308, 315
Rist *v.* Hobson 516
Ritchie *v.* Malcolm 431
River Steamer Co., *Re* 232
— Weir Commrs. *v.* Adamson.. 607, 609
Robb *v.* Green 590
— *v.* Starkey 544
Robert *v.* Marsh 601
Roberts, *Re* 250
— *v.* Allatt 214
PAGE
Roberts *v.* Doxon 467
— *v.* Eddington 352
— *v.* General Steam Co. 147
— *v.* Humphreys 33, 34
— *v.* James 131
— *v.* Oppenheim 205
— *v.* Security Co. 518, 587, 600
— *v.* Woodward 95
Robertson *v.* Amazon Tug Co... 596
v. Flynn 650
— *v.* Jackson 387, 662
— *v.* Money 662
Robin, The 387
Robins *v.* Bridge 446
Robinson, *Re* 20
— *v.* Bradshaw 501
— *v.* Brown 545
— *v.* Buccleuch.....342, 343, 365, 371, 679
— *v.* Collingwood 110
— *v.* Cowpen Bd. 111, 130
— *v.* Davies 499
— *v.* Duleep Singh 416, 433
— *v.* Fenner 406
— *v.* Geisel 414
— *v.* Gregory 555
— *v.* Jones 25
— *v.* Markis 225
— *v.* Mollett 106, 107, 123
— *v.* Newman 369
— *v.* Preston 581
— *v.* Robinson, 2 P.D. ..20, 21, 416
— *v.* — 1 S. & T. 233, 243
— *v.* Rudkins 581
— *v.* Smith 25, 127
Robinson's Case 242, 413
Robson *v.* Andrada 237
— *v.* Atty.-Gen 316
— *v.* Kemp 55, 76, 205, 206
Roby, *Re* 670, 680
Roch *v.* Callen 669
Rochefoucauld *v.* Boustead, 65 L.J.Ch. 200, 203, 204, 208
— *v.* — 1897, 1 Ch....580, 582, 598
Roden *v.* Lond. Small Arms Co. 616, 617, 637
Rodgers *v.* Richards 29
Rodriguez *v.* Tadmire 191
Rodwell *v.* Redge 109
Roe *v.* Davies 496
— *v.* Ferrars 233
— *v.* Mutual Loan Fund...664, 683
— *v.* Naylor 147, 148, 464, 501, 566, 570
— *v.* Nix 198, 435
— *v.* Parker 298
— *v.* Roe 345
— *v.* Siddons 634
Rogers *v.* Allen 132, 357
— *v.* Custance 544
— *v.* Hadley 600
— *v.* Hawken 266
— *v.* Lambert 686
— *v.* Manley 40
— *v.* Quinn 231
— *v.* Wood 295, 298, 300, 305
Rohmann *v.* Rohmann 346
Rolfe *v.* Hampden 224

PAGE
Rolland v. Hart 89
Ronkerdorff v. Taylor 361
Root v. King 335
Roots v. Snelling 632
Ropner v. Stoate 107
Roscommon Peerage 554
Rose v. Clarke 532
Rose-Troup v. Sleeping Car Co.. 16, 389
Roselle v. Buchanan 207
Rosenberg v. Northumberland Soc. 371
Rosher, *Re* 21
Ross v. Boyd 44, 453
— v. Gibbs 202
— v. Helm 110, 572
Rossiter v. Miller 630
Rost v. Railway Co. 8
Rothbury, The 18
Rotherham v. Mid & G. W. Ry.. 66
Rouch v. G. W. Ry. 55, 59, 76
Roupell v. Haws...69, 118, 120, 137, 140, 167
Rouse, *Re* 501
Rousillon v. Rousillon 31
Routledge v. Hislop 413, 420
— v. Ramsay 14
Rowbotham v. Dunnett 580
Rowe, *Re*, Pyke v. Hamlyn 603
— v. Brenton ..132, 168, 300, 358, 467, 539
— v. Grenfel 132
Rowlands v. De Vecchi....122, 288, 291, 292
Rowley v. L. & N. W. Ry....380, 387
Royal Exchange Assur. v. Tod.. 630, 637, 664
Royal Warrant Holders' Assoc. v. Deane 65, 391, 394
Ruben v. Great Fingall Co....88, 685
Ruck v. Ruck 216, 217, 427, 429
Rudd v. Bowles 528
— v. Wright 300
— v. Skelton Soc. 109
Ruddeman v. Smith 95
Ruddy v. Mid. G. W. Ry..... 247
Ruel v. Tatnell 620
Rugg v. Kingsmill 681
Rumball v. Metropolitan Bk..... 124
Rundle v. Beaumont 351
— v. Hearle 133
Ruscoe v. Grounsell 533
Rush v. Peacock 242
— v. Smith 474
Rushworth v. Craven 133
Russell v. Jackson 204
— v. Pilson 465
— v. Smyth 136
— v. Waterford Ry. 416, 422
Rutherford v. Ounau 89, 96
Ruthven v. De Bour 202
Rutland's Case 567, 568
Rutter, *Re* 341, 588
Ryall v. Hannam 652
— v. Kidwell 589
Ryan v. Ring..287, 288, 290, 292, 293
— v. Ryan 554
Ryder v. Wombwell 13
Ryland v. Jackson 43

PAGE
S. v. B. 9, 119
S. v. S., 1907, P. 216, 475
— v. — 24 T.L.R. 119
Sadgrove v. Brydon 530
— v. Hole 156
Sadlier v. Biggs 541, 629
St. Leonards v. Ashburner..111, 623
Saloman v. Saloman 369
Salford Corp. v. Lever 204
Salmon v. Webb..578, 579, 592, 597
Salte v. Thomas 349
Sammon v. Bennett 208
Sanders v. Sanders..18, 105, 117, 120
— v. Waugh 169
Sanderson v. Graves 587
— v. Collins 99
Sandford v. Remington 205
Sandilands, *Re* 517
Sarat Chunder Dey v. Gopal Chunder Lala 686
Sarl v. Bourdillon 617, 638
Sastry Velaider v. Sembecutty.. 679
Saunders v. Baldy 425
— v. Cockrill 590
— v. Hamilton 422
— v. Kent 587
Saunderson v. Piper.....602, 613, 614, 654
Savage v. Savage 465
Savory, *Re* 515
— v. World of Golf 632
Sawyer v. Birchmore 206
Saxlehner v. Apollinaris Co...64, 148
Saye & Sele, Barony of..199, 536, 549 552, 678
Sayer, *Re* 618, 639
— v. Glossop 343, 400, 442, 535, 537, 548, 554
— v. Kitchen 545
Scales v. Key 104
Scarf v. Jardine 416, 682
Scarfe v. Hallifax 254
Schenley, *Re* 526
Schloss v. Stevens 662
Schmaltz v. Avery 582
Schneider v. Norris 516
Schofield, *Exp.* 215
Scholefield, *Re* 11, 618
Scholfield v. Londesborough 530
Scholes v. Chadwick 239, 240
Scholey v. Walton 242
Schott, *Re* 328, 332
Schumack v. Lock 248
Schwabacher v. Heimer.....133, 238, 240, 283
Schwalbe, The ...59, 70, 71, 248, 251
Scotstown Estate Co. v. Jackson. 435
Scott, *Re*, 1903, 1 Ch. 667, 668
— *Re*, 97 L.T. 581
— v. Brown 20
— v. Brownrigg 580
— v. Commonwealth 201, 211
— v. Coulson 601
— v. Jones 545
— v. Marshall 254
— v. Pilkington 406
— v. Sampson 133, 191, 383
— v. Scott 464

PAGE
Scott *v.* Thompson 191
Scottish Shire Line *v.* London, etc., Co. 387
Scottish Co. *v.* Poole 537
Scrutton *v.* Childs 614
— *v.* Stone 168
Scully *v.* Scully 541
Seago *v.* Deane 595
Seal, *Re*, Seal *v.* Taylor 623, 649
— *v.* Claridge 520
Seale-Hayne *v.* Jodrell 645
Seaman *v.* Netherclift 448, 478
Seaward *v.* Dennington 213
Sec. of State *v.* Charlesworth.... 20
Seccombe, The 18
Sedgwick, *Re, Exp.* Hobbs 152
Seed *v.* Higgins 65, 391, 393
Segelcke, *Re* 603
Seibert *v.* People 64
Selfe *v.* Isaacson 465
Seligman *v.* Huth 600
Sellen *v.* Norman 122
Sells *v.* Hoare 458
Selwin *v.* Brown 672
Selwood *v.* Mildmay....626, 656, 657
Serjeant *v.* Nash 685, 686
Serrao *v.* Noel 406, 416, 424
Seton *v.* Lafone 685, 687
Sewell *v.* Corp 123, 365
— *v.* National Telephone Co.... 97
Sewers Commrs. *v.* Gellatly 414
Seymour, *Re* 518
Shackell *v.* West 29
Shackle *v.* Shackle 78
Shailer *v.* Bumstead 62, 242
Shanahan, *Re* 215
Shankland *v.* Baine 420
Shardlow *v.* Cotterell 632
Sharman, *Re* 326, 520
— *v.* Brandt 582
Sharp, *Re*, 10 Morr. Rep. 434
— *Re*, 1908, 2 Ch. 625
— *v.* Newsholm 82
Sharpe *v.* Foy 89
— *v.* Jackson 24, 366, 563
— *v.* Lamb 18
— *v.* Macaulay 395
Sharples *v.* Rickard 532
Shaw *v.* Day 423, 427
— *v.* Broom 240, 241
— *v.* Herefordshire 406
— *v.* Roberts 483
— *v.* Shaw 448
Shea *v.* Green 475
— *v.* Wilson 83
Shearburn *v.* Chertsey Council.. 131
Shearn, *Re* 529
Shears *v.* Jacob 520
Shedden *v.* A.-G. and Patrick... 295, 310, 312, 316, 384, 408
Sheen *v.* Bumpstead, 1 H. & C.. 155, 383
— *v.* —2 H. & C.....108, 149, 392
Sheers *v.* Thimbleby 528, 630
Shelling *v.* Farmer 433
Shelton *v.* Livius 597
Shephard, *Re* 679
Shepheard *v.* Bray 348, 430
Shepherd *v.* Robinson 251
Sherratt *v.* Mountford 610, 623, 644, 660
Sheward, *Re* 580, 589
Shewring *v.* Shewring 452
Shields, *Re* 668, 673
— *v.* Boucher 308, 314, 315
Shilling *v.* Accidental Co.....64, 85, 153, 221
Ship Money Case, The 55
Shoe Machinery Co. *v.* Cutlan.. 417, 418, 424
Shore *v.* Bedford 202
— *v.* Wilson.....387, 605, 612, 615, 621, 639, 662, 664
Short *v.* Lee 110, 127, 359
Shortrede *v.* Cheek 616, 633
Shortt *v.* Robinson.....362, 369, 483, 691
Shrewsbury *v.* Blount..98, 103, 149, 151, 154, 155
— *v.* Hart 372
— Co *v.* Shaw 585
— Peerage ..309, 313, 315, 336, 360
Shuman *v.* Shuman 679
Sibert *v.* People 80
Sibley, *Re* 640
Sidmouth *v.* Sidmouth 670
Sievier *v.* Duke 191
Sikes *v.* Marshal 230
Sillick *v.* Booth 118
Sills *v.* Brown....126, 387, 391, 392 440, 512
Simmonds *v.* Woodward.....625. 649, 651
Simmons *v.* London J.-S. Bk.... 247, 251
— *v.* Mitchell 399
— *v.* Rudall 529
Simpson, *Re* 588
— *v.* Dismore 136, 523
— *v.* Margitson 15, 642, 661
— *v.* Robinson 151, 156, 257
— *v.* Sinclair 50
Sims *v.* Marryat 20
— *v.* Trollope 564
Sinclair *v.* Sinclair 412
— *v.* Stevenson 544
Sinclair's Divorce Bill 439, 512
Singapore, The 252, 352
Singer *v.* Audsley 500
— Co. *v.* Wilson 13, 457
Singleton *v.* Tomlinson.....526, 618
Sinnot *v.* Kehoe 538
Sir R. Peel, The 385
Skaife *v.* Jackson 242
Skeate *v.* Slaters 13
Skilbeck *v.* Garbett 122
Skillen, *Re* 618
Skinner *v.* Hunt 558
— *v.* Shew 75
Skrine *v.* Gould 147
Skyring *v.* Greenwood 376
Sladden *v.* Sergeant 480
Slade *v.* Tucker 202
Slane Peerage.....310, 313, 317, 358, 539

PAGE
Slaney v. Wade..117, 218, 311, 312, 317, 471
Slate, *Exp.* 585, 681
— *Re* 626
— v. Hodgson 525
— v. Lawson 243
Slatterie v. Pooley 229, 234, 538
Slattery v. People 257
Sligo v. Curan 490
Slingsby v. A.-G. 385, 679
— v. Grainger 626
Slinn, *Re* 326, 330
Sly v. Sly 284, 288, 292, 521
Small v. Nairne 439, 499
— v. Warr 96
Smart, *Re* 528
— v. Williams 230, 354
Smee v. Smee 38
Smith, *Re*, 1891, 1 Ch. 442
— *Re*, 1916, 2 Ch. 613
— *Re*, 15 P.D. 520
— *Re*, 20 T.L.R. ..560, 612, 626. 657
— *Re*, Oswell v. Shepherd 517
— v. Allison 192
— v. Andrews 361, 525
— v. Bailey 90, 97
— v. Beadnell 232
— v. Bedouin Co. 577, 589
— v. Blakey..10, 59, 74, 248, 278, 279, 280, 282, 283, 287, 288, 290
— v. Blandy 232
— v. Brownlow ..297, 304, 358, 359
— v. Chadwick 613
— v. Conder 325, 526, 669, 673
— v. Cook 391
— v. Cramer 59, 76
— v. Daniell 202
— v. Fell 202
— v. Gooch 285
— v. Henderson 136
— v. Hughes 150
— v. Jeffryes 591, 638, 657
— v. Johnson 417
— v. Keal 94
— v. Lister 297, 300, 303, 304
— v. Lyon 237
— v. Mid. Ry. 391
— v. Morgan 245
— v. Philpott 369
— v. Reynolds 123
— v. Ridgway 648
— v. Sainsbury 402
— v. Shann 186, 419
— v. Smith, 1 L.R.I...111, 120, 128, 313, 541, 547
— v. — 3 Bing. N.C. 240
— v. —1890. *Times* 216
— v. — 10 Ir. Rep. Eq. 547
— v. S. E. Ry. 107
— v. Tebbitt. L.R. 1 P. & D. .. 104
— v. — L.R. 1 P. & D. ...309, 310
— v. Thompson 638
— v. Whittingham 243
— v. Wilkins 165
— v. Wilson 622, 629, 661
— v. Young 544
Smout v. Ilbery 104

PAGE
Smyth v. Anderson 230, 235
Smythies, *Re* 668
Sneath v. Taylor 369
Snowball, *Exp.*, *Re* Douglas 152
— v. Goodricke 254
Sociedada, The 252, 352
Société Anonyme v. Scholefield. 663
— Générale v. Tramways Union or Walker 92, 530
Solicitor, *Re* a, 25 Q.B.D. 215
— *Re* a, 36 Sol. Jo. 435
Solomons, *Re* 198, 533
Solway, The ..233, 246, 251, 252, 440
Sombre v. Tronp 104
Somerset v. France 294
— v. Hart 96
— v. Wade 96
Sotilichos v. Kemp 638, 642
South American Co., *Re* 406
— Eastern Ry. v. Railway Commrs. 619
— Hetton Coal Co. v. N. E. Ry. 17
— Staffs Tram. Co. v. Ebsmith. 375
— — v. Sickness Co. 421
Southern v. Thomas 395
— v. Woolaston 618
Southwark Co. v. Quick 209
Soward v. Leggatt 31
Spaight v. Twiss 357
Spargo v. Brown 225
Speeding v. Young 491
Spenceley, *Re* 432
— v. De Willott 161, 165, 478
— v. Schulenburgh 208
Spencer, *Re* 614
— v. Bailey 500, 548
— v. Billing 467
— v. Lotz 636
— v. Thompson 413, 418
— v. Williams 415, 419, 420, 431
Spencer's Will, *Re* 580, 598
Spicer v. Cooper 662
— v. Martin 596
Spike v. Thompson 360
Spittle v. Walton 452
Splents v. Lefevre.....246, 311, 314
Spokes v. Grosvenor Hotel Co... 213
Spooner v. Browning 96
Spratt, *Re* 327
Spurway v. Spurway 77
Staben v. Freeman 467
Stacpoole v. Reg. 300
Staden v. Staden 199
Staines v. Stewart 324, 333
Stalworth v. Inns 562
Stamford Co. v. Smith 231
Standen v. Christmas 133
Stanger v. Searle 400
Stanley v. Stanley 618, 648
— v. White....59, 72, 131, 161, 162
Stanton v. Percival 230, 238
— v. Richardson 616
Staple of England v. Bk. of England 518, 687
Stapleton v. D'Alton 624
Stapylton v. Clough....83, 103, 276, 288, 292, 293, 577
State v. Campbell 512

PAGE
State *v.* Daley 81
— *v.* Picton 263
— *v.* Shelley 58
Stead, *Re* 580
— *v.* Dawber 587, 603
— *v.* Heaton 286
Stearine Co. *v.* Heintzman 390
Stearns *v.* Doe 225
Stebbing *v.* Spicer 523
Stebbings *v.* L. & N. W. Ry..... 482
Steeds *v.* Steeds 415, 581, 588
Steel, *Re* 384, 612, 655, 656
— *v.* Lester 352
Steele *v.* M'Kinley 586
— *v.* Mart 585
— *v.* Savory 447
Steevens' Hospital *v.* Dyas..372, 529
Steinkeller *v.* Newton 439, 470
Stephen *v.* International Co..... 147
Stephens, *Re* 540
— *v.* Foster 471
— *v.* Wanklin 498
Stephenson, *Re*, Donaldson *v.* Bamber 625, 629, 658
— *v.* Garnett 412
— *v.* Heathcote 619
— *v.* Tyne Commrs. 397, 488
Stevens *v.* King 618, 619
— *v.* Tillett 409, 416
— *v.* Woodward 95
Steward *v.* Dunn 104
Stewart, *Re* 668
— *v.* Cauty 127
Stewart's Case 258
Steyner *v.* Droitwich 294, 381
Stiles *v.* Cardiff Co. 95, 248
Still *v.* Halford 562
Stobart *v.* Dryden..83, 103, 192, 225, 227, 277, 318, 321, 575
Stock *v.* McAvoy 670
Stockbridge *v.* Quicke 69, 291, 344, 365
Stockdale *v.* Hansard 20
Stockfleth *v.* De Tastet 232
Stoddard *v.* Watchmakers' Alliance 15
Stokes *v.* Mason 20
— *v.* Stokes 410
Stones *v.* Byron 449
— *v.* Dowler 572
Stonor *v.* Fowle 561, 576
Storey *v.* Bermondsey 689
Storr *v.* Scott 235
Stott *v.* Fairlamb 593
Stowe *v.* Joliffe 350
— *v.* Querner 12, 537, 538
Stowell *v.* Robinson 587
Strachan, *Re* 198
— *v.* Univ. Stock Exch. 479
Stacy *v.* Blake 250
Straker *v.* Reynolds 442
Stratford *v.* Hogan 203
Strathlorne Co. *v.* Baird 106
Strauss *v.* Goldschmidt 500
Streeten *v.* Black 465
Stretten *v.* Stubbs 232
Strickland *v.* Maxwell 637
Stringer *v.* Gardiner ..618, 623, 647
PAGE
Strode *v.* Winchester ..286, 580, 598
Strong *v.* Bird 668, 672
Strongitharm *v.* North Lonsdale Co. 127
Strother *v.* Barr 571, 573
Stroughill *v.* Buck 684
Stuart *v.* Balkis Co.....441, 447, 498
Stubbs *v.* Sargon 639
Studds *v.* Watson 527
Studdy *v.* Sanders 205, 206
Sturgeon *v.* Wingfield 684
Sturla *v.* Freccia..287, 288, 289, 292, 293, 299, 307, 315, 316, 339, 341, 347, 348, 349, 354, 355 356, 359, 360, 362, 363, 365
Sudgrove *v.* Bryden 518
Suffell *v.* Bk. of England 529
Sugden, *Re* 682
— *v.* St. Leonards....48, 63, 64, 79, 219, 324, 325, 327, 329, 331, 490, 541
Suisse *v.* Lowther 669
Sulc *v.* Garzena 162
Sullivan *v.* Creed 25, 127
— *v.* Sullivan 613, 614, 640
Summer's Trusts, *Re* 679
Summers *v.* Moorhouse 614, 650
— *v.* Moseley 474
Sumner *v.* Brown 473
Sussex Peerage—278, 280, 282, 287, 319, 388, 389, 390, 393
Sutro *v.* Heilbut 125
Sutton *v.* Gregory 290
— *v.* Sadler 104, 135, 324, 327, 330, 680
Swan *v.* Miller 246, 247
— *v.* North British Co. 687
— *v.* Swan 427, 429
Swann *v.* Barber 591
Swansea Corp. *v.* Quirk 204
Sweet, *Re* 447, 521
— *v.* Lee 639
Sweeting *v.* Pearce 106, 124
Sweetman *v.* Sweetman 145
Swift *v.* M'Tiernan 361
Swifte *v.* Swifte 432
Swiftsure, The 280, 285
Swinnerton *v.* Stafford 525
Swire, *Re* 584
Sybray *v.* White 252
Sykes, *Re* 327, 529
— *v.* Dunbar 198
— *v.* Sykes 466, 560
Sylph, The 417
Symes *v.* Goodfellow 689
Symmers *v.* Reg. 373
Symonds *v.* Gaslight Co. 258
— *v.* Rees 420

TADMAN *v.* Henman 686
Taff Vale Ry. *v.* Amalgamated Soc. 619
— *v.* Davis 620
Tait *v.* Beggs 249, 689
Talbot *v.* Cusack 470, 471
— *v.* Lewis 300
— *v.* Marshfield 203
— *v.* Seeman 335

PAGE
Tanner *v.* Taylor 470
Tannian *v.* Synnott 202
Tanswell *v.* Scurrah 475
Taplin *v.* Atty. 543
Tate *v.* Hyslop 89, 95
Tatham *v.* Haslar 32
— *v.* Wright 564
Taunton, *Re* 117
Taylor, *Exp.* 344
— *Re*, 22 Ch. D. 603
— *Re*, 34 Ch. D. 660
— *Re*, 1910, 1 K.B. 597
— *v.* Barclay 21
— *v.* Cartwright 668
— *v.* Clemson 405
— *v.* Devey 296
— *v.* Hollard 412, 416
— *v.* Parry 113, 161, 168, 623
— *v.* Smith 526
— *v.* Willans 149, 157, 250
— *v.* Wilson 29, 428
— *v.* Witham 278, 279, 280, 281, 285
— *r.* Yorkshire Ins. Co. 89
Teebay *v.* Manchester Ry. 590
Teign Valley Co. *v.* Woodcock.. 232, 236, 238
Temperley *v.* Smyth 147
Temperton *r.* Russell 28
Tennant, *Re* 685
— *v.* Hamilton 169, 478
Thames, etc., Co. *v.* Gunford... 387
Thelluson *v.* Cosling 335, 337
Theodor Körner, The 209
Thomas, *Re* 281, 289
— *v.* Ansley 569
— *v.* Connell 63, 65, 87
— *v.* David 465, 481, 482
— *v.* Exeter Post 406
— *v.* G. W. Collieries 107
— *v.* G. W. Ry. 107
— *v.* Howell 619
— *r.* Jenkins 295
— *v.* Jones 261, 490
— *v.* Morgan 152
— *v.* Newton 200
— *v.* Roberts 564
— *r.* Russell 149, 155, 405
— *v.* Sec. of State India 204
Thompson, *Re*, L.R. 1 P. & D... 332
— *Re*, 12 P.D. 313
— *Re*, 91 L.T. 312, 679
— *Re*, 39 Ir.L.T.Jo. 680
— *v.* Adams 536
— *r.* Cartwright 89
— *r.* Clarke 413, 418, 423
— *v.* Clydesdale Bk. 147
— *r.* Donaldson 432
— *r.* Farmer 171
— *v.* Gibson 421
— *v.* Hickman 585, 602
— *v.* Nelson 604
— *v.* R. 158, 163, 164, 179, 488, 493, 690
— *r.* Trevanion 55, 58, 59, 78
Thomson *v.* Austen 232, 236
Thorn, *Re* 331
— *r.* Dickens 332, 650
PAGE
Thorne *r.* Cann 580
— *v.* Jackson 22, 25
Thornhill, *Re* 679
Thornton *v.* Royal Exchange Co. 397
Thorpe *v.* Eyre 433
Throckmorton *v.* Holt 62, 64
Thurston *v.* Slatford 543
Thurtell *v.* Beaumont 10
Tichborne Case, 1872, *Times* ... 207
— vol. i 569
— (passim) 118
Ticket Co. *v.* Colley 393
Tiley *v.* Cowling 430
Tilk *v.* Parsons 75
Tiukler *v.* Walpole 352
Tinline, *Re* 668
Tisdall *v.* Parnell 357, 360
Tobakin *v.* Dublin Co. 208
Tobin *v.* L. & N. W. Ry.....126, 248
Tod *v.* Winchelsea 543, 570
Todd *v.* Anderson 20
— *v.* Johnson 604
— *r.* Rowley 162, 169
Todrick *r.* Wilson 126
Toleman *v.* Portbury 37
Tolhurst *r.* Associated, &c., Mfrs. 624
Toll *r.* C. P. Ry. 134
Tollemache, *Re*, *Exp.* Anderson.. 552
Tolman *r.* Johnstone 478, 481
Tombs *r.* Tombs 119
Tomkins *v.* A.-G. 352
Tompson *v.* Dashwood 156
Tonge, *Re* 326, 327, 332
Tooker *r.* Beaufort 23, 358
Toosey *v.* Williams 122
Tootals Trusts, *Re* 560
Topham *r.* McGregor ...467, 470, 471
Toronto Ry. *r.* Toronto Corp..... 420
Torret *v.* Cripps 516
Toulmin *v.* Copland 417
Towhill, *Re* 652
Towle *r.* Topham 649
Townend *r.* Toker 586
— *v.* Townend 447
Townsend *v.* Moore..61, 326, 328, 401
— *v.* Townsend 626, 657, 669
Tracy Peerage, Mins. Ev. 354
— Hubb, 673 317
— 10 C. & F. 386, 388, 547
Trafford *v.* St. Faith's Council303, 525
Tranton *v.* Astor 337
Travers *v.* Blundell 626, 655
— *v.* Mason 124
Treasury Sol. *v.* White.....498, 688
Trego *v.* Hunt 594
Trelawney *v.* Coleman 62
Trench *v.* Doran 580
Trevivan *r.* Lawrence 685
Trewhitt *v.* Lambert 572
Trimlestown *v.* Kemmis..40, 233, 240, 279, 280, 284, 528
Trimmer, *Re* 581, 599, 647
Trimoner *r.* Bayne 670
Trinidad Co. *v.* Coryat 684
Troke *r.* Felton 126
Trotter, *Re* 520
— *r.* Maclean 122, 287, 288, 290
Trueman *r.* Loder 106, 662

PAGE
Trust, &c., Corp., *Re* 443
Tucker, *Re* 244
— *v.* Bennett 32, 578
— *v.* Burrow 670
— *v.* Lawson 133
— *v.* Linger 106, 124, 220
— *v.* Oldbury..83, 239, 240, 248, 276, 278, 280, 282, 289
— *v.* Wilkins 347
Tufton *v.* Whitmore 439
Tugwell *v.* Hooper 203
Tullock *v.* Dunn 242
Tunley *v.* Evans 243
Tupper *v.* Foulkes 518
Turley *v.* Thomas 21
Turncock *v.* Turncock 678
Turner, *Re*, 1906, W.N. 389
— *Re*, 1910, 1 K.B. 545
— *Re*, 29 Ch. D. 199, 309, 342
— *Re*, *Times*, Feb. 8th, 1912..... 331
— *v.* A.-G.....242, 246, 281, 286, 581, 598
— *v.* Bowley 13
— *v.* Culpan 564
— *v.* Haji 147
— *v.* Hutchinson 246, 290
— *v.* Stallibras 127
— *v.* Turner 616, 638
— *v.* Warren 450
Turquand, *Exp.*, *Re* Parker 21
— *v.* Knight 203, 206
Turton *v.* Turton 104, 119, 121
Tussaud, *Re* 667, 668, 670, 671
Tustin *v.* Arnold 59, 72, 248
Tutton *v.* Darke 25, 380
Twyman *v.* Knowles 573
Tyas *v.* Brown 208
Tyler *v.* Kingham 368
Tyrrell *v.* Painton 32
Tyrwhitt *v.* Tyrwhitt 580
— *v.* Wynne 161

Uhde *v.* Walters 662
Ulster Bank *v.* Synott 636
Ulverstone Union *v.* Park 199
United Shoe Co. *v.* Brunet 14
— States *v.* McRae 213
University College *v.* Taylor.... 526
Universo Insce. *v.* Merchants Co. 124
Upjohn *v.* Hitchens 634, 663
Upton *v.* Hume 156
Urquhart *v.* Butterfield 18, 250
Usher *v.* Henwood 465
Uxbridge *v.* Winchester 409

Vacher *v.* Cocks....65, 87, 257, 261
Vadala *v.* Lawes 406
Vagg, *Exp.* 427, 430
Vagliano *v.* Bk. of England..... 377, 518, 686, 687
Vaise *v.* Delaval 197
Vallance, *Re* 560
Valletort Co., *Re* 147
Valter's Trusts, *Re* 343
Van Diemen's Land Co. *v.* Table Cape Bd. 629, 634, 664
Van Omeron *v.* Dowick 26, 122
Van Praag *v.* Everidge 601
PAGE
Van Sandau *v.* Turner 20, 21
Van Straubenzee *v.* Monck 325
Van Wart *v.* Wolley 250
Vandeleur *v.* Glynn 231
Vandenbergh *v.* Spooner 630
Vander Donckt *v.* Thellusson.. 388, 389, 390
Vandespar *v.* Duncan 662
Vandewall *v.* Tyrrell 74, 76
Varicas *v.* French 438
Vaughan, *Re*, 26 Sol. Jo.....462, 501
— *Re*, 17 T.L.R. 615, 625, 651
— *v.* De Winton 168
— *v.* Martin 469
Vaughton *v.* L. & N. W. Ry. 10
Vaux Peerage 337, 381
Veale *v.* Reid 38
Vear, *Re* 625
Venables *v.* Sweitzer 213
Venn, *Re* 613
Verney *v.* Verney 420
Veronica Case, The 42
Verry *v.* Watkins 192
Vezey *v.* Rashleigh 587, 604
Viatka, The 353
Villiers *v.* Skelton.....602, 614, 654
— *v.* Villiers 48
Vincent *v.* Cole 572
Vine St. Superintendent, *Re*.. 22
Vines *v.* Arnold 423
— *v.* Vines 327
Viney *v.* Barss 167
Virgo *v.* Virgo 418, 428
Vitoria, *Re* 407, 411
Vivian *v.* Moat 282, 283, 290
Volant *v.* Soyer 200, 210
Von Eckhardstein *v.* Von Eckhardstein 190
Von Linden, *Re* 548
Vowles *v.* Young...307, 309, 310, 315
Vyner *v.* Wirral Council 295, 297, 303

W. *v.* S. 119
Waberley *v.* Cockerel 567
Waddington *v.* Roberts 122
Waestaff, *Re*, 96 L.T. 474, 498
— *Re*, 1908, 1 Ch. 642
— *v.* Wilson 249
Wainewright *v.* Wainewright... 325, 326, 327, 328, 330, 334
Wait, *Re* 619, 641
Waite, *Re* 312
Wake *v.* Harrop 517, 581
Wakefield *v.* Cooke..409, 411, 412, 421
— *v.* Llanelly Ry. 689
Wakelin *v.* L. & S. W. Ry., 1896. 1 Q.B. 32
— *v.* — 12 App. Cas. ..30, 31, 35
Wakeman *v.* West 378, 379
Walbran, *Re* 640
Waldele *v.* N. Y. Ry. 72
Waldridge *v.* Kennison 232, 235
Waldron *v.* Coombe 366
— *v.* Jacob 631
Waldy *v.* Gray 292, 541
Wales *v.* Wales 161, 166
Walford *v.* Fleetwood 20

PAGE
Walker, *Re*, 53 L.T. 199, 216
— *Re*, 16 Manson 198
— *v.* Beauchamp 341
— *v.* G. W. Ry. 98
— *v.* Manchester, etc., Banking Co. 377
— *v.* S. E. Ry. 558
— *v.* Walker 113, 134, 156
— *v.* Wilsher 231, 232
— *v.* Wingfield 341
Walker's Case 137
Wallace *v.* Cook 351
— *v.* Roe 517
— *v.* Wallace 344
Waller, *Re*, White *v.* Scoles..612, 650
Wallis *v.* Littell 600
— *v.* Soutter 385
— *v.* Russell 619
Walsham *v.* Stainton 207, 208
Walter *v.* Haynes 122
Walters *v.* Le Blanc 527
— *v.* Lewis 66, 73
— *v.* Smith 31, 191
Walthamstow Coun. *v.* Hanwood. 122
Walton *v.* Green 78
— *v.* Tophakyan 414
Want *v.* Moss 585
Ward, *Re* 128
— *v.* Cox 225
— *v.* Duncombe 91
— *v.* Gamgee 461
— *v.* Hobbs 150
— *v.* L. G. Omnibus Co. 99
— *v.* Lumley 528
— *v.* Marshall 205
— *v.* Murray 21, 548
— *v.* Sinfield 482
— *v.* Wells 438
Warne *v.* Chadwell 176
Warner *v.* Mosses 495, 498
Warren *v.* Swineburne 24, 563
— *v.* Warren 122
Warrick *v.* Queen's Coll., L.R. 3 Eq. 203
— *v.* — 40 L.J.Ch. 300
Warwick *v.* Foulkes 156
Watcham *v.* A.-G.....613, 614, 624, 629, 634, 655
Waterford Corp. *v.* Price...146, 230, 258, 372, 373
Waterpark *v.* Fennel 616, 617, 634, 642
Waters *v.* Braithwaite 126
Watkins *v.* Nash 583
— *v.* Rymill 148
— *v.* Vince 96
Watkinson *v.* Wilson 663
Watson *v.* Jaeger 662, 691
— *v.* Jones 448
— *v.* King, 3 C.B. 249, 569
— *v.* — 4 Camp. 351
— *v.* Little 199, 404, 428
— *v.* Rodwell 18, 473
— *v.* Smith 16, 31, 149, 151
— *v.* Woodman 244
Watt *v.* Watt 157, 191, 232, 516
Watteau *v.* Fenwick 88
Watts *v.* Fraser 153, 167, 176
PAGE
Watts *v.* Lyons 116, 134, 220
— *v.* Vickers 105, 122
Waygood *v.* James 409
Wayland *v.* Met. Ry. 208
Weall *v.* James 414
Weatherley *v.* Weatherley 166
Webb *v.* Alexandria Co. 124
— *v.* Austin 684
— *v.* Baldwin 131
— *v.* Byng 641, 648
— *v.* Catchlove 196
— *v.* East 213
— *v.* Hewitt 588
— *v.* Smith 244, 245
Webber *v.* Corbett 627, 658, 660
— *v.* Stanley 133, 648
Webster, *Re* 679
— *v.* Armstrong 422
— *v.* Cecil 601
Wedd *v.* Porter 123
Wedgwood *v.* Hart 37
Weed *v.* Ward 385
Weeding, *Re* 625
Weeks *v.* Birch 239, 419, 685
— *v.* Maillardet 632
Wegg-Prosser *v.* Evans 414
Weigall *v.* Runciman 608
Weikersheim's Case 374
Weinberg *v.* Weinberg 233, 487
Weld-Blundell *v.* Wolseley 387
Welland *v.* Middleton 355, 361
Weller *v.* Stone 248
Wells *v.* Holland 14
— *v.* Jesus Coll. 300
— *v.* Smith 89, 150
— *v.* Wells 660
Welsbach Co. *v.* New Sunlight Co. 500
Wemyss *v.* Hopkins 422, 425
Wenman *v.* Mackenzie..414, 415, 433
Wentworth *v.* Lloyd 201
Wernher, *Re* 431
West, *Re* 581
— *v.* Blakeway 588
— *v.* Steward 530
— *v.* West 194
— Devon Mine, *Re* 251
— Riding Bk. *v.* Elmore 599
Westacott *v.* Hahn 124
Westcott *v.* Westcott 216
Western of Canada Co., *Re* ... 499
— Corp. *v.* Poole 537
Westinghouse *v.* Mid. Ry. ..208, 209
Westlake *v.* Westlake 346, 389
Westmacott *v.* Westmacott..346, 554
Westmoreland Co., *Re* 443
— *v.* Feilden 411
Weston, *Re*, L.R. 1 P. & D. 333
— *Re*, 1907, 1 Ch. 232
— *v.* Emes 589
Westwood *v.* Chettle 34
Whaley *v.* Carlisle 21, 285, 365
— *v.* Masserene 280, 489
Wharam *v.* Routledge 477
Wharton Peerage 313, 336
Whateley *v.* Spooner ...526, 669, 673
Wheatley *v.* Smithers 98
— *v.* Williams 206
Wheeldon *v.* Burrows 616, 634

PAGE
Wheeler *v.* Le Marchant.201, 202, 208
— *v.* Morris 127
Whicker *v.* Hume 431
Whickham *v.* Ashe 57
Whistler *v.* Ruskin 387
Whitaker *v.* Tatham...608, 628, 671
— *v.* Wisbey 569
Whitcomb *v.* Whiting 245
White, *Re* 679
— *v.* Barry Ry. 31
— *v.* Bywater 380
— *v.* Cox 559
— *v.* Credit Assoc. 207
— *v.* Dowling 251, 261
— *v.* Morris 436
— *v.* White 233, 259
Whitechurch *v.* Cavanagh 99, 685, 686
Whitehead *v.* Scott 18
Whitehouse *v.* Hemmant 688
— *v.* Hugh 588
Whitelegg, *Re* 389, 497
Whiteley, *Re* 196, 242, 254, 495
— *v.* King 328
Whitelocke *v.* Baker 307
— *v.* Musgrove 523
Whitfield *v.* Aland 470
— *v.* Brand 573
— *v.* Langdale 626, 656
Whitford *v.* Tutin 570
Whiting *v.* Turner 521, 522
Whittaker *v.* Kershaw 416, 422
Whitton *v.* Whitton 343, 345
Whittuck *v.* Waters 313, 344
Whorwood, *Re* 618, 639
Whyman *v.* Garth 476, 519, 522
Whyte *v.* Nutting 250
— *v.* Whyte 432
Widgery *v.* Tepper 421
Wiedemann *v.* Walpole.256, 257, 258, 259, 261, 438, 487, 489
Wigglesworth *v.* Dallison 105
Wigley *v.* Treasury Sol.....313, 342
Wihen *v.* Law 342
Wilberforce *v.* Hearfield 359
Wilcox *v.* Gotfrey 487, 489
Wild *v.* Holt 161, 168
Wilder *v.* Wilder 435
Wilding *v.* Sanderson, 76 L.T.... 462
— *v.* — 1897, 2 Ch. 584, 585
Wilkins *v.* Birmingham Corp. ... 434
— *v.* Gill 435
— *v.* M'Ginity 105, 622, 642
— *v.* Stevens 669
Wilkinson *v.* Blades 427
— *v.* Clark 159, 167, 369
— *v.* Dutton 29
— *v.* Graves 156
— *v.* Stoney 15
Williams, *Re*, 42 Ch. D. 618
— *Re*, 134 L.T. 659
— *v.* Arkle 670
— *v.* Barmouth Council 588
— *v.* Birmingham Co. 677
— *v.* Davies 411
— *v.* E. I. Co. 33, 35, 46
— *v.* Eady 25
— *v.* Goodchild 300, 302
PAGE
Williams *v.* Goose 38
— *v.* Innes 252
— *v.* Jones, 10 Ves. 670, 671
— *v.* — 36 W.R. 591
— *v.* Morgan 300, 428, 633
— *v.* Moss's Empires 587
— *v.* Pinckney 682
— *v.* Powell 19
— *v.* Preston 249
— *v.* Quebrada Ry. 203
— *v.* Richards 162
— *v.* Star Co. 195
— *v.* Stern 588, 604
— *v.* Vauxhall Colliery Co. 418
— *v.* Wilcox 347, 688
— *v.* Williams, L.R. 1 P. & D... 233
— *v.* — 17 Ch. D. 145
— *v.* — 12 W.R. 438
— *v.* — 32 Beav. 85, 148, 153, 670, 674
— *v.* — 1916, P. 497
Williamson *v.* Freer 156
— *v.* Williamson 377
Willies *v.* Farley 73, 81, 254
Willis *v.* Bernard....62, 78, 83, 688
— *v.* Curtois 641
Willmett *v.* Harmer 10
Wills *v.* Palmer 276, 281, 680
Wilson *v.* Beddard 515
— *v.* Bowie 477
— *v.* De Coulon 461
— *v.* Love 15
— *v.* Morley 603
— *v.* O'Leary.....326, 327, 330, 669, 674
— *v.* Rastall 201, 203
— *v.* Robinson 156
— *v.* Salamandra Co. 95
— *v.* Squire 646
— *v.* Thornbury 108
— *v.* Turner 249
— *v.* Wilson, L.R. 2 P. & D. .. 82
— *v.* — 9 P.D. 512
— *v.* — 1903, P. 384, 388, 389
Wilton *v.* Phillips 342
— *v.* Webster 63, 78, 83
Wiltshire *v.* Naylor 446
Wiltzie *v.* Adamson 258
Windsor, *Re* 654
Winfield *v.* Shoolbred 495
Wing *v.* Angrave 680
— *v.* Epsom Council 559
Wingfield, *Exp.*, *Re* Florence 21
Winslow, *Re* 210
Winsor *v.* Reg. 453
Winstanley *v.* N. Manchester Overseas 630
Winstone, *Re* 680
Winter *v.* Henn 192
— *v.* Wroot 83
Winterbottom *v.* Derby 131
Wintle, *Re* 342
Wisden *v.* Wisden 445
Withnell *v.* Gartham 290
Witt *v.* Witt 83
Wodock *v.* Robinson 578, 589
Wolf *v.* Halford 597
Wollaston *v.* Hakewill 538

PAGE
Wolmerhausen, *Re* 243, 244
Wolsey *v.* Pethick 59, 81, 83, 289
Wolton *v.* Gavin 110
Wolverhampton Co. *v.* Hawksford 374
Wolverton, *Re* 623, 627, 660
Womersley *v.* Dally 106, 124
Wood, *Re*, Ward *v.* Wood...603, 669
— *v.* Baxter 582
— *v.* Cooper 469
— *v.* Cox 191
— *v.* Durham 191
— *v.* Mackinson 474, 475
— *v.* Priestner 636
— *v.* Rowcliffe 624
Woodfine, *Re* 474
Woodhouse *v.* Balfour 521, 522
— *v.* Woodhouse 203, 204
Woodnoth *v.* Cobham 278
Woodward, *Re* 340, 344, 543
— *v.* Buchanan 161, 166, 168
— *v.* Goulstone 325
Woodworth *v.* Sugden 500
Woolam *v.* Hearn 574
Woolfe *v.* Horne 582
Woolley *v.* N. L. Ry....205, 208, 209
Woolway *v.* Rowe 111, 239, 240
Working Men's Soc., *Re* 445
Worman *v.* Worman 406, 417
Worsley, *Exp.* 366
Worswick, *Re* 208
Worth *v.* Brown 96, 255
Worthington *v.* Dublin Ry...205, 209
— *v.* Moore 523
Wray, *Re* 581
— *v.* Wray 625, 649
Wrenn, *Re* 332, 650
Wright, *Re*, 39 Ir.L.T.R. 516
— *Re*, 44 Ir.L.T.R. 529
— *v.* Bagnall 683
— *v.* Beckett 480
— *v.* Cobb 400
— *v.* Court 94
— *v.* Day 69
— *v.* Graham 562
— *v.* Hearson 479
— *v.* Holdgate 199, 678
— *v.* Kerrigan 83
— *v.* Littler 277, 321
— *v.* L. G. Omnibus Co...410, 413, 416, 422

PAGE
Wright *v.* Mills 194
— *v.* Saunderson 521
— *v.* Tatham, 1 A. & E. ..436, 437, 439, 440, 519
— *v.* — 7 A. & E. 58, 83, 116, 135, 219, 220, 382
— *v.* — 5 C. & F. 58, 65, 75, 82, 84, 135, 145, 257, 262, 384, 391, 401, 403, 484
— *v.* Wilkin 499
— *v.* Willcox 40
— *v.* Wright, 49 Sol. Jo. 93
— *v.* — 1904, *Times* 499
Wyatt, *Re* 91
— *v.* Bateman 218, 225
— *v.* Berry 522
— *v.* Gore 194
— *v.* Palmer 406
Wyke *v.* Rogers 582, 599
Wylson *v.* Dunn 527
Wynne *v.* Tyrwhitt 276, 524
Wynne's Case 612
Wyse *v.* Leahy 360, 623
Wytcherley *v.* Andrews 431

Xenos *v.* Wickham.....97, 583, 600

Yangtsze Ins. Assn. *v.* Indemnity Co. 379
Yarmouth Ry., *Re* 549
Yates *v.* Kyffin-Taylor 418
— *v.* Pym 663
Yeats *v.* Yeats 625
Yool *v.* Ewing 678
Yorke *v.* Smith 570
— *v.* Yorkshire Co. 387
Yonill *v.* Scott-Robson 616, 634, 662, 663
Young, *Exp.*, *Re* Kitchin....10, 243, 404, 415, 427
— *v.* Austen 578, 592, 603
— *v.* Holloway 413, 430, 431
— *v.* Raincock 684
— *v.* Schuler 59, 75, 516, 517, 519, 581
— Manfg. Co., *Re* 500

Zouch Peerage 310, 340
Zumbeck *v.* Biggs 442

LAW OF EVIDENCE.

Sixth Edition.

ERRATA AND ADDENDA.

PAGE	LINE	
3	7 from top.	*after* "ss. 27–121" *add* ", 240–2."
14	7 from top.	*for* "211–3" *read* "240–2."
16	last line.	*after* "alone." *read* "The latter view is now enforced by the Admn. of Justice Act, 1920, s. 15."
19	14 from top.	*add* "As to what amounts to an admission of the truth of a charge, so as to render a conviction unappealable, see R. *v.* Graham Campbell, 65 Sol. Jo. 46."
20	26 from top.	*after* "241" *add* "; Lipton *v.* Powell, 65 Sol. Jo. 275)."
42	30 from top.	*for* "42)." *read* "42; *post*, 464)."
45	12 from end.	*for* "ss. 513–22]." *read* "ss. 514–22, 556]."
85	(left col.) 29 from top.	*for* "Accident" *read* "Accidental."
87	(right col.) 2 from top.	*after* "so" *add* "; *cp.* The Queen's Case, 2 Brod. & Bing. 299–301]."
126	(right col.) 17 from top.	*after* "powers" *insert* "; Stonehouse *v.* Masson, 151 L. T. Jo. 296)."
142	(left col.) 36 from top.	*after* "found" *add* "at A.'s lodgings" and on line 39 *for* "inadmissible" *read* "admissible."
145	8 from end.	*after* "136)" *add* "; but where the dealing has been variable, knowledge will not be inferred (Roe *v.* Naylor, 87 L. J. K. B. 958, 963, C. A.)."
147	3 from end.	*after* "712;" *add* "affd. 87 L. J. K. B. 958, C. A.;"
152	(left col.) 26 from end.	*after* "proved" *add* "; *cp.* R. *v.* Zulueta, *ante*, 143]."
165	2nd line.	*after* "108" *add* "; Roe *v.* Naylor, 87 L. J. K. B. 958, 963, C. A.)."
165	34 from top.	*after* "508" *insert* "; *cp.* Pollard *v.* P., *post*, 166."
166	(left col.) 20 from end.	*for* "corroboration, *post*, p. 491–4" *read* "*ante*, 119; *post*, 190, 491–4."
188	16 from end.	*for* "may" *read* "might."
188	9 from end.	*for* "statute" *read* "undermentioned statutes."
188	8 from end.	*after* "answer" *insert* "(R. *v.* Rowton, *inf.*)," and *for* "are" *read* "were."
190	5 from end.	*after* "deceased" *insert* "(R. *v.* Biggin, 1920, 1 K. B. 213;"
192	13 from top.	*for* "477–9" *read* "477–83."
259	(right col.) 4 & 5 from top.	*delete* "a doctor" and *for* "procuring an abortion upon" *read* "committing an unnatural offence with"
311	14 from top.	*for* "52" *read* "53."
356	(right col.) last line.	*add* "See *post*, 440, 512."
371	3 from end.	*after* "113" *read* "; Frost *v.* Clanway Co., 1920, 1 K. B. 423; Turton *v.* East &c. Co., 90 L. J. K. B. 267)."
382	12 from top.	*after* "347–8" *add* ", 538–49;"
411	last line but one.	*for* "and Irish" *read* "Irish and Colonial"
411	last line.	*after* "28" *add* "; and Admn. of Justice Act, 1920, s. 9."
440	22 from end.	*after* "*sed qu.*" *read* "and in actions under Ld. Campbell's Act, the contrary has been held, Calmenson *v.* Merchants' Warehousing Co., 1921, W. N. p. 59, H. L.; Barnett *v.* Cohen, 37 T. L. R. 629; *cp.* Bird *v.* Keep, *ante*, 356;"
454	9 from top.	*for* "his" *read* "him."

PAGE	LINE	
454	14 from end.	*after* "250" *read* "; R. *v.* Wood, 1920, 2 K. B. 179),"
464	13 from top.	*after* "*sup.*" *add* "; R. *v.* Bottomley, 1909, 2 K. B. 14;"
484	11 from top.	*after* "C. A." *add* "; Lipton *v.* Powell, 65 Sol. Jo. 275)."
486	17 from end.	*after* "*contra*)." *add* "Children under fourteen cannot be accomplices in felony, but may in other cases. Whether accomplices or not, it is desirable to caution the jury as to acting on their testimony (R. *v.* Cratchley, 9 Cr. App. R. 232; R. *v.* Tatam, 15 *id.* 132)."
505	29 from top.	*after* "Blackburn J." *delete* to end of sentence, and *substitute* "see cases cited *infra*, 8]."
506	5 from end.	*after* "J.;" *add* "R. *v.* Katz, 17 T. L. R. 67; R. *v.* Holloway, 65 J. P. 712;" and *after* "*contra*" *add* "R. *v.* Guerin, cited *ante*, 42, 464;"
506	4 from end.	*for* "Tay. s. 412" *read* "Tay. 8th ed. s. 482, who queries R. *v.* Vidil;"
512	11 from top.	*after* "*sup.*" *add* "; and conflicts with the new cases cited in the *Addenda* for insertion on p. 440)."
512	20 from end.	*for* "Ross." *read* "Ros."
517	29 from top.	*after* "unless" *insert* "under."
532	top line.	*after* "*sup.*)." *add* "And an unstamped Deed of Arrangement has been received to prove an act of bankruptcy, though rejected in proceedings to recover property comprised in the deed (*Re* Shaw, 90 L. J. K. B. 204)."
532	top line.	*after* "As to" *insert* "unstamped Insurance slips, see *post*, 537; and as to"
536	11 from top.	*after* "XXX." *insert* "See 84 J. P. Jo. 508; and"
539	6 from top.	*for* "293" *read* "339."
548	28 from top.	*after* "775" *insert*", and Enolin *v.* Wylie, 10 H. L. C. 1, 10)."
562	13 from top.	*add* "As to the reciprocal enforcement of judgments in the U.K. and other parts of the Empire, see Admn. of Just. Act, 1920, s. 9."
563	3 from top.	*for* "102–13" *read* "502–13."
565	1 & 2 from top.	*for* "1887 (50 & 51 Vict. c. 57)" *read* "1914 (4 & 5 Geo. V. c. 47)."
565	4 from top.	*for* "(ss. 5, 6)" *read* "(s. 5)." And *for* "s. 7" *read* "s. 6."
565	5 from top.	*for* "11" *read* "25."
565	7 from top.	*for* "this Act" *read* "the similar Act of 1887."
570	13 from end.	*for* "; *cp.* Passenger's Tickets, *ante*, 147" *read*", cited *ante*, 147–8; *cp.* Brough *v.* Netherton, W. N. 1921, 127)."
575	30 from top.	*for* "590," *read* "590),"
581	20 from top.	*after* "537" *insert*", and Hayo's Estate, 1920, 1 I. R. 103)."
613	3 from top.	*for* "661;" *read* "661);"
630	4 from top.	*for* "673);" *read* "673;"
630	24 from top.	*after* "(3);" *insert* "Wigram, Prop. VI.;"
661	34 from top.	*after* "clause" *add* "in the will."
661	35 from top.	*after* "erased" *add* "in the probate."
681	13 from top.	*after* "136)." *insert* "As to children as accomplices, see *ante*, 486."

205/21 *The Eastern Press, Ltd., London & Reading.*

THE LAW OF EVIDENCE

BOOK I.

PRODUCTION OF EVIDENCE.

CHAPTER I.

INTRODUCTORY.

LAW,—Substantive and Adjective. Law is commonly divided into Substantive Law, which defines rights, duties, and liabilities; and Adjective Law, which defines the procedure, pleading, and proof, by which the substantive law is applied in practice.

The rules of *Procedure* regulate the general conduct of litigation; the object of *Pleading* is to ascertain for the guidance of the parties and the Court the material facts in issue in each particular case; *Proof* is the establishment of such facts by proper legal means to the satisfaction of the Court. The first-mentioned term is, however, often used to include the other two.

PROOF, in this sense, is effected by—(*a*) Evidence, (*b*) Presumptions, (*c*) Judicial Notice, and (*d*) Inspection.

(a) EVIDENCE. Definitions. *Evidence,* as the term is used in judicial proceedings, means the facts, testimony, and documents which may be legally received in order to prove or disprove the fact under inquiry.

Taylor applies the word to 'all the legal means, exclusive of mere argument, which tend to prove or disprove any fact the truth of which is submitted to judicial investigation' (s. 1). This, however, is too wide, since, though it excludes 'mere argument' (*i. e.* presumptions of fact), it would include presumptions of law, judicial notice, and inspection, which are not usually treated under this head. On the other hand, the word is sometimes, though it is submitted unduly, restricted to facts (Hunter, Roman Law, 3rd ed., 1050), and sometimes to testimony and documents exclusive of facts (Steph. art. 1; Gulson, *infra*). Bentham defines evidence as 'Any matter of fact the effect, tendency, or design of which is to produce in the mind a persuasion concerning the existence of some other matter of fact; a persuasion either affirmative or disaffirmative of its existence. Of the two facts so connected, the latter may be distinguished as the principal fact, and the former as the evidentiary fact' (I Jud. Ev. 17, 18, 24). This definition is adopted by Best (ss. 11, 33). Both writers, however, include testimony and documents under the head of 'evidentiary facts' (Benth. i Jud. Ev. 51-5; Best, ss. 10, 14,

27-31, 123). Prof. Thayer defines evidence as 'Any matter of fact which is furnished to a legal tribunal otherwise than by reasoning, or a reference to what is noticed without proof, as the basis of an inference as to some other matter of fact' (Cas. on Ev. 1st Ed., 2; 3 Harv. L. Rev. 142); but in this definition he appears to include not only facts in a narrow sense, but oral, written, and 'real' evidence as well (Pr. Tr. on Ev., 263-4; though see 391, 396). Sir J. Stephen, excluding facts as evidence, restricts the latter term to "(1) Statements made by witnesses in Court, under legal sanction, in relation to matters of fact under enquiry; such statements are called oral evidence; and (2) Documents produced for the inspection of the Court or judge; such documents are called documentary evidence" (art. 1). This restriction, however, conflicts with other parts of the Digest, *e.g.* an admission, which by art. 15 is a relevant 'fact,' is declared by art. 64 to be primary 'evidence'; while elsewhere, after asking 'what is evidence?' it is added, 'the only possible answer is that one fact is, or is not, relevant to the other,' a definition which, if taken literally, would admit facts but exclude testimony and documents [5th ed. Introd., p. xii.; see further, *post,* 51-2]. Mr. Gulson gives several definitions which, however, are not easy to reconcile; for while, like Stephen, he contends that facts are not evidence, but only its subject-matter (Philosophy of Proof, ss. 12, 260-8), he yet speaks constantly of 'evidentiary facts' and 'circumstantial evidence,' and defines evidence itself sometimes as the science, art, or process of ascertaining or verifying facts (ss. 17, 24), sometimes as proof (ss. 24-6), sometimes as the means of proof, by which he refers to observation, perception, or the exercise of the senses (ss. 24-6, 168-9, 177, 183, 223-4, 254, 259-60) and sometimes as the result obtained by applying these means of proof to facts (ss. 174, 226, 230, 266, 314, 319). On the whole, what he appears chiefly to regard as evidence is either the act of perception itself (exercised by the Court, or the reporting witness) or the result of its application to facts, as distinct from the facts themselves. But he concedes that the distinction between facts and evidence is an arbitrary one, and that any fact which generates probability is in some sense a means of proof (ss. 203, 260), and while excluding facts because they are the subject-matter of testimony, inconsistently admits testimony although it is the subject-matter of perception (ss. 323, 345). At the present day, however, this question can hardly be considered an open one, for the whole practice of the Courts proceeds on the assumption that facts are 'evidence' both actually and technically. Thus, to take only one of innumerable instances, in an action for breach of promise, the fact that the defendant was silent on a certain occasion has been held to be statutory 'evidence' corroborative of his promise to marry (*Bessela* v. *Stern,* 2 C. P. D. 266, C. A.), though it would not fall within either Stephen's or Gulson's definition. The latter's contention that perception by the Court, as distinct from the fact perceived, is itself evidence, seems equally untenable, for though it is usual to speak of 'the evidence of one's own senses,' yet in law it is that which is adduced by the parties, not that which is furnished by the Court in the way of sight, hearing, or reasoning faculty, which alone constitutes 'evidence' for whose wrongful admission or rejection the Courts provide a remedy (*cp.* 1 Benth. Jud. Ev. 250-4; Thayer, Pr. Tr. Ev. 264).

Facts. No satisfactory definition of the term 'fact' has been, or perhaps can be, given. Broadly it applies to whatever is the subject of perception or consciousness. But juridically it has generally to be distinguished from *law*

(*post,* 13-16), sometimes from *opinion* (*post,* chap. xxxv.), and sometimes from *testimony* and *documents* (*supra*). These distinctions, however, are purely arbitrary, and it is not possible always to apply them consistently. Bentham divides facts into physical or psychological; events or states of things; and positive or negative (*i.e.* the non-existence of positive facts) [Benth. i, 39-50; Best, ss. 12-13; Steph. art. 1 (the definition in the first two eds. is omitted in later eds.); Gulson, ss. 27-121; Chamberlayne, Ev. ss. 38-53; Thayer, Pr. Tr. Ev. 190-2].

Classifications. The subject of evidence is not one which lends itself readily either to definitions or divisions. Few of its terms have acquired settled or unambiguous meanings, and no two writers adopt the same classification. Bentham gives in all *nine* heads of evidence: (1) *Ab intra* and *Ab extra* (Immediate and reported); (2) Real and Personal (from things and persons); (3) Voluntary and Involuntary Personal; (4) Depositional, Testimonial and Documentary; (5) Oral and Scriptitious Depositional Testimony; (6) Direct and Circumstantial; (7) Ordinary and Makeshift (*i.e.* with full or only partial security for correctness); (8) Pre-appointed and Unpre-appointed; (9) Original and Unoriginal. The following divisions or distinctions, however, which are commonly observed in practice, comprise all that are really essential to be noticed:—

Direct, Circumstantial and Real Evidence. By Direct evidence is meant that a given fact is proved either by its actual production, or by the testimony or admissible declaration of some one who has himself perceived it. By Indirect, Circumstantial, or Presumptive evidence is meant that other facts are thus proved, from which the existence of the given fact may be logically inferred. The two forms are equally admissible, and the testimony, whether to the *factum probandum* or the *facta probantia,* is equally direct; but the superiority of the former is that it contains at most only one source of error, fallibility of assertion, while the latter has, in addition, fallibility of inference. Little is to be gained, from a comparison of their cogency, since, save in the case of actual production (see *infra,* Real Evidence), both forms admit of every degree of cogency from the lowest to the highest.—The principles underlying direct and circumstantial evidence are by some writers considered to be identical, the credibility of one and the probability of the other being said both to rest upon inference (1 Stark. 3rd ed. 12-13; Steph. Introd. Ind. Ev. Act, 49-64; Markby, Ind. Ev. Act, 5-6; Thayer, Pr. Tr. Ev. 263-4; Wigmore, Ev., ss. 25, 475-6; Salmond, Jurisp., 1st ed. 585). Others regard faith and inference as radically distinct, and base belief in human assertion not on inference, but on instinct confirmed by experience (1 Benth., Jud. Ev., 110-138; Greenleaf, s. 7; Best, ss. 15, 132; Tay., ss. 50-1; Reid, Human Mind, c. 6, s. 24; McKinnon, Phil. of Ev. 40). Mr. Gulson maintains that whereas inferences must be based on the known laws of nature, and those underlying circumstantial evidence are so based, there is no known law of nature which entitles us to conclude that *voluntary,* as distinct from *involuntary,* communications truthfully represent the knowledge of the speaker. He adds that whether the human will be, or be not, subject to any laws of causation at all, is controverted; but even if it be, such laws are buried in obscurity (ss. 175-6, 503; Dumont, Jud. Ev. 19; Norton, Ev. 2nd ed., s. 109; *post,* 321-322). However this may be, the forensic rules applicable to the two topics are so essentially different that it is not possible satisfactorily to treat them

under a common head and in practice they never are so treated. [Tay. ss. 63-9; Best. ss. 293-5; Steph., Intro. to Indian Ev. Act; *Id.* Gen. View of the Cr. Law, 203-5; Wills, Circ. Ev., 6th ed., 19-52; Amos, Jurispr. 333-5; Hunter, Roman Law, 3rd ed. 1050-1; Gulson, ss. 122-8, 199-218; Wigmore, Ev. ss. 24-6, 275-6; Whart., Civil Ev., s. 8; *Id.* Crim. Ev., ss. 10-20. The terms Circumstantial and Presumptive are in general used convertibly; but some writers distinguish them as genus and species (Wills, *sup.*), and others as the converse (Gulson, s. 490)].

Real Evidence. Material objects, other than documents, produced for the inspection of the Court, are often called Real evidence. This, when obtainable, is the most satisfactory kind of all, since, save for identification or explanation, neither testimony nor inference is relied upon, but the fact speaks for itself (see further, Inspection, *infra*, 7). Bentham states that real evidence is always circumstantial (i, 55; iii, 33-4); but this is not so. When the object produced is an evidentiary fact from which the principal fact may be inferred, the evidence is circumstantial; when its own existence or some visible quality of it, is itself the principal fact, the evidence is direct (Best, s. 196; Gulson, ss. 227-8). Sir J. Stephen has been criticised for omitting this topic from the Indian Ev. Act and Digest. His explanation is, that though, in addition to oral and documentary evidence, a third class might be formed of things produced in Court, not being documents, this division would introduce needless intricacy, since as the condition of material things is usually proved by oral evidence, there is no need to distinguish between oral and material evidence (Introd. Ind. Ev. Act, p. 14). The phrase 'Real evidence,' indeed, is unsatisfactory and like many other evidential terms is used in different senses by different writers. Bentham defines it as that of which any object belonging to the class of *things* is the source, persons being included in respect of qualities belonging to them in common with things, while he defines 'personal' evidence as that furnished by human agents either voluntarily by discourse or signs, or involuntarily by changes of deportment (i Jud. Ev. 51-2; iii, 26). Voluntary conduct, *i.e.* that which serves to convey an indication of the mind of a person, is also, though less explicitly, classed by him as 'personal' evidence (i, 69*n.*; iii, 11). Later, he adds that 'physical real evidence, whether arising from a real or personal source,' is either *immediate, i.e.* where the thing itself is present to the senses of the Judge, or *reported, i.e.* where its existence is testified to by the percipient witness, in which case it is immediate to the witness, but reported to the Judge (i. 69*n*; iii, 33-4). Best adopts these terms and divisions, save that he classes (1) involuntary changes of deportment, and (2) voluntary conduct, as real and not as personal evidence (ss. 28, 196-8). Mr. Gulson criticises both writers for ignoring the distinction which he supposes to exist between facts and evidence (see *ante*, 2), and remarking (erroneously so far as Bentham is concerned), that their 'reported real' and 'personal' evidence are practically identical, defines 'real' evidence as 'the evidence of immediate perception exercised upon the fact itself,' 'the evidence obtained by the Court through the mere exercise of its own perceptive faculties' (ss. 223-4, 226, 430). He thus makes *perception* (not alone of things, but of acts and persons also), the test of real, or immediate, evidence, and not the *facts perceived*, which latter, as we have seen, he regards not as evidence, but merely its subject-matter. Moreover, placing documents in the same category as other material objects, since both are equally the subject-matter of inspection (ss. 313-20)

he classes all evidence other than 'real' in the above sense, as 'oral,' or transmitted (ss. 174-85). But, as he admits that oral evidence is 'itself entirely addressed to the senses of the tribunal' (ss. 323-345), this seems a distinction without a difference and would reduce all evidence to the single category of 'real.' In truth, however, witnesses and documents each combine both kinds of evidence, immediate in respect of their production to (or, as Mr. Gulson would have it, their perception by) the Court, and transmitted or reported in respect of any facts they narrate.—Prof. Wigmore discards the phrase 'real evidence' as misleading, and substitutes 'Autoptic Proference,' explaining that "a fact is evidenced autoptically when it is offered for direct perception by the senses of the tribunal." He adopts the latter locution, "in order to avoid the fallacy of attributing an evidential quality to the thing itself," and adds that "bringing a knife into Court is not strictly giving evidence of its existence." By this, however, he does not apparently seek to deny that the knife when produced is evidence in the sense that it "proves or disproves itself," but merely means to convey that "it is not evidence in the particular sense of giving testimony, or offering circumstantial evidence of its existence." (Ev. s. 24; Pocket Code, ss. 112-114). [Best, ss. 28, 196-214; Gulson, ss. 174-85, 222-9, 262-6, 313-16; Wigmore, Ev. ss. 24, 1150-68; Chamberlayne, Ev. ss. 27-31. The last named writer overlooks iii. Jud. Ev. 33-4 quoted *sup.*, and so attributes to Best, instead of Bentham, the division 'immediate and reported.' His account of Best's and Mr. Gulson's views is, in some other respects, also not quite accurate. For a detailed examination of 'Real' evidence, by the present writer, see Yale Law Journal, May, 1920].

Original Evidence and Hearsay. Statements used Circumstantially and used Testimonially. The terms 'original' and 'unoriginal' are used by Bentham to denote a sub-division of 'Testimonial' evidence, under which latter head he classes any probative statement whether made on oath or not. He describes evidence as 'original' when the principal fact is transmitted to the Court by the percipient witness, and 'unoriginal' when it is transmitted by some intermediate person (i. Jud Ev. 57). Best adopts this division, but makes an important extension thereto, applying it to *all* evidence, whether 'testimonial' or not, and in order to adapt the terms to the enlarged area, defines 'original' evidence more generally, as 'that which has an independent probative force of its own,' and 'derivative' (second-hand or secondary evidence), as that which derives its force from some other source (ss. 29-30, 89, 472, 492-5). This classification is characterized by Mr. Gulson as plausible, but deceptive, because it is not possible to draw any definite line between the two species. There is no evidence, he contends, that can properly be called 'original' except that acquired by the immediate perception of the Court (see 'real' evidence, *supra.*) Compared with this all other evidence is more or less derivative. But since, according to Mill, there is scarcely any direct perception that does not itself involve some element of inference, it follows that very little even of immediate or 'real' evidence is entirely original (ss. 230-7).

The term Original evidence, however, is also used, in contradistinction to Hearsay, in another and rather different sense from the above, that requires to be specially emphasized. In this sense it means any statement made out of Court, whose materiality depends on the fact that it was made, and not on the fact that it was true; while Hearsay (second-hand) evidence means any statement made out of Court which is offered as evidence of the truth of the matters

asserted. Thus, statements constituting a fact in issue, *e.g.* a libel, contract, threat, or notice, but which are used merely to show what was written or said on the given occasion, and not that the contents of the libel, etc., were true, are original evidence; while an entry in a shop-book, debiting a customer with goods, and used directly to prove the sale, is hearsay, and only admissible by exception. So, statements constituting a fact which is merely relevant to the issue, *e.g.* a police-report to the same effect as a libel, but tendered merely to show the *bona fides* of the defendant in publishing the libel (*R* v. *Labouchere, post,* 133), or a complaint, in a case of rape, tendered merely to confirm the testimony of the prosecutrix or negative her consent (*post,* 113), is original evidence; while these statements, if sought to be used as proof of the truth of their contents, would be hearsay, and only admissible in excepted cases. The test of whether a statement belongs to one class or the other is, therefore, not the nature of its contents, but the evidentiary *purpose* for which it is used; so that the same statement may be original evidence when tendered for one purpose and hearsay where tendered for another, [*post,* 60-2, 103, 112-16, 218, 225; 31 L. Q. Rev. 230-1; 26 Harv. L. Rev. 150-3]. This distinction between the use of a statement as a *fact* (whether in issue or relevant), and its use as a probative *assertion* or *narrative,* though not always adequately recognized, or easy to apply (see *e.g. Lloyd* v. *Powell Co., post* 62; *Milne* v. *Leister, post* 74), is one of paramount importance. Indeed, Mr. Gulson regards it as "the chief, if not the whole, difficulty of the art of judicial evidence" (s. 366). It is unfortunate, however, that the terminology to express it should be so inapt and unenlightening as seriously to imperil the distinction itself. The terms 'Circumstantial' and 'Testimonial' have been suggested as substitutes in this connection (Wigmore, Ev. s. 25); and although the former is not strictly appropriate to statements which may often be actually in issue, nor the latter to those that are not made upon oath, yet they will be found convenient as indicating more clearly the two contrasted uses. The various statements dealt with in chaps. vi.-x., xxviii., xliv.-vii., herein, are examples of statements used circumstantially, *i.e.* as original evidence; those in chaps. xvii.-xxxiv. are examples of statements used testimonially, or rather quasi-testimonially, *i.e.* as hearsay, admissible or not by exception [Tay. ss. 576-87; Best, s. 495; Steph. Digest. Note viii.; Ros. N. P. 17th ed. 51-3; Id. Cr. Ev., 13th ed. 23-5; Gulson, ss. 186-98; 285-312, 357, 364-5; Wigmore, Ev., ss. 25, 475, 1361; Chamberlayne, Ev., vol. iv., pp. vii.-xiv., s. 2580].

Primary and Secondary Evidence. As commonly used, these terms apply to the kinds of proof that may be given of the *contents* of a document, irrespective of the *purpose* for which such contents, when proved, may be received (Steph. arts. 64, 70; Gulson, ss. 337-43, 443-4).—Primary evidence means the best or highest kind, that which the law regards as affording the greatest certainty of the fact in question; thus, production of the original document, or proof of an admission of its contents by the party against whom it is tendered, is considered primary in this sense. Secondary evidence means inferior or substitutionary evidence, that which itself indicates the existence of more original sources of information; thus, a copy, or the testimony of a witness who has read the document, is secondary. In *Lucas* v. *Williams,* 1892, 2 Q. B., p. 116, Lord Esher remarked: "Primary evidence is evidence which the law requires to be given first; secondary evidence is evidence which may be given in the absence of that better evidence, when a proper explanation of its absence has

been given." This, however, is only approximately true, for the law in some cases requires secondary evidence to be given first, and in others allows the production of primary evidence to be optional (*post,* 560; *cp.* 535, 543). The terms primary and secondary are also occasionally applied to proof of handwriting (*post,* 400, 515), and attestation (*post,* 519); and Mr. Taylor regards depositions as secondary evidence of oral testimony (s. 464; *contra,* Gulson, s. 354, and *post,* 436-7).

Second-hand and Secondary Evidence Distinguished. Used in the above sense, the term *second-hand* (*i.e.* hearsay) evidence is applicable both to oral and written statements; it deals only with their use as evidence of the *truth* of the facts asserted; and it is in general inadmissible, however unanswerably the absence of the original source may be accounted for, *e.g.* by the death, absence, or lunacy of the percipient witness (*post,* chap. xvii.). The term *secondary evidence,* on the other hand, is by common usage confined to documents; it deals only with the means of proving their *contents*; and it is in general admissible whenever the absence of the primary source has been satisfactorily explained (*post,* chap. xliii.), [Best, s. 494].

(b) **PRESUMPTIONS** are either of law or fact. *Presumptions of law* are arbitrary consequences expressly annexed by law to particular facts; and may be either *conclusive,* as that a child under seven is incapable of committing a felony; or *rebuttable,* as that a person not heard of for seven years is dead, or that a bill of exchange has been given for value. They are sometimes defined as *inferences,* directed by law to be drawn from particular facts (Steph. art. 1; Austin, Jurisp., 4th ed. 507; Best, s. 304); but, strictly speaking, as Prof. Thayer points out, a compulsory inference is a contradiction in terms, the law having no mandamus to the logical faculty. It would be more correct to say that the law requires Courts to abstain from drawing inferences, and to accept one fact as the legal equivalent of another (Pr. Tr. Ev. 314-5, 317).

Presumptions of fact are inferences which the mind naturally and logically draws from given facts, irrespective of their legal effect. They are always rebuttable. [*Post,* chap. xlviii.; and see Circumstantial evidence, *ante,* 3].

(*c*) **JUDICIAL NOTICE** is the cognisance taken by the Court itself of certain matters which are so notorious, or clearly established, that evidence of their existence is deemed unnecessary. [Stephen, in the first two editions of the Digest, described these as "facts which need not be proved," but in later editions calls them "facts proved otherwise than by evidence" (Pref. to 3rd ed.); Tay. ss. 3-21; Best, ss. 252-4; see fully, *post,* 19-26].

(*d*) **INSPECTION, VIEW, COMPARISON.** Inspection has been defined as a substitution of the eye for the ear in the reception of evidence, and as a general rule is allowed whenever it is practicable, and will assist the tribunal in arriving at a decision. The practice dates back for some seven centuries to the old trials by inspection, which were the appropriate means of determining certain questions, *e.g.* age, identity, the genuineness of records, mayhem, pregnancy, &c. At first some of these were tried by the Court itself, but in doubtful cases reference was made to the jury, and gradually this became the usual rule. [Thayer, Cas. Ev. 2nd ed., 720; Hale, P.C. cited *post,* 119; Tay., ss. 554-66; Best, 196-7; Wigmore, ss. 24, 1150-68; Gulson, ss. 174-85, 222-9, 313-36; and see Real evidence, *ante,* 4].

Valuable inferences are commonly derived through this channel from, *e.g.* the demeanour of witnesses under examination, the condition of premises in dispute in an action, the appearance of the instruments used in committing a crime, or from verified models and plans. So, in an action for damages for the bite of a dog, the dog was produced in Court, that the jury might judge of its disposition (*Line* v. *Taylor,* 3 F. & F. 731). Under several statutes, also, the *age* of the persons may be similarly determined, *e.g.* the Vagrancy Act, 1824, s. 3 (*R.* v. *Viasani,* 30 J.P. 758), the Summary Jurisdiction Act, 1879, s. 49, the Children Act, 1908 (8 Ed. VII. c. 67), s. 123 (*R.* v. *Cox,* 1898, 1 Q.B. 179), and this is sometimes done without statutory authority (*R.* v. *Turner* 1910, 1 K.B. 346); while in cases of disputed handwriting (*post,* 108), pirated trade-marks or engravings, and the like (*Lucas* v. *Williams,* 1892, 2 Q.B. 113), direct comparison between the genuine and disputed specimens, made either by the tribunal itself or sometimes by witnesses and others out of Court (*id.;* and *cp. Du Bost* v. *Beresford,* 2 Camp. 511), is not only allowable, but often a most efficacious test. In the inferior Courts, questions of this nature are often decided upon a view by the Court alone, without witnesses. And in infringement and passing-off cases, mere comparison by the Court has sometimes been held sufficient [*Bourne* v. *Swan,* 1903, 1 Ch. 211, and cases cited; *Hennessy* v. *Keating,* 1908, 1 I.R. 43, C.A.; 42 Ir L.T.R. 169, H.L. *per* Ld. Ashbourne, "I go on the evidence of my own eyes. Looking at the bottles and looking at the labels, I am unable to see any colourable imitation;" *per* Ld. Macnaghten. "The eye no doubt is the best test. Generally, but not always, the comparison is enough"]. In *Lond. G. O. Co.* v. *Lavell,* 1901, 1 Ch. 135, C.A., however, the Court remarked that a view was not to be put in the place of evidence, but was to enable the tribunal to understand the questions raised and to follow and apply the evidence. As to *Confrontation* for purposes of identification, see *post,* 465-6; but a person attending on subpœna cannot, it seems, against his will be asked to stand up in Court for identification (*Farulli* v. *F.,* 1917, P. 28).

Production when compulsory. On charges of larceny, the Court usually insists upon the stolen property, if found, being produced, unless it is of a perishable nature, or its exhibition would be inconvenient or offensive; but generally the production of 'real' evidence is not compulsory (Tay. 555-555A.; Best, s. 197; Gulson, ss. 322-30; *post,* 47), and indeed, where the jury may be unduly affected or prejudiced thereby, it may either be wholly refused (*Rost* v. *Ry. Co.,* 41 N.Y. 1069; *Golden Co.* v. *Buxton,* 97 Fed. Rep. 415), or permitted only in conjunction with expert or other competent testimony (Tay., ss. 556-7), or subject to caution as to its dangers (*R.* v *Picton,* 30 How. St. Tr. 457, 480; *R.* v. *Ings,* 33 *id.* 1051, 1088). Thus, in an action for injury by a collision, Wright, J., in the absence of the doctor and unless by consent refused to allow the jury to view the injured limb (*Curtler* v. *London Tramway Co.,* Times, Feb. 13, 1891); and, in a case of disputed handwriting, Blackburn, J., refused to allow a comparison to be made without the help of experts (*R.* v. *Harvey,* 11 Cox 546, approved *R.* v. *Rickard,* 13 Cr. App. R. 140; *post,* 108). In both civil and criminal cases, moreover, the judge may adjourn the Court to enable the jury to *view* any material property or thing during the trial, a course which may be adopted even after the summing-up (*R.* v. *Whalley,* 2 C. & K. 376; *R.* v. *Martin,* 12 Cox 204); though the jury must not communicate with the witnesses during such view (*R.* v. *Martin, sup.*) [Tay., ss. 558-66].

Detention. Preservation, Inspection. Samples, Photographs, Experiments. Under O. 50, rr. 3-5, the Court or a judge may in civil cases order the detention, preservation, or inspection of any property or thing forming the subject-matter of the proceedings; as well as samples or photographs to be taken, observations to be made, or experiments to be tried, so as to obtain full information or evidence. Such inspection may be by judge or jury; and obstacles which impede it may be ordered to be removed (*Bennett* v. *Griffiths,* 3 L.T. 735). Similar powers exist in Admiralty cases by 24 & 25 Vict. c. 10, s. 18; in Patent Actions by the Patents Act, 1907, s. 34; in Arbitrations and References by O. 36, r. 48 (*Macalpine* v. *Calder,* 1893, 1 Q.B. 545; *Barnett* v. *Aldridge,* 4 T.L.R. 16; but a view of which one party only has notice invalidates the award, *Gregson* v. *Armstrong,* 70 L.T. 106); and in County Court cases by C.C.R. 1903, O. 12, r. 3 and O. 22, r. 17 (an inspection of a lady's mouth by a dentist was, however, refused under these rules as not being "any property or thing the subject-matter of the action," *Mitchell* v. *Stephens,* 29 L. Jo. 389). Irrespective of the above, however, medical inspection of a party may be ordered in various cases, *e.g.* in Chancery to determine pregnancy (*Re Blakemore,* 14 L.J. Ch. 336); in Nullity suits (Oakley, Divorce, 5th ed. 130-5, and refusal to submit is evidence against the party, *S.* v. *B.,* 21 T.L.R. 219; *contra* in criminal cases, *inf.*); in actions for Railway accidents (31 & 32 Vict. c. 119, s. 26); and under the Workmen's Compensation Act, 1906, Sch. I (4) (*Marshall* v. *Orient Co.,* 101 L.T. 584); though bankrupts cannot be compulsorily examined with a view to their life insurance (*Re Betts,* 19 Q.B.D. 39). So, scientific experiments may be ordered (*post,* chap. xxxv.), artistic tests undertaken (*Belt* v. *Lawes,* 1882, Times Nov. 17), or specimens of handwriting executed, in or out of Court (*post,* 109), during the trial.

Criminal Cases: View, Search, Physical Examination, Finger-Prints, etc. In criminal cases the power to order a view *before* the trial is restricted to proceedings on, or removed into, the Crown side of the Q.B. [6 Geo. IV. c. 50, ss. 23, 24; C.O.R. 1906, rr. 148, 233 (*p*); as to view during trial, see *R.* v. *Martin sup.*]. But the police, though they have no general power of search, may, on arrest of a prisoner for felony or misdemeanour, seize and retain all material documents and articles in his possession, for production in Court, and even impound articles belonging to and produced by a witness (*Dillon* v. *O'Brien,* 16 Cox, 245; *R.* v. *Lushington, Exp. Otto,* 1894, 1 Q.B. 420; *R.* v. *Thompson,* 33 T.L.R. 506, C.C.A.; *post,* 138; though as to money, see *Gordon* v. *Chief Commissioner.* 45 L. Jo. 505). And by warrant, under the Larceny Act, 1861, s. 103, and the Prevention of Crimes Act, 1871, s. 16, this power is greatly extended. So, letters and telegrams may, by warrant of a Secretary of State, be detained and opened at the Post Office and, if admissible, used in evidence (7 Will. IV. and 1 Vict. c. 36, s. 25, extended by 32 & 33 Vict. c. 73, s. 23; *R.* v. *Cooper,* 1 Q.B.D. 19). Generally, also, prisoners may be compulsorily examined as to their mental condition, physical marks, measurements, finger-prints, circumcision, &c. [*R.* v. *Beck,* Parl. Rep. pp. x-xi; *R.* v. *Johnson,* Times, Jan. 29, 1914; *R.* v. *Castleton,* 3 Cr. App. Ca. 74; *post,* 136; though in Scotland the legality of photographing the accused against his will, has been questioned (*Adamson* v. *Martin,* 1916, 1 Sc. L.T. 53; *cf. Farulli* v. *F.,* 1917, P. 28)], or asked to put on a particular garment for identification (*R* v. *Wood,* Times,

Dec. 14, 1907); but on a charge of concealment of birth, the medical examination of a female, against her consent, is illegal (*Agnew* v. *Jobson*, 13 Cox 625), and a prisoner's refusal to be examined as to a certain disease has been held no evidence against him (*R.* v. *Gray*, 68 J.P.R. 327).

PROOF IN CIVIL AND CRIMINAL CASES. The rules of proof are in general the same in civil and criminal proceedings, but the following differences must be noted:

(1) In civil, but not in criminal, cases, the rules of evidence may be relaxed by *consent of parties*, or *order of the Court*. Thus the parties may agree to try their case wholly or partly upon affidavits (*post*, chap. xli.); or make admissions for the purpose of dispensing with formal proof at the trial (*post*, 18); or obtain leave in chambers either to interrogate each other before trial or, in certain cases, to prove particular facts at the trial by affidavit or hearsay, and documents by secondary evidence (*post*, chap. xli.); or obtain discovery and inspection of the opponent's documents (O. 31; 2 Russ. Cr. 2073). Stamp objections, also, can only be taken in civil cases (*post*, chap. xlii.). Moreover, admissible evidence is sometimes excluded (*Harris* v. *H.*, 27 L.T. 428), or inadmissible evidence let in (*Smith* v. *Blakey* and *Abbeyleix* v. *Sutcliffe*, cited *post*, chap. xix.; *Oriental Co.* v. *Surat*, 1 L.R. 20 Bomb. 99, 103, 212; *Exp. Young, Re Kitchin*, 17 Ch. D. 668), by express or implied *contract* between the parties.

(2) The provisions relating to *Character, Complaints, Confessions, Dying Declarations*, and the *Competency* and *Compellability of witnesses* are wholly or partly peculiar to the criminal law.

(3) Civil cases may be proved by a *preponderance of evidence* (*Cooper* v. *Slade*, 6 H.L.C. 746, 772); criminal charges must be proved *beyond a reasonable doubt* (*R.* v. *White*, 4 F. & F., 383; *R* v. *Hodge*, 2 Lew. C.C. 227; 42 Sol. Jo. 835, *per* Lord Ludlow; *R.* v. *Lee*, 24 T.L.R. 627; Wills Circ. Ev., 6th ed., 287-304, 315-9). This distinction, which dates from the end of the eighteenth century, was due to the reaction, then setting in, against the rigours of the penal code, and was originally applied *in favorem vitæ* to capital cases only [10 Am. L. Rev. 642; Wigmore, s. 2497; Tay., s. 112; Best, s. 96; Steph., art. 94]. As to the amount of evidence required to support issues resting on the prosecution or prisoner respectively, see *post*, 34.

Whether criminal charges arising in *civil* proceedings must be proved with equal strictness is doubtful. The affirmative is supported by Taylor and Stephen, *sup.*: and, in an action on a fire policy, it has been held that the proof of a plea of wilful burning must suffice to convict of arson (*Thurtell* v. *Beaumont*, 1 Bing, 339); so in actions for libel with pleas in justification imputing forgery (*Chalmers* v. *Shackell*, 6 C. & P. 475), or bigamy (*Willmett* v. *Harmer*, 8 C. & P. 695). The weight of opinion, however, is *contra*, the reasons for the criminal rule being inapplicable to civil cases. Thus, in actions for penalties under the Corrupt Practices Act, 1854, a charge of bribery might be proved by a mere preponderance of probability (*Cooper* v. *Slade, sup.*; *Magee* v. *Mark*, 11 Ir. C.L.R. 449, *per* Pigot, C.B. *diss.* Fitzgerald, B.); so, as to the forgery of a deed in an ejectment action (*Doe* v. *Wilson*, 10 Moo. P.C. 502, 531); and in actions on burglary policies (*Hurst* v. *Evans*, 1917, 1 K.B. 352), or against carriers (*Vaughton* v. *L & N.W. Ry.*, L.R. 9 Ex. 93; *Boyce* v. *Chapman*, 2 Bing. N.C. 222; *Blankensee* v. *Midland Ry. Co.*, 28 L. Jo. 325), the felony

of the defendent's servants need not be strictly established; and the weight of opinion in America is to the same effect (10 Am. Law Rev. 642; Wigmore, s. 2498; Thayer, Pr. Tr. Ev. 558 *n.*).

LEX FORI. Unless otherwise provided by statute, questions of evidence are determined by the *lex fori* and not by the *lex loci contractus* (*Bain* v. *Whitehaven Ry.*, 3 H.L.C. 1, 19; *Hamlyn* v. *Talisker*, 1894, A.C. 203, 213). Thus, copies of foreign documents though admissible in a foreign Court, will be rejected unless complying with English Law (*Brown* v. *Thornton*, 6 A. & E. 125); and conversely, a document admissible here has been rejected on an Indian Appeal (*Clark* v *Mullick*, 3 Moo. P.C. 252, 279). [Tay., s. 49; Dicey, Confl. of Laws, 2nd ed. 708, 712.] With regard to Interpretation, the general rules are that, unless a different intent is expressed in the document, wills and contracts affecting realty are governed by the *lex situs*, wills of personalty by the *lex domicilii*, and contracts, &c., affecting personalty by the *lex loci contractus* (*Bain* v. *Whitehaven Ry., sup.; Re Scholefield*, 1908, 2 Ch. 408); or where such contracts are made between residents in different countries, by the law intended by the parties, *i.e.* generally the *lex loci solutionis* (*Hamlyn* v. *Talisker, sup.; Chatenay* v. *Brazilian Co.*, 1891, 1 Q.B. 79; *Hansen* v. *Dixon*, 96 L.T. 32).

FUNCTIONS OF JUDGE AND JURY. LAW AND FACT. The duty of the presiding judge at a trial by jury is four-fold: He must (1) decide all questions as to the *admissibility* of evidence; (2) instruct the jury as to any specific rules of law or practice affecting its *production or effect;* (3) determine at the close of the case whether *any evidence* has been given fit to be considered by the jury; and (4) explain to them the general principles of law applicable to the issues, discriminating, where necessary, between questions of *law* which belong to the Court and questions of *fact* which, in general, belong to the jury (Tay., s. 23). To this it may be added that, in summing-up, he is entitled, provided he leaves the issues of fact to the jury, to express his own opinion on the merits of the case (*post,* 13).

(1) **Admissibility of Evidence.** Questions as to the admissibility of evidence are questions of law, and determinable by the judge; questions as to its credibility and weight, are questions of fact, and in general belong to the jury. Whether there is *any* evidence, therefore, is for the judge; but whether there is *sufficient* evidence is for the jury. It has even been held that where testimony is entirely unimpeached, a judge may act on it without leaving its credit to the jury (*Davis* v. *Hardy*, 6 B. & C. 225). Under the head of admissibility fall questions whether a declaration is part of the *res gestæ;* a fact sufficiently 'similar' to show knowledge or system (*post,* chap. xii.); a communication privileged; a confession voluntary; a declarant in a pedigree case legitimately connected with the family; a dying declaration made without hope of recovery; the issues on a plea of *res judicata* identical; a witness competent, justified in refusing to answer, or sufficiently ill for his deposition to be read; evidence admissible as corroborative (*post,* 484-94); or a document duly executed, stamped or produced from proper custody or after sufficient search [Tay., ss. 23-4, 517; Best, s. 82].

Disputed facts. Moreover, where the question of admissibility depends on the proof of some preliminary, but disputed fact, it must in general be decided

by the judge alone, since as the jury are only sworn to try the issue, it is not practicable to take an interlocutory verdict, or receive evidence *de bene esse*, leaving it to be decided at the end of the case whether it should have been received or not (*Bennison* v. *Jewison*, 12 Jur. 485; *Bartlett* v. *Smith*, 11 M. & W. 483; *Lewis* v. *Marshall*, 7 M. & G. 729, 743-4; *Cleave* v. *Jones*, 7 Ex. 421; *Boyle* v. *Wiseman*, 11 Ex, 360); and this is so, even where the given fact happens to be also in issue in the action and ultimately determinable by the jury. Thus, in pedigree cases, the judge may decide to receive a declaration, though the relationship of the declarant is the very point in issue (*Doe* v. *Davies*, 10 Q.B. 314; *Re Perton*, 53 L.T. 707, 709); and, if a *primâ facie* case is made out, he is not bound to hear evidence on the *voir dire* to rebut the fact (*Hitchins* v. *Eardley*, L.R. 2 P. & D. 248); and the same rule is said to apply to proof of handwriting, in order to admit entries in a register, and of agency in order to admit the declarations of the agent (*Doe* v *Davies, sup.*). So, in an action of contract, where the defendant, on notice, produced a document which the plaintiff denied to be the contract, Byles, J., held the determination of this point to be for him, though, by consent, he took the opinion of a jury thereon as an interlocutory issue (*Froude* v. *Hobbs*, 1 F. & F. 612). And where a plaintiff had denied, in chief, that the contract on which he sued was in *writing*, this was treated as a question for the judge on which evidence *contra* could at the option of the defendant, be either at once interposed, or postponed (*Cox* v. *Couveless*, 2 *id.* 139). On the other hand, in an action on a policy, where the defendant, on notice to produce, denied the existence of any policy, the judge was held to have acted rightly in admitting the plaintiff's copy and leaving the question of the existence of an original, to the jury, Bramwell, B., remarking that "where the objection to the copy concedes that there was primary evidence in existence, but defective in some collateral matter, *e.g.* as to the stamp, the judge must before he admits the copy, hear and determine the objection. But where it goes to the very foundation of the action, he should not decide the matter, but receive the copy and leave the main question to the jury" (*Stowe* v. *Querner*, L.R. 5 Ex. 155). The jury may, also, it seems, be asked whether they believe the testimony as to the loss of a document, so as to justify the admission of secondary evidence (*Berwick* v. *Horsfall*, 4 C.B.N.S. 450).

Evidence to prove or disprove facts of this nature should, however, in general, be interposed when the question arises, and not postponed (*Boyle* v. *Wiseman*, 11 Ex. 360; *Cox* v. *Couveless, sup.*). Moreover, in deciding the question, the better opinion is that the judge is not confined to strictly legal evidence, but may rely, *e.g.* on affidavits (*Knight* v. *Campbell, per* Pollock, C.B. cited Tay., s. 517; *Duke of Beaufort* v. *Crawshay*, L.R. 1 C.P. 699); nor need these preliminary facts be proved beyond reasonable doubt, it being sufficient, if they are merely *primâ facie* established (*Hitchins* v. *Eardley, sup.*; Tay., s. 24A). An erroneous decision thereon may, however, be reviewed (*Cleave* v. *Jones*, 7 Ex. 421). As to inspection of a document by the judge, to determine its claim of privilege, see *post*, 200.

(2) **Production and Effect.** It is the duty of the judge to explain, and of the jury to observe, any legal rules which regulate the production or effect of evidence, *e.g.* which side has the burden of proof; what presumptions apply; when corroboration is required; when statements are evidence, and for what purpose and against whom; and when documents are conclusive or when

merely *primâ facie* evidence. He may also advise them to give more credence to oral evidence than affidavits, and to direct and positive testimony than the speculative opinion of experts [Tay., s. 25]. Moreover, the judge may and should assist the jury with his advice when the testimony is conflicting, and even state his view as to the general merits of the case. Thus, though he is not justified in directing that they *must* find the facts in a particular way, he may state his view that they should be so found, or ought not to be accepted by the jury at all; and he is entitled to tell them that a prisoner's story is a remarkable one, or that it differs from other accounts he has given of the same matter (*R.* v. *O'Donnell,* 12 Cr. App. R. 219). So, in a murder trial, though it is inadvisable, it is not improper for him to suggest to the jury further theories of the cause of death than those presented by the prosecution or defence (*R.* v. *Smith,* 84 L.J.K.B. 13, 2153).

(3) **Case for the Jury**: *Civil Cases.* Formerly, if there was a scintilla of evidence to support the issues, the judge was bound to leave it to the jury; but now, in every case, it is for the judge to decide whether there is any evidence from which the jury can *reasonably* find for the party on whom the burden of proof rests (*Ryder* v. *Wombwell,* L.R. 4 Ex. 32, 38; *Giblin* v. *McMullan,* L.R. 2 P.C. 317, 335; *Metropolitan Ry.* v. *Jackson,* 3 App. Cas. 193, 207-8; *Hiddle* v. *National, &c., Co.,* 1896, A.C. 372; *Skeate* v. *Slaters,* 1914, 2 K.B. 429). If there is no evidence, or a mere scintilla, it is his duty to withdraw the case from the jury and enter judgment for the opposite party (*Ryder* v *Wombwell, sup.; Turner* v *Bowley,* 12 T.L.R. 402, *per* Lord Esher). And the test whether the evidence only amounts to a scintilla, is to assume it uncontradicted, and then inquire whether the jury would be justified in founding a verdict thereon (*Exp. Morgan,* 2 Ch. D. 72, 90, *per* Mellish, L.J.). On the other hand, if there be *conflicting* evidence, it must be left to the jury (*Dublin Ry.* v. *Slattery,* 3 App. Cas. 1155); and in doubtful cases, it is always prudent to take this course, leaving its justification for future decision (Tay., s. 25*a*). Moreover a plaintiff cannot, unless he consents, be non-suited on the mere opening of counsel without his evidence being heard, or on merely taking it as read, and if this has been done the Court of Appeal will hear it before deciding the case; so a defendant, even though the judge is about to decide in his favour, has the right to have his evidence heard before a decision is given (*Exp. Jacobson, re Pincoffs,* 22 Ch. D. 312; *Singer* v. *Wilson,* 3 App. Cas. 376; *Fletcher* v. *L. & N. W. Ry.,* 1892, 1 Q.B. 123; *Jones* v. *J.,* 1895, P. 201). *Criminal Cases.*—If at the close of the case for the prosecution, there is not sufficient evidence to go to the jury, the judge is not, in the absence of a submission by the defendent, bound to stop the case, for the defendant must take his chance of the defence disclosing incriminating matter (*R.* v. *Martin,* 17 Cox 36; *R.* v. *George,* 1 Cr. App. R. 168); and even where the judge mistakenly rules that there *is* sufficient evidence to go to the jury, a conviction founded on further facts disclosed by the defence, will not be quashed (*R.* v. *Power,* 1919, 1 K.B. 572; *R.* v. *Fraser,* 7 Cr. App. R. 99; *R.* v. *Pearson,* 72 J.P. Rep. 449; *R.* v. *Bower,* 1919, 1 K.B. 172; *contra, R.* v. *Joiner,* 4 Cr. App. R. 64, is apparently not sustainable).

(4) **Law and Fact.** Generally speaking, in jury-trials matters of *law* are determinable by the judge and matters of *fact* by the jury; *Ad questionem facti non respondent judices, ad quæstionem juris non respondent juratores.* In certain exceptional cases, however, matters of fact are determined by the

judge; and incidentally, matters of law are often determined by the jury, since, where their verdict is *general, i.e.* for plaintiff or defendant, or guilty or not guilty, it is compounded both of the facts and the law applicable thereto. But though they have a right to find such general verdicts, the jury may, if in doubt as to the law or its application, find the facts *specially,* leaving the Court to pronounce judgment on the whole matter [Tay., ss. 23-48; Best, ss. 80-82; Gulson on Proof, 211-3. As to Law and Fact generally see Thayer, Pr. Tr. Ev. 183-262; Markby, 2 Law Mag. 4th series, 311; 31 Law Mag. 1; 12 Harv. L. Rev. 457-60; 545; 15 *id.* 271; 34 *id.* 123; 29 Yale L. Jo. 253; and as affecting appeals, see 108 L.T. Jo. 360, and Boulton on Case Stated, 107-129].

By *matter of law,* in this connection is usually meant some duty, or standard, which it is the province of the Court to apply and enforce; by *matter of fact,* some issue of fact which is raised on the pleadings (*Bartlett* v. *Smith,* 11 M. & W. 483; *Bennison* v. *Jewison,* 12 Jur. 485; Thayer, Pr. Tr. Ev. 184-193). But this distinction is not always reliable. Thus in English Courts, although the existence of English law is a question of law to be determined by authorities and argument, the existence of Scotch, Colonial or foreign law is treated as a question of fact to be determined by evidence; so that, in the House of Lords or Privy Council, what was a question of fact in the Court below to be established by evidence, may become on appeal a question of law to be judicially noticed (*post,* 20). Again, what is 'reasonable' is sometimes treated as a question of law and sometimes as one of fact. Indeed, the decision of the point often depends, not on any inherent distinction, but merely on the construction of some particular statute. In civil cases the objection that a given matter is for the judge or jury respectively should be raised at the trial, and is too late on appeal (*Maskelyne* v. *Stollery,* 16 T.L.R. 97, H.L.); but in a criminal trial the judge has no power to draw inferences from the finding of the jury; and where the latter had stated in answer to the judge that they believed the evidence for the prosecution, and he thereupon entered a verdict of guilty, the conviction was quashed (*R.* v. *Farnbrough,* 1895, 2 Q.B. 484).

Law. The following questions, *inter alia,* are deemed to be matters of law, and determinable by the judge: Whether the rate of interest is excessive, or a bargain harsh and unconscionable, under the Money-lenders Act, 1900, since the word 'Court' in the Act can only refer to the judge (*Abrahams* v. *Dimmock,* 1914, 2 K.B. 372; *Wells* v. *Holland,* 41 Ir. L.T. Rep. 217); whether certain acts "tend to produce public mischief" (*R.* v. *Brailsford,* 1905, 2 K.B. 730, 747); whether an article is so dangerous as to impose a special duty on the user (*Blacker* v. *Lake,* 106 L.T. 533); whether a custom (*Bradbury* v. *Foley,* 3 C.P.D. 129, 131) or a covenant in restraint of trade (*United Shoe Co.* v *Brunet,* 1909 A.C. 330, 341), is reasonable; or whether on a charge of perjury, the matter sworn to is 'material' (Perjury Act, 1911, 1 (6); *cp. R.* v. *Baker,* 1895, 1 Q.B. 797). The *Construction of Documents, e.g.* statutes, records, deeds, wills, or ordinary correspondence, is usually held to be matter of law and not of fact (*Lyle* v. *Richards,* L.R. 1 H.L. 222, 241; *Hutchison* v. *Bowker,* 9 L.J. Ex. 240; Tay., 10th ed. s. 43; *post,* chap. xlvi; *contra* Thayer, Pr. Tr. Ev. 203-7); but in either case it is for the Court and not the jury. Thus it is for the judge to say whether a writing constitutes a sufficient acknowledgment under the Statutes of Limitation (*Morrell* v. *Frith,* 3 M. & W. 402; *Routledge* v. *Ramsay,* 8 A. & E. 221), or whether a sum payable on a breach

of contract is a penalty or liquidated damages (*Wilson* v. *Love*, 1896, 1 Q.B. 626, C.A.). And, although the question of "parcel or no parcel" is for the jury, the judge must direct them as to any documents affecting that question (*Lyle* v. *Richards, sup ; post*, chap. xlvi). It is for him, also, to construe a contract or a patent specification after the meaning of any peculiar terms, or the existence of the surrounding circumstances, if disputed, has been ascertained by the jury; it being the duty of the latter to take the construction from the Court, either absolutely, if there be no such terms or circumstances to be ascertained, or conditionally, if there be such (*Neilson* v *Harford*, 8 M. & W. 806; *Hitchin* v. *Groom*, 5 C. B. 515; *Bowes* v. *Shand*, 2 App. 455, 462). So, as to the construction of policies; although, if the question whether they cover particular goods depends on a latent ambiguity requiring resort to parol evidence, it is for the jury (*Hordern* v. *Commercial Union*, 56 L.T. 240). The construction of *foreign contracts* is for the judge, after proof of translation, and of the local meaning of the terms (*Chatenay* v. *Brazilian Co.*, 1891, 1 Q.B. 79; *Copin* v. *Adamson*, 31 L.T. 242, 258; *post*, 390, as to foreign *law*, see *infra* Fact), as also is that of lost documents whose contents have been proved by secondary evidence (*Berwick* v. *Horsfall*, 4 C.B.N.S. 450). The inspection of a record is likewise the peculiar province of the Court (*R.* v *Hucks*, 1 Stark. 521); and where the judge considered that a certain word was '*My.*' (*i.e*, Mary), he excluded evidence that it was '*Mrs.*,' and refused to leave the question to the jury (*Remon* v. *Hayward*, 2 A. & E. 666). So, where the question was whether a deed was delivered as an escrow and the facts were contained in an accompanying letter, its construction was held for the judge alone (*Furness* v. *Meek*, 27 L.J. Ex. 34; *post*, chap. xlv.).

On the other hand, where a contract is wholly oral (*Maskelyne* v. *Stollery*, 16 T.L.R. 97, H.L.), or partly oral and partly written (*Bolckow* v. *Seymour*, 17 C.B.N.S. 107; *Moore* v. *Garwood*, 4 Ex. 681), or perhaps consists of a series of informal documents (*Stoddard* v. *Watchmakers' Alliance*, Times, Dec. 14, 1901, C.A.; *contra, Kay* v. *Cotesworth*, 7 Ex. 595), the question is for the jury. So, where the question was whether the defendant had adopted the acceptance of a bill, the construction of a letter written by him, taken in connection with his subsequent conduct, was held for them (*Wilkinson* v. *Stoney*, 1 Jebb & Symes, 509). And in cases of libel, whether in civil or criminal proceedings (*Nevill* v. *Fine Art Co.*, 1897, A.C. 68; Tay., s. 42), written threats (*R.* v. *Coady*, 15 Cox 87), incitements (*R.* v. *Fox*, 19 W.R. 109), or false pretences (*R.* v. *Cooper*, 2 Q.B.D. 510; *R.* v *Randell*, 16 Cox 335; *R.* v. *King*, 1897, 1 Q.B. 214, 219; *R.* v. *Rosenson*, 12 Cr. App. R. 235), although it is for the judge to decide whether the written words were *capable* of the meaning alleged, it is for the jury to say whether they in fact *bore it*.

Fact. Questions of fact are in general for the jury. Thus, it is for the jury to determine the question of *actual knowledge, real intention, bona fides*, or *express malice* (Tay., s. 38). So, the existence of a *nuisance*, the *unsoundness of a horse*, the *unseaworthiness of a ship*, the *competency of a testator*, or his subjection to *undue influence*, are for them (*id.*); as also, in cases outside the Workmen's Compensation Act, *sup.*, whether an agent's act was within the scope of his authority (*post*, chap. vii.). In Divorce cases, where *adultery* is in issue on the pleadings, it is for the jury, when not, for the judge (*Long* v. *L.*, 15 P.D. 218; *Pomero* v. *P.*, Times, Dec. 20, 1884; *Farulli* v. *F.*, 61 Sol. Jo. 110). And even where *facts are admitted*, the inferences

therefrom, if doubtful, are still for the jury (*Davey* v. *L. & S. W. Ry.*, 12 Q.B.D. 70, 76, C.A.; *Pearce* v. *Lonsdowne*, 69 L.T. 316, 317); otherwise they are for the judge (*R.* v. *Oppenheimer*, 1915, 2 K.B. 755).

The meaning of technical terms is a question of fact for the jury (*Bowes* v. *Shand, sup.*) *e.g.*, the trade meaning of "bales" (*Gorrisson* v. *Perrin*, 2 Q.B. N.S. 681), "June and (or) July" (*Alexander* v. *Vanderzee*, L.R. 7 C.P. 530), or "payment in from six to eight weeks" (*Ashforth* v. *Redford*, L.R. 9 C.P. 20); as also the question whether the facts proved constitute a "representation" under the Dramatic Copyright Act, 1833 (*Planché* v. *Braham*, 8 C. & P. 68). And where it is doubtful whether a word is used in its ordinary sense, or not, the question is for the jury (*Simpson* v. *Margetson*, 17 L.J.Q.B. 81); though words of doubtful import used in Acts of Parliament should, it seems, be explained to the jury by the judge, *e.g.* the meaning of "town" under the Railway Clauses Consolidation Act, 1845 (*Elliot* v. *S. Devon Ry.*, 2 Ex. 725). Where an offer was of 'good' barley and the acceptance of 'fine,' the jury were allowed to find that these terms meant different things, but not that the acceptor by 'fine' meant 'good,' the Court holding there was no contract (*Hutchison* v *Bowker*, 5 M. & W. 535).

The following questions of fact, however, are by exception for the *judge*: (1) The existence of any disputed fact on which the admissibility of evidence depends (*ante*, 11-12). (2) The question of what, in certain cases, is *reasonable, e.g.* the question of *reasonable and probable cause* in actions for malicious prosecution and false imprisonment. Here, if the facts are in dispute, it is for the jury to find whether the defendant took reasonable care to inform himself of the true state of the case, and honestly believed in the charge (*Brown* v. *Hawkes*, 1891, 2 Q.B. 718; *Watson* v. *Smith*, 15 T.L.R. 473; *Bradshaw* v *Waterlow*, 1915, 3 K.B. 527), but for the judge, aided by their answers, to determine whether the facts so found amount to "reasonable and probable cause" for the prosecution or arrest (*Lister* v. *Perryman*, L.R. 4 H.L. 521; *Abrath* v. *N. E. Ry. Co.*, 11 App. Cas. 247; *Cox* v. *English Bank*, 1905, A.C. 168). So, the question of *reasonable suspicion* under the Pawnbrokers Act, 1872, although one of fact, is for the judge (*Howard* v. *Clarke*, 20 Q.B.D. 558, 562; *cp.*, *Carter* v. *Kimball*, 29 L. Jo. 398). And the same rule applies to what is a *reasonable time* for the performance of certain acts, *e.g.*, for an executor to remove goods from the testator's mansion (Co. Litt., s. 69); though these cases have been greatly reduced by Statutory or Common Law rules defining the meaning of reasonable time in many mercantile and other transactions. Thus, what is a reasonable time for notice of dishonour of a bill of exchange, which used to be a question for the judge, is now regulated by the Bills of Exchange Act, 1882, s. 49, sub-s. 12; so, what is a reasonable time in which to quit land is specially defined by the Agricultural Holdings Act, 1883, ss. 33, 54. But in general, where no fixed legal rules apply, this question is one purely for the jury. [Tay., ss. 30-36.] It seems doubtful whether *foreign law*, though treated as a question of fact, is for the jury or judge. In *R.* v *Picton*, 30 How. St. Tr. 536-40, 864-70, Lord Ellenborough left the question to the jury; see also Tay., s. 48; and *Rose-Troup* v. *Sleeping Car Co.*, Times, Feb. 3, 1911, *per* Bucknill, J.; *Contra*, *Copin* v. *Adamson*, 31 L.T. 242, 255, 258, where three judges held that foreign law, like the construction of foreign documents, was for the judge alone.

Mixed Law and Fact. In the following, which are usually termed mixed cases (Tay. 26), although they are treated by Austin as questions neither of law nor fact, but of the application of the given law to the given fact (Jurisp. vol. I., 236), and by Thayer as questions of fact merely (Pr. Tr. Ev. 193-202, 253), the functions of judge and jury are divided. Thus, in actions for *Necessaries,* it is a question of law for the judge whether the goods are capable of being necessaries, regard being had to the station in life of the infant, but a question of fact for the jury whether he was already adequately supplied with similar goods (*Nash* v. *Inman,* 1908, 2 K.B. 1, 13, C.A.). In actions of *Negligence,* it is a question of law for the judge whether, from the given state of facts, negligence *can* be inferred, and a question of fact for the jury whether it *ought* to be (*Metropolitan Ry.* v. *Jackson,* 3 App. Cas. 193, 207). And in cases of *Libel or Slander,* it is a question of law for the judge whether in the circumstances, the words used were *capable* of a defamatory meaning, and one of fact for the jury whether they *bore* it (*ante* 15); the question of privilege, if the underlying facts are undisputed, or have been found by the jury, is also one of law for the former, while that of malice, disentitling to privilege, is for the latter (*Clark* v *Molineux,* 3 Q.B.D. 237); and on a defence of 'fair comment' on 'a matter of public interest' the judge decides the latter point and the jury the former (*South Hetton Coal Co.* v. *N. E. Ry.,* 1894, 1 Q.B. 133, 141, C.A.). Whether an accident 'arose out of, and in, the course of employment,' under the Workmen's Compensation Act, 1906, is a mixed question, involving a finding of fact by the jury as to the nature and scope of the employment, and the cause of the accident, and one of law for the judge as to whether on the construction of the Act, these findings come within it (*Hutchinson* v. *McKinnon,* 32 T.L.R. 283, H.L.).

CHAPTER II.

MATTERS OF WHICH EVIDENCE IS UNNECESSARY.

No evidence is required of matters which are either, (*a*) Admitted for the purposes of the trial or (*b*) Judicially noticed.

(*a*) **ADMISSIONS FOR PURPOSES OF TRIAL.** Admissions for the purpose of dispensing with proof at the trial, which must be distinguished from those tendered as evidence, the former not being usually receivable in *other* proceedings and the latter not being usually *conclusive,* may be made as follows:

In **Civil Cases,** (1) By the *Pleadings,* or default thereof (*Ripley* v. *Arthur,* 86 L.T. 735). Subject to the exceptions *infra,* or to amendment by leave, these are conclusive and exclude any evidence at the trial for or against the admitted matters (*The Buteshire,* 1909, P. 170; *The Rothbury,* 10 T.L.R. 60; *The Hardwicke,* 9 P.D. 32; *Maclaren* v. *Davis,* 6 T.L.R. 372); so, generally as to admissions in a Preliminary Act, which are even stronger than those in the pleadings (*The Seccombe,* 1912, P. 21, 59). (2) *Pursuant to notice* under O. 32, rr. 2-5. By rule 2, the party notified may admit "*any documents, saving all just exceptions,*" which dispenses with formal proof, but preserves other objections (*Dudley Co.* v. *D. Corp.,* 120 L.T. Jo. 521); the admission of a copy, however, does not dispense with proof of the original (*Sharpe* v. *Lamb,* 11 A. & E. 805), and the admitted document should be formally put in at the trial and marked by the registrar (*Watson* v. *Rodwell,* 22 Ch. D. 153). By rule 4, he may also admit "*any specific fact or facts*" mentioned in the notice; such admissions, however, are only available for the particular person giving, and cause affected by, the notice, and may be amended or withdrawn on terms. (3) *By agreement, or otherwise,* before or at the trial by the parties or their agents. Thus, a solicitor's letter, written to the opposite party, and containing admissions, will bind his client, and may entitle the opponent to sign judgment (*Ellis* v. *Allen,* 1914, 1 Ch. 904). And an admission made by counsel at the trial for the purpose of dispensing with proof, has been held to preclude any evidence on the point (*Urquhart* v. *Butterfield,* 37 Ch. D. 357, 369, 374, C.A.); but in jury trials an opposite view seems to obtain (*Barnes* v. *Merritt,* 23 T.L.R. 419, C.A., cited *post,* 183; *Whitehead* v. *Scott,* 1 Moo. & Rob. 2); at all events where the inference from admissions is doubtful, evidence to support or rebut the suggested views is receivable, and should be left to the jury (*Davey* v. *L. & S. W. Ry.,* 12 Q.B.D. 70, 76, C.A.; *Pearce* v *Lansdowne,* 69 L.T. 316; *Sanders* v. *S.,* 19 Ch. D. 373, 380 C.A.); though an application to adduce such evidence made for the first time on appeal has been rejected (*Sanders* v. *S., sup.*). [Tay., s. 724; Ann. Pr. Notes to O. 32; Ros. N.P. 78-9; Gulson, ss. 463-5].

Admissions of the present kind do not, however, exclude evidence of the facts admitted in all cases, on account of the danger of fraud, *e.g.*, in *probate* suits (*Hutley* v. *Grindstone,* 5 P.D. 24), *divorce* cases (*Boucher* v. *B.,* 1 R. 494; and *cp. post,* 233), *peerage* claims (Hubback, Ev. of Succ. 97; Palmer Peerage Law, 239), or suits for *declarations of title to property* (*Williams* v. *Powell,* 1894, W.N. 141).

In **Criminal Cases,** except by a plea of guilty, admissions dispensing with proof, as distinguished from admissions or confessions which are evidential (as to which see *post,* chap. xxi.), are not allowed either in cases of felony or misdemeanour [*R.* v. *Thornhill,* 8 C. & P. 575; *R.* v. *Stevens,* 151 C.C.C. Sess. Pap. 182; *cp. A.-G.* v. *Bertrand,* L.R. 1 P.C. 520; Steph. art. 60; Best, s. 97]. A plea of guilty, however, only admits the offence charged and not the truth of the depositions (*R.* v. *Riley,* 18 Cox 285; *Foucar* v. *Sinclair,* 33 T.L.R. 318).

(*b*) **JUDICIAL NOTICE.** Courts will take judicial notice of the various matters enumerated below, these being so notorious or clearly established that evidence of their existence is unnecessary. [Tay., ss. 4-21; Ros. N.P. 80-84; Best, ss. 253-254; Steph. art. 58; Thayer, Pr. Tr. Ev. 277-312; *id.* Cases on Ev., 2nd ed., 19-23.]

Scope of the Rule. The doctrine of Judicial Notice extends to all departments of law, and is not confined to that of evidence. And it applies not only to judges, but also to juries with respect to matters coming within the sphere of their everyday knowledge and experience (*R.* v. *Rosser,* 7 C. & P. 648). Thus the latter, as well as the former, may be asked to notice, without proof, the meaning of the imputation "Frozen Snake" in a libel case (*Hoare* v *Silverlock,* 12 Q.B. 624, 633). Generally matters directed by statute to be judicially noticed, or which have been so noticed by the well-established practice or precedents of the Courts, *must* be recognised by the judges; but beyond this, they have a wide discretion and *may* notice much which they cannot be required to notice. The matters noticeable may include facts which are in issue or relevant to the issue, as well as the contents of documents and their methods of proof; and the notice is in some cases *conclusive,* and in others (*e.g.* the genuineness of signatures) merely *primâ facie* and rebuttable.

Although, however, judges and juries may, in arriving at decisions, use their *general* information and that knowledge of the common affairs of life which men of ordinary intelligence possess (*Byrne* v. *Londonderry Co.,* 1902, 2 I.R. p. 480, approved *Hennessy* v. *Keating,* 1908 1 I.R. p. 83; *Duberley* v. *Mace,* 6 B.W.C.C. pp. 84, 86, C.A.; *R.* v. *Jones,* cited Best, s. 254), they may not, as might juries formerly (Thayer, Pr. Tr. Ev. 170, 298), act on their own *private knowledge or belief* regarding the case but, if they have material facts to impart, should be sworn as witnesses [Tay., s. 1379; Best, ss. 38, 88. As to judges, see *Hurpurshad* v. *Sheo Dyal,* L.R. 3 Ind. App. 259; *R.* v. *Antrim,* 1895, 2 I.R. 603, 649; 71 J.P. Jo. 290, 302; as to Juries, see *R.* v. *Rosser,* 7 C. & P. 648, *per* Parke, B.; *Manly* v. *Shaw,* Car. & M. 361; *R.* v. *Sutton,* 4 M. & S. 532]. When so sworn, a judge (unlike a juryman, Tay., s. 1379; *post,* 197-8), must not, either when acting alone or with others, adjudicate on his own testimony, save, possibly, in formal, immaterial, or undisputed matters [*R* v. *Hacker,* 5 How. St. Tr. 1181; and see 6 *id.* 1013 *n.*; *R.* v. *Antrim,* 1901, 2 I.R. 133, 141, 164; *R.* v. *Galway,* 31 Ir. L.T.R. 160;

R. v. *Tyrone,* 44 Ir. T.L.R. 264; *Mitchell* v *Croyden,* 30 T.L.R. 526; Wigmore, s. 1909]. Nor may judges act on information gained in other cases (*Robinson* v. *R., inf.; post,* 29).

(1) **Law. Procedure. Custom.** *Law.* Judicial notice will be taken of the existence and contents of all Public Statutes; and all Acts of Parliament of whatever nature passed since 1850, unless the contrary is expressly provided (52 & 53 Vict. c. 63, s. 9; *post,* 549); as well as of every branch of unwritten law obtaining in England or Ireland (Jud. Act, 1873, s. 24). Thus if in a common law Court, points of equity, or of parliamentary, ecclesiastical or admiralty law arise, they must be determined not by calling experts, but by the Court itself, either of its own knowledge, or by inquiry, or by hearing authorities and argument (*Sims* v. *Marryat,* 17 Q.B. 281, 288, 292; *Chandler* v. *Grieves,* 2 H. Bl. 606 *n.*; *Reynolds* v. *Fenton,* 3 C.B. 187, 191, where notice was taken that Irish suits were commenced by process and not by verbal summons). Scotch, colonial, or foreign law, however, is not judicially noticed, but must be proved as a fact by skilled witnesses (*ante,* 14; *post,* 388), except Scotch law in the House of Lords, or Colonial law in the Privy Council, where what was a question of fact in the Court below to be proved by evidence, becomes a question of law to be judicially noticed (*Cooper* v. *C.,* 13 App. Cas. 88; *Lyell* v. *Kennedy,* 14 *id* 437). As to notice by British Consular Courts of foreign local law, see *Sec. of State* v. *Charlesworth,* 17 T.L.R. 265. *Illegality,* if appearing on the face of a contract, will be judicially noticed, whether pleaded or not; *aliter* where it is merely deducible from surrounding circumstances (*North Western Salt Co.* v. *Electrolytic Co.,* 1914, A.C. 461, which appears to modify *Scott* v. *Brown,* 1892, 2 Q.B. 724, and *Re Robinson,* 1912, 1 Ch. 717 C.A.; see also *Montifore* v *Menday, &c., Co.,* 1918, 2 K.B. 241).

Procedure. Judicial notice will be taken of the procedure and privileges of both Houses of Parliament (*Stockdale* v. *Hansard,* 9 Ad. & E. 1; *Bradlaugh* v. *Gossett,* 12 Q.B.D. 271); though not of Orders in Council, nor transactions in parliamentary journals (*A.-G.* v. *Theakstone,* 8 Price 89; *R.* v. *Knollys,* 1 Ld. Ray. 10, 15, as to proof of which see chap. xliii.). Also of the Articles of War, and the Rules of Procedure now superseding them made under the Army Act, 1881 (ss. 69, 70); though not of a book called the "Rules and Regulations for the Government of the Army" (*Bradley* v. *Arthur,* 4 B. & C. 304), nor of the Regulations for the Territorial Force, which must be proved by Government printers' copy (*Todd* v. *Anderson,* 1912, Sc. (J.) 105). Also of the Rules made by the Lord Chancellor or other authorized officials under various Acts (*e.g.* under the Bankruptcy Act, 1914, s. 132); and of the jurisdiction and rules of procedure of the various divisions of the High Court (Jud. Act, 1873, s. 24; Ros. N.P. 82; Tay. s. 19); though the proceedings and practice of inferior Courts, unless regulated by statute, are only noticed by themselves, and not by each other, or by the High Court (Steph. art. 58 (5); *Van Sandau* v. *Turner,* 6 Q.B. 773, 784; *Dance* v. *Robson,* M. & M. 295). The Courts will also notice the privileges of their own officers and solicitors (*Stokes* v. *Mason,* 9 East, p. 426; *Walford* v. *Fleetwood,* 14 M. & W. 449); and all matters appearing in their own proceedings (*e g.* that an indictable conspiracy has been committed by some of the parties, *Scott* v. *Brown,* 1892, 2 Q.B. 724; *Hunt* v. *Fineburgh, inf.*); though not, it has been said, the names of their officers (*Frost* v. *Hayward,* 10 M. & W. 673; in *Hunt* v. *Fineburgh,* Times, Dec. 8, 1888, however, judicial

notice was taken that one of the solicitors named on the record had been suspended); nor a mere printed, but unidentified, copy of the Law Society's Rules (*Pickles* v. *Sutcliffe*, 37 L.J. 543). And judicial notice will not be taken that the issue under trial is identical with one previously tried before the same judge and so is *res judicata* (*Robinson* v. *R.*, 2 P.D. 75; cited *post*, 416.

Custom. Notice will be taken of local customs of descent, *e.g.* Gavelkind and Borough-English (*Re Chenoweth*, 1902, 2 Ch. 488); the general practice of conveyancers (*Re Rosher*, 53 L.J. Ch. 722); the rules of average adjustment (*Lohre* v. *Aitchison*, 3 Q.B.D. 558, 561); and all customs which have been either (1) *settled by judicial decision—e.g.* the rule of the road (*Leame* v. *Bray*, 3 East, 593; *Turley* v. *Thomas*, 8 C. & P. 103), the lien of innkeepers on their guests' goods for the amount of their bills (*Mulliner* v. *Florence*, 3 Q.B.D. 484), the lien of bankers on their customers' securities (*Brandao* v. *Barnett*, 3 C.B. 519, 530; *Lond. Chart. Bk. of Australia* v. *White*, 4 App. Cas. 413), the fact that debentures are negotiable instruments, though not so expressed (*Edelstein* v. *Schuler*, 1902, 2 K.B. 144), the custom of hotel-keepers to hold their furniture on the hire-purchase system (*Crawcour* v. *Salter*, 18 Ch. D. 30; *Exp. Turquand, Re Parker*, 14 Q.B.D. 636), and of horsedealers to receive horses on sale or return (*Exp. Wingfield, Re Florence*, 10 Ch. D. 591); or (2) *certified to and recorded in any of the Divisions of the High Court—e.g* the customs, certified by the Recorder of London, of foreign attachment (*Crosbie* v. *Hetherington*, 4 M. & Gr. 933), or of shops being market-overt (*Hargreave* v. *Spink*, 1892, 1 Q.B. 25); the old rule that each Court only notices customs held by or certified to it, is probably superseded by the Judicature Act, 1873 (Steph. art. 58 (4) *note*). *Recent* customs will be judicially noticed in the High Court if shown (*e.g.* by reported decisions, *Exp. Powell, Re Matthews*, 1 Ch. D. 501) to have been determined therein at all events more than once (*Exp. Turquand, sup.*); and so, also, as to County Courts (*George* v. *Davies*, 1911, 2 K.B. 445); though such customs may, of course, be displaced by proof of later ones (*Moult* v. *Halliday*, 1898, 1 Q.B. 125).

(2) **Constitutional, Political, and Administrative Matters.** Judicial notice will be taken of all public matters affecting the government of the country—*e.g.* the accession and demise of the Sovereigns of this country; the existence and titles of all other acknowledged Sovereign Powers, judges being bound to know whether a State has been recognised as independent or not (*Taylor* v. *Barclay*, 2 Sim. 213); the days of general elections (Tay. s. 18); the date and place of the sittings of Parliament (*R.* v. *Wilde*, 1 Lev. 396; *Birt* v. *Rothwell*, 1 Ld. Raym. 210, 343); the principal officers of State and heads of departments, whether past or present (*Whaley* v. *Carlisle*, 17 Ir. C.L.R. 792, where the Court judicially noticed that Lord Hawkesbury had been Foreign Minister in 1803); the judges of the Supreme Court, but not, it seems, those of inferior courts (*Van Sandau* v. *Turner*, 6 Q.B. 773, 786); and the marshals and sheriffs, though not their deputies (*Grant* v. *Bagge*, 3 East, 128). So, judicial notice will be taken of a war in which this country is, or has been, engaged [*R.* v. *Berenger*, 3 M. & S. 67; *Ward* v. *Murray*, Times, Mar. 5th, 1900, where the siege and relief of Kimberley on certain dates were noticed; *Re A Petition of Right*, 1915, 3 K.B. 649, 658, where it was noticed that certain districts in England had been attacked by aircraft; *Re*

Vine St. Superintendent, 1916, 1 K.B. 268, 274-5, where it was noticed that German civilians in this country were carrying on war by intrigues, spying, and the use of wireless telegraphy, light-signalling, and carrier pigeons, and were communicating information to enemy submarines and Zeppelins; *The Pacific,* 33 T.L.R. 529, where it was noticed that Swedish firms were extensively engaged in facilitating the entrance of contraband goods into Germany; *The Alwina,* 32 *id.* 494, 495, where it was noticed that Germany having no convenient coaling stations, it was difficult for her ships to be coaled except by subterfuge]. On the other hand, where a war has not been publicly proclaimed, nor noticed in any statute, it must be proved to the jury (1 Hale 164; Fost, C.L.d. 1, c. 2, s. 12); and a war beween foreign Powers will not be noticed (*Dolder* v. *Huntingfield,* 11 Ves. 292; *sed qu.*).

(3) **Territorial and Geographical Divisions.** Judicial notice will generally be taken of the extent of British jurisdiction; but where this is in doubt, the Court may and should apply under the Foreign Jurisdiction Act, 1890, s. 4, to one of H.M.'s principal Secretaries of State, who is to furnish the information required, which shall be "conclusive evidence" of the matters stated (*Foster* v. *Globe Syndicate,* 1900, 1 Ch. 811); and if this has not been done, evidence will be receivable on the point (*Ibrahim* v. *Rex,* 1914, A.C. 599). Notice will also be taken of the territorial and administrative divisions of the country into counties (including those that are maritime), towns, parishes, &c. (*Deybel's Case,* 4 B. & Ald. 243; *R.* v *Ely,* 15 Q.B. 827; *R.* v. *St. Maurice,* 16 Q.B. 908); and of the geographical position and general names of districts and parts of the sea as marked in the Admiralty charts (*e.g.* that the term "the St. Lawrence" applies to both the gulf and river of that name; *Birrell* v. *Dryer,* 9 App. Cas. 345, *per* Lord Blackburn). But the Court will not take judicial notice of the precise extent or limits of the various counties and divisions; nor whether particular places are, or are not, situated therein; nor of the local position of particular places with respect to each other. Thus it has refused to notice that "Bedford Row, Holborn," was in the county of Middlesex, or that "the Court of Requests held at Kingsgate Street, Holborn," though established by Statute, was the Court of Requests for that county (*Thorn* v. *Jackson,* 3 C.B. 661; *cp. Church* v. *Imp. Gas Co., inf.* 25), or that a particular part of the Tower of London was within the City of London (*Brune* v. *Thompson,* 2 Q.B. 789), since in the first case it was notorious that parts of Holborn were within the City of London, and in the last that parts of the Tower were within the County of Middlesex. So, in *Kearney* v. *King,* 2 B. & Ald. 301, notice would not be taken that "Dublin" meant "Dublin in Ireland," since there might be other Dublins elsewhere; nor in *Kirby* v. *Hickson,* 1 L.M. & P. 364, would the Court notice that Park Street, Grosvenor Square, was within twenty miles of Russell Square.

(4) **Official Gazettes.** The official gazettes of London, Edinburgh, and Dublin will be noticed on their mere production (31 & 32 Vict. c. 37, ss. 2 and 5); but the entire Gazette and not a mere cutting must be produced (*R.* v. *Lowe,* 15 Cox 286). See *post,* 337-8.

(5) **Official Seals and Signatures.** Judicial notice will be taken of the following seals and signatures: The Great Seals of the United Kingdom and of England, Ireland and Scotland respectively (*Lord Melville's Case,* 29 How. St. Tr. 707); the Privy Seal and Privy Signet (*Lane's Case,* 2 Co. Rep. 17 *b*); the Royal Sign Manual and the signatures of the principal Secretaries

of State, with any matters stated thereunder (*Mighell* v. *Sultan of Johore*, 1894, 1 Q.B. 149, *e.g.* the certificate of the Secretary of State for India, authenticating the signature of an Indian official, *post*, 364); though not, it has been said, those of the Lords of the Treasury (*R.* v. *Jones*, 2 Camp. 131); the Treasury Solicitor's Seal, however, will be noticed (39 & 40 Vict. c. 18, s. 1); also that of the Minister of Pensions (Ministry of Pensions Act, 1916, s. 6), those of the Ministers of Labour, Food, Shipping and of the President of the Air Board (New Ministries, &c., Act, 1916, s. 11), and that of the Air Council (Air Force Act, 1917, s. 10), and of the Minister of National Service (Ministry of Nat. Service Act, 1917, s. 2); the Wafer Seal and Wafer Privy Seal framed under the Crown Office Act, 1877, ss. 4, 5 (3 *a*); the Seal and Privy Seals of the Duchies of Lancaster (Tay. s. 6) and Cornwall (26 & 27 Vict. c. 49, s. 2); the Seal of the Corporation of London (*Doe* v *Mason*, 1 Esp. 53); though not that of the Bank of England or other Corporations (*Doe* v. *Chambers*, 4 A. & E. 410; Ros. N.P. 132, unless admissible under 8 & 9 Vict. c. 113, s. 1, *post*, 553), nor it seems, those of County Councils unless expressly so provided, even where seals are conferred by Statute (Tay. s. 14; no seals are given to Parish Councils, *id.*); the Seals of the Old Superior Courts of Justice (*Tooker* v. *Beaufort*, Say. 297), of the Old Admiralty Court (*Green* v. *Waller*, 2 Lord Ray. 893), and of the Prerogative Court of Canterbury (*Kempton* v *Cross*, Cas. *temp.* Hardw. 108) and all seals authorized by statute to be used by any court of justice (*Doe* v. *Edwards*, 9 A. & E. 554; the statement to the contrary in Ros. N.P. p. 80, omits this case)—*e.g.* the Chancery Common Law Seal (12 & 13 Vict. c. 109, s. 11); and the Seals of the Courts of Probate (20 & 21 Vict. c. 77, s. 22), Divorce (20 & 21 Vict. c. 85, s. 13), Admiralty (24 & 25 Vict. c. 10, s. 14) and Bankruptcy (Bpy. Act, 1914, s. 142; Bpy. Rules, 1915, rr. 60-72).

The Judicature Acts confer no seal on the Supreme, or High, Court or its divisions (*Re Court Bureau*, 1891, W. N. 9; Steph. art. 58, *note*); but judicial notice is by statute required to be taken of the *signatures* of the judges of the superior Courts to any judicial or official document (The Evidence Act, 1845, s. 2, as modified by Jud. Act, 1873, s. 76; unless, at least, such signatures appear not to be affixed in the usual manner, *Blades* v. *Lawrence*, L.R. 9 Q.B. 374); and of the Examiners (O. 37, r. 18); and a seal is given to the Central Office of the Royal Courts of Justice and its various departments (Tay. s. 1539), documents duly stamped therewith being receivable in evidence without further authentication (O. 61, rr. 6, 7; *post* 553); so with documents purporting to be sealed with the seals of the various District Registries (Jud. Act, 1873, s. 61). Judicial notice is also required to be taken of the seal and signatures of the judges and registrars in Bankruptcy (Bankruptcy Act, 1914, s. 142; as to Ireland, see *Re Keller*, 22 L.R.I. 158), and of any person authorized under the Act to take affidavits (B.RR., 1915, r. 60); of the seal of the Enrolment Office in Chancery (12 & 13 Vict. c. 109, s. 17); and that of the County Courts (County Courts Acts, 1888, s. 180), and the Court of the Vice-Warden of the Stannaries (The Stannaries Act, 1836, c. 19). So, by the Companies Act, 1908, s. 225, judicial notice is, for the purposes of that section, to be taken of the signature of any officer of the High Court in England or Ireland, or of the Court of Session in Scotland, or of the Registrar of the Stannaries; as well as of the Seals and Stamps of their respective offices. But the signatures of the Attorney-General or Public

Prosecutor, evidencing consent to a prosecution, will not be judicially noticed, but must be proved in the ordinary way (*R.* v. *Turner,* 1910, 1 K.B. 346; *post,* 189-90).

In addition to the above, the seals authorized by statute to be used by numerous public offices and bodies are often either directed to be judicially noticed or rendered admissible in evidence without proof of their genuineness—*e.g.* those of the Patent and Record Offices (*post,* 549); of the Boards of Trade, Local Government, Poor Law, Public Health and Agriculture; of the Commissioners of Railways and Canals, Public Works, Prisons and Charities; and of the Apothecaries Co., &c. (Tay. ss. 6 *n,* 19).

So, under the Commissioners for Oaths Act, 1889, ss. 3, 6, and 1891, s. 2 (which replace O. 38, r. 6), judicial notice is required to be taken of the seals and signatures to affidavits &c., required for the purpose of any Court or matter in England, or for the registration of any instrument in the United Kingdom, of all persons authorised (*otherwise than by the law of any foreign country*) to administer oaths &c., in any place out of England. Such persons are, in Scotland, Ireland, the Channel Islands, or H.M.'s dominions (colonial or foreign)—any judge, court, notary-public, or other person lawfully authorized (O. 38 r. 6); and in foreign countries—the various diplomatic and consular agents. And similar notice will be taken of a colonial notary's seal and signature, although the document, *e.g.* a release, is not attested for the purpose of being used in Court (*Brooke* v *B.,* 17 Ch. D. 833); as also of a foreign notary's protest abroad of a foreign bill (*Chesmer* v. *Noyes,* 4 Camp. 129). But judicial notice will not be taken of an English protest of a foreign bill (*id.*) it being necessary either to call the notary, or where the entry was made by a deceased clerk in the course of duty, to prove this fact (*Poole* v. *Dicas,* 1 Bing, N.C. 649); though in *Brain* v. *Preece,* 11 M. & W. 773, 775, Lord Abinger, while admitting that it was usual to call the notary, doubted whether this was necessary, "for suppose the clerk were dead, still I think the protest would be sufficient evidence." Nor will the seals and signatures to affidavits of notaries-public &c., when *authorized merely by foreign law,* be judicially noticed (*Re Earl's Trusts,* 4 K. & J. 300); these must be verified independently by a British consul or vice-consul (*Brittlebank* v. *Smith,* 50 L.T. 491; but not by a foreign consul, even though there be no British consul, *Re De Salazar,* 21 W.R. 776), or by certificate of the High Court of the foreign country (*per* Field, J., cited Stringer, Oaths, 3rd ed. 47-9), or by the consul of such country in England (*Warren* v. *Swinburne,* 9 Jur. 510; *cp. Davis' Trusts,* 8 Eq. 48). [See *post,* 563; Stringer, 3rd ed. 46-55; *Sharpe* v. *Jackson,* 39 L. Jo. 400; Ann. Pr., Notes to O. 38, r. 6; as to non-contentious matters, see also Statutory Declarations, *post,* 501-2]. Colonial and foreign judicial documents purporting to be sealed with the seal of their respective courts are, however, admissible under 14 & 15 Vict. c. 99, s. 7 (*post,* 561). As to affidavits, &c., sworn out of, but required for use in, the Superior Courts of, or for the registration of deeds in, Ireland, and the judicial notice of the seals or signatures of the persons before whom such affidavits, &c., are sworn, see Jud. Act (Ir.) 1877; and R.S.C. (Ir.), 1905, O. 38, r. 7.

(6) **Matters notified, and Companies incorporated, by Statute.** Matters notified by a public Act of Parliament must be judicially noticed—*e g.* that the Isle of Ely is a franchise in the nature of a riding and liable for the repair

of its bridges since 7 Will. IV & 1 Vict. c. 53 (*R.* v. *Ely,* 15 Q.B. 827; *cp. Thorn* v. *Jackson, sup.* 22); or that the office of assessor and collector of the land-tax and assessed taxes is a "public annual" one, under 3 W. & M. c. 11, s. 6 (*R.* v. *Anderson,* 9 Q.B. 663).

So, in *Church* v. *Imperial Gas Co.,* 6 A. & E. 846, 856, it being objected that it did not appear from the record that the defendants were a corporation or sued in that capacity, the Court took judicial notice that they were in fact the corporation of that name created by 1 & 2 Geo. IV. c. 117. And in *Macgregor* v. *Dover Ry.,* 18 Q.B. 618, the objection being that there was no proof that the S. E. Ry. Co. mentioned in the pleadings was the statutory corporation of that name, the Court remarked, "We know by a public Act that there is such a corporation as the S. E. Ry. Co., and must assume its identity with the one named in the pleadings and no other." As to the seal of the Corporation of London, see *ante,* 23.

(7) **Notorious Facts.** The Court will take judicial notice of facts which are notorious — *e.g.* the ordinary course of nature; the standards of weight and measure (*Hockin* v. *Cooke,* 4 T.R. 314; *O'Donnell* v. *O'D.,* 1 L.R. Ir. 284; 13 *id.* 226); the public coin and currency (*Kearney* v. *King,* 2 B. & Ald. 303), and its difference of value in early and modern times (*Bryant* v. *Foot,* L. R. 3 Q.B. 497); the course of post, the stamps of post-offices on letters, and the fact that postcards are unclosed documents whose contents are visible to those dealing with them, and so have been read and published (*Robinson* v. *Jones,* 4 L.R. Ir. 391; *Huth* v. *H.,* 1915, 3 K.B. 32, 39, C.A., *post* 91, 106); the meaning of common words and phrases, *e.g.* of "nominal rent" in a modern statute (*Camden* v. *Inland Rev. Commrs.,* 1914, 1 K.B. 641, C.A., expert evidence on the point being inadmissible), or that beans are a species of pulse (*R.* v. *Woodward,* 1 Moo. C.C. 323); the existence of the universities of Oxford and Cambridge, and the fact that they are national institutions for the advancement of learning and religion (*Re Oxford Rate,* 8 E. & B. 184); the difference of time in places east and west of Greenwich (*Curtis* v. *Marsh,* 3 H. & N. 866); the Almanac annexed to the Common Prayer Book as being part of the law of the land (*Collier* v. *Nokes,* 2 C. & K. 1012; *Tutton* v. *Darke,* 5 H. & N. 647; *post,* 380)—*e.g.* the number of days in a given month (1 Rol. Ab. 824), or that a certain day of a month was a Sunday (*Hanson* v. *Shackleton,* 4 Dowl. 48), though not, it has been said, matters not therein contained—*e.g.* the time of sunset on a particular day (*Collier* v. *Nokes, Tutton* v. *Darke, sup ;* Mr. Taylor queries this, s. 16 *n*). Nowadays, however, Courts in referring to the Almanac have as little thought of any particular edition as in referring to the Bible or Æsop's Fables (Thayer, Pr. Tr. Ev. 292 *n*). Under the Definition of Time Act, 1880 (43 & 44 Vict. c. 9), expressions of time in legal documents are to be construed with reference in Great Britain to Greenwich mean time, and in Ireland to Dublin mean time. — The Courts have also noticed that the streets of London are crowded and dangerous (*Dennis* v. *White,* 1916, 2 K.B. 1, 6); that boys are naturally reckless (*Clayton* v. *Hardwick Colliery Co.,* 32 T.L.R. 159, H.L.; *Williams* v. *Eady,* 10 T.L.R. 41; *Robinson* v *Smith,* 17 T.L.R. 235, 423; *Sullivan* v. *Creed,* 1904, 2 I.R. 317; *Mahon* v. *Dublin Co.,* 39 Ir. L.T.R. 126); that cats are ordinarily kept for domestic purposes (*Nye* v. *Niblett,* 1918; 1 K.B. 23); but not that rabbit coursing is necessarily a nuisance (*Ayers* v. *Hanson,* 56 Sol. Jo. 735).

Refreshing Memory of Judge. When in doubt as to any matter to be noticed, the judge may refer for information to appropriate sources—*e.g.* to dictionaries for the meaning of words (*post,* 379-380), to histories, firmans and treaties to determine the status of a foreign ruler (*The Charkieh,* 42 L.J. Ad. 17); or to the officials of a public department (*id.: Mighell* v. *Sultan of Johore,* 1894, 1 Q.B. 149; Foreign Jurisdiction Act, 1890, s. 4, *ante,* 22). He may also, it seems, refuse to take judicial notice of the given matter unless the party interested produces the necessary books of reference (*Van Omeron* v. *Dowick,* 2 Camp. 42, where Lord Ellenborough declined to notice the King's proclamation without production of the Gazette containing it); and so, also, as to the contents of the Articles of War, where these were not produced (*R.* v. *Withers,* cited in *R.* v. *Holt,* 5 T.R. p. 442; Tay., s. 21; Steph., art. 59). As to how far dictionaries, almanacs, &c., are admissible in evidence independently of this ground, see *post,* 379-80.

CHAPTER III.

MATTERS TO WHICH EVIDENCE MUST BE CONFINED. PLEADINGS. PARTICULARS. VARIANCE AND AMENDMENT. FACTS IN OTHER CASES EXCLUDED.

EVIDENCE MUST BE CONFINED TO THE ISSUES. The maxim that *Evidence must be confined to the Issue* expresses in a loose form the two-fold exclusion of facts (1) by pleading and substantive law; and (2) by the law of evidence as to relevancy (Tay., ss. 298, 316; Best, ss. 251-2; Thayer, Pr. Tr. Ev. 269).

The present chapter deals with the *former* only, the rule here being that evidence must be directed and confined to the proof or disproof of the issues as settled by the *pleadings,* or statements equivalent thereto, and supplemented by the *particulars,* where any have been delivered; and that no other grounds of complaint or defence, nor any matters not necessary by law to establish those under trial, can be proved, *e.g.* on a charge against an undischarged bankrupt of obtaining credit without disclosing his bankruptcy, the fact that he has no intention to defraud is immaterial, the intent forming no ingredient of the offence (*R.* v. *Dyson,* 1894, 2 Q.B. 176; *post,* 149).

Pleadings. *Civil Cases.* In Actions in the High Court the pleadings must contain, and contain only, a statement in a summary form of the material facts on which the parties rely for their claim or defence; but not the evidence by which the case is to be proved (O. 19, r. 4); nor, unless first denied by the other side, any facts which the law presumes in a party's favour, or as to which the burden of proof lies upon his opponent (O. 19, r. 25). The laxity of present day pleading is, however, notorious and has been severely criticised by a high authority:—"The present practice appears to have most of the vices of the old procedure in Chancery. There are pleadings, it is true, but they are for all practical purposes disregarded. The plaintiff is allowed to prove what he likes, and set up any case he can. The judge has no longer to deal with a case formulated on the pleadings, but to make up his mind whether, on the facts proved, there is any, and what, case at all. This disadvantage is accentuated when there is a jury" (*Banbury* v. *Bank of Montreal,* 1918, A.C. 626, 710, *per* Ld. Parker). As to where there are no pleadings, see O. 18A and Odgers Pl. 8th ed. 79-80; and as to County Courts see the County Courts Act, 1888, ss. 73, 80, 82, 86.

Criminal Cases. Under the Indictments Act, 1915, every indictment shall now contain, and be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, described in ordinary language, and avoiding as far as possible technical terms, but without necessarily stating all the essential elements of the offence (s. 3; Sch. I. r. 4). And charges for more than one felony or misdemeanour, or for both felonies and misdemeanours, may also be joined in the same indictment (s. 4), if they are

founded on the same facts, or form, or are part of, a series of offences of the same or a similar character [Sch. I. r. 3; *post,* 57].

Particulars. *Civil Cases.* The object of particulars, which are now usually endorsed on the pleadings, is to limit the generality of the issues, so as to inform the parties of the case they have to meet and thus prevent surprise at the trial. They are not intended to disclose the means by which the case is to be proved—*e.g.* the nature of an opponent's evidence, or the names of his witnesses merely as such (*Temperton* v. *Russell,* 9 T.L.R. 318, 322; *Duke* v. *Wisden,* 77 L.T. 67). In the absence of leave to amend, the parties are bound by their particulars, evidence *dehors* is inadmissible, and the jury cannot award more than these disclose (*Hodge* v. *Matlock U. D. C.,* 75 J.P. Rep. 65, C.A.); but if particulars have been waived, such evidence cannot be excluded (*Hewson* v. *Cleeve,* 1904, 2 I.R. 536, 551, cited *post,* 183). A mere order for particulars, however, does not operate as a stay unless so directed, and the proper course when it has not been obeyed is not to exclude the evidence but to postpone the hearing (*Brook* v. *B.,* 12 P.D. 19.) [Ann. Pr., Notes to O. 19, rr. 6-8; O. 36, r. 37; Bullen, Pl. 6th ed., 37-41; Ros. N.P. 88-90; Odgers Pl. 172-183].

Criminal Cases. Under the Indictments Act, 1915, s. 3, particulars necessary to give reasonable information of the nature of the charge, must now be given in the indictment; and the prosecution will probably, in accordance with the old rule, be confined thereto (Ros. Cr. Ev. 186; Arch. Cr. Pl. 61-62). In summary cases, however, no objection can be taken by the defendant to any defect in the information, complaint, or summons, either in substance or form (*infra.* Variance); though where he is prejudiced by the want of information he may apply to adjourn the hearing (Ros. Cr. Ev. 162; *R.* v. *Esdaile,* 1 F. & F. 213; *Neal* v. *Devenish,* 1894, 1 Q.B. 544). Moreover, the insufficiency of particulars is not a matter upon which a case can be stated (*Neal* v. *Devenish, sup.*).

Variance and Amendment. Formerly the parties could only succeed strictly *secundum allegata et probata;* if the proofs differed from the allegations, the variance was fatal. Now, however, though the case made at the trial must not substantially differ from that appearing on the record, very large powers of amendment are conferred upon Courts with the object of preventing a miscarriage of justice. Thus:

In *Civil Cases* in the High Court the judge may at any time, on just terms, allow all such amendments in the *pleadings* as are necessary to determine the real questions in dispute between the parties (O. 28); and County Courts have a similar power (whether there is anything in writing to amend by or not) under the C. C. Act, 1888, s. 87, and C. C. R., 1903, O. 14. So the *particulars* may be amended, or a further and better statement thereof ordered on proper terms (O. 19, r. 7).

In *Criminal Cases,* also, if it appears to the Court, either before or at the trial, that the indictment is defective, the Court may order such amendments to be made as it thinks necessary and as can be made without injustice; and may make such order as to the costs thereof as it thinks fit (Indictments Act, 1915, s. 5).

Inferior Courts. Under the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), no objection can now be raised by the defendant to any information, complaint, or summons on the ground of any *defect in substance or in*

form, or of any *variance* between such information, &c., and the evidence produced (s. 1); though (in the case of variances only) where the defendant has been misled thereby, the hearing may be adjourned (ss. 1, 9).

Under this Act no express power of *amendment* is given; but the justices have, it seems, such power both in cases of defect in substance (*Rodgers* v. *Richards*, 40 W.R. 331, where two charges were improperly joined in one information and it was held that one should have been struck out, or the complainant called upon to elect, but that the summons should not have been dismissed), and in those of variance (*Exeter Corp.* v. *Heaman*, 37 L.T. 534); in addition, in the latter case, to the power to adjourn given by ss. 1, 9. The power to amend is, however, limited to defects or variances of *minor* importance. Thus, where neither summons nor conviction has set out the essential ingredients of the offence, this is a defect in substance which is fatal, no amendment of either will be allowed and the conviction may be quashed on case stated or *certiorari* (*Cotterill* v. *Lempriere*, 34 Sol. Jo. 348; *R.* v. *McKenzie*, 1892, 2 Q.B. 519). So, as to the graver cases of variance; thus, there is no power to amend or adjourn where one offence is charged and a different one proved (*Martin* v. *Pridgeon*, 1 E. & E. 778, in which the defendant was summoned for drunkeneness and riotous behaviour under one Act and convicted of drunkenness under another; *R.* v. *Brickall*, 33 L.J.M.C. 156, where the charge was for assaulting a constable in the discharge of his duty, and the conviction for common assault); or where the wrong person is charged and not merely the right one misdescribed (*Oxford Tramway Co.* v. *Sankey*, 54 J.P. 564). As to those exceptional cases in which justices may convict of a minor offence, although the facts point to a more aggravated one with which the defendant is not charged, and over which they have no jurisdiction, see *R.* v. *Dawson*, 42 J.P. 456, and *Wilkinson* v. *Dutton*, 3 B. & S. 821; or under one section of a Statute where the complaint is made under another, see *Shackell* v. *West.* 2 E. & E. 326.

Facts in other Cases Excluded. It is a general rule that each case must be decided on its own evidence, and not on that adduced in any other (*Hamilton* v. *Walker*, 1892, 2 Q.B. 25; *Groom* v. *Lawrence*, 46 L.J. 329; *Calico Assn.* v. *Booth*, 5 B.W.C.C. 82, 84, 86, C.A.; *Taylor* v. *Wilson*, 106 L.T. 44; *Parker* v. *Sutherland*, 81 J.P. Rep. 197; *R.* v. *Posnett*, 9 Cr. App. R. 64; *R.* v. *Fermanagh*, 42 Ir. T.L.R. 6); nor should the facts in other cases be referred to (*post*, 39). Thus, although, if each case is based solely on its appropriate evidence, the decision in a first case may be postponed until a second has been heard (*R.* v. *Fry*, 19 Cox 135), yet where justices had based their decision of one charge partly upon evidence given on a second, arising out of the same facts, both convictions were quashed, the former for the above reason, and the latter because the defendant was deprived of his defence of *res judicata* (*Hamilton* v. *Walker* and *R.* v. *Fermanagh, sup.*). It is safer, therefore, for justices not to hear evidence as to separate offences before arriving at a decision as to one; and if, on appeal, it is impossible to ascertain to which offence the conviction applies, it will be quashed (*Parker* v. *Sutherland, sup.*). Under the Lunacy Act, 1890, R. 42, however, the same evidence may be used on two summonses where the facts are similar (*Re Morris*, 132 L.T. Jo. 513, C.A.). As to when depositions &c., in former, or earlier stages of the same, trials are admissible, see generally *post*, chaps. xxxvi.-vii., lxi.; and as to previous convictions, *post*, 41-2.

CHAPTER IV.

BURDEN OF PROOF. RIGHT TO BEGIN. MATTERS NOT TO BE STATED TO THE JURY. COURSE OF EVIDENCE. SPEECHES. REPLY. THE *BEST EVIDENCE* RULE.

BURDEN OF PROOF. The burden of proof lies upon the party who substantially asserts the affirmative of the issue.

[Tay., ss. 364-377; Best, ss. 265-277; Ros., 8th ed., N.P. 95-96; Steph., arts. 93-97 *a*; Gulson on Proof, ss. 509-13; Thayer, Pr. Tr. Ev. 353-389; Wigmore, Ev. chaps. 86-7; and see 6 Harv. L. Rev. 125; 17 *id.* 208; and 17 Am. L. Rev. 892.]

Principle. This rule, derived from the maxim of Roman law, *ei incumbit probatio, qui dicit, non qui negat,* is adopted partly because it is but just that he who invokes the aid of the law should be the first to prove his case; and partly because, in the nature of things, a negative is more difficult to establish than an affirmative (Best, ss. 266-270; Tay., s. 364).

Meaning and Scope of Rule. As applied to judicial proceedings the phrase "burden of proof" has two distinct and frequently confused meanings: (1) The burden of proof as a matter of law and pleading—the burden, as it has been called, of *establishing a case,* whether by preponderance of evidence, or beyond a reasonable doubt; and (2) The burden of proof in the sense of *introducing evidence* (Thayer, *sup.;* Chamberlayne's Best, s. 265 *n*).

(1) *Burden of Proof on the Pleadings.* The burden of proof, in this sense, rests upon the party, whether plaintiff or defendant, who substantially asserts the affirmative of the issue. It is fixed at the beginning of the trial by the state of the pleadings, and it is settled as a question of law, remaining unchanged throughout the trial exactly where the pleadings place it, and never shifting under any circumstances whatever. If, when all the evidence, by whomsoever introduced, is in, the party who has this burden has not discharged it, the decision must be against him (*Pickup* v. *Thames Ins. Co.,* 3 Q.B.D. 594, 600; *Wakelin* v. *L. & S. W. Ry.,* 12 App. Cas. 41, 45). So, in criminal cases, even where the second, or minor, burden of introducing evidence is cast upon, or shifted to, the accused, yet the major one of satisfying the jury of his guilt beyond a reasonable doubt is always upon the prosecution and never changes; and if, on the whole case, they have such a doubt, the accused is entitled to the benefit of it and must be acquitted (*R.* v. *Stoddart,* 25 T.L.R. 612; *R.* v. *Schama,* 84 L.J.K.B. 396; *R.* v. *Badash,* 87 *id.* 732; 13 Cr. App. R. 17; *R.* v. *Murphy,* 49 Ir. L.T.R. 15; *R.* v. *Grinberg,* 33 T.L.R. 428; *post,* 35).

In deciding which party asserts the affirmative, regard must of course be had to the substance of the issue and not merely to its grammatical form, which latter the pleader can frequently vary at will; moreover, a negative

allegation must not be confounded with the mere denial of an affirmative one. The true meaning of the rule is that where a given allegation, whether affirmative or negative, forms an essential part of a party's case, the proof of such allegation rests on him (*Abrath* v. *N. E. Ry.*, 11 Q.B.D. 440, 457, *per* Bowen, L.J.; *Doe* v. *Johnson*, 7 M. & Gr. 1047, *per* Tindal, C.J.); *e.g.* in an action against a tenant for not repairing according to covenant (*Soward* v. *Leggatt*, 7 C. & P. 613), or against a horse-dealer that a horse sold with a warranty is unsound (*Osborn* v. *Thompson*, 9 *id.* 337), proof of these allegations is on the plaintiff; so in actions for malicious prosecution, it is upon him to shew the absence of reasonable and probable cause (*Abrath* v. *N. E. Ry.*, 11 App. Cas. 247; *Cox* v. *English Bank*, 1905, A.C. 168); while in actions for false imprisonment, proof of the existence of reasonable cause is upon the defendant, since arrest, unlike prosecution, is itself a tort and demands justification (*Hicks* v. *Faulkner*, 8 Q.B.D. 167, 170; *Watson* v. *Smith*, 15 T.L.R. 473; *cp. Walters* v. *Smith*, 1914, 1 K.B. 595). An alternative test, in this connection, is to strike out of the record the particular allegation in question, the onus lying upon the party who would fail if such a course were pursued (*Mills* v. *Barber*, 1 M. & W. 425, 427; Tay., s. 365).

In all but the simplest cases, however, the burden of the issues is divided, each party having one or more cast upon him. Thus, in actions of contract, proof of the contract, performance of conditions precedent, breach and damages, is upon the plaintiff; while the defendant has the onus of facts pleaded in confession and avoidance, *e.g.* infancy, release, rescission, accord and satisfaction, fraud, &c. So, negligence is upon the plaintiff, but contributory negligence upon the defendant (*Wakelin* v. *L. & S. W. Ry. sup.; White* v. *Barry Ry.*, 15 T.L.R. 474; though, as to the shifting of these burdens, see *inf.* 35). Again, in an action by A. to restrain B. from trading in a certain locality in breach of the latter's covenant, to which the defence is a denial of the covenant, and in the alternative that it is unreasonable, the onus of proving the covenant is upon A. and its unreasonableness upon B. (*Rousillon* v. *R.*, 14 Ch. D. 351). And in an action for damage to goods shipped under a charter-party containing the usual exceptive clause as to damage by perils of the sea, the onus, where nothing is admitted by either party, is upon the plaintiff to prove the contract and non-delivery; upon the defendant to prove damage by perils of the sea; and upon the plaintiff in reply to prove negligence of the defendant disentitling him to the benefit of the clause (*The Glendarroch*, 1894, P. 226). As to loss under the exceptive clauses of a burglary policy, see *Hurst* v. *Evans*, 86 L.J.K.B. 305.

(2) *Burden of adducing Evidence.* It is in the second sense that the term is more generally used, and must be applied in the following pages; and while the burden of proof in the first sense is always stable, the burden of proof in the second sense may shift constantly, according as one scale of evidence or the other preponderates (*Pickup* v. *Thames Ins. Co.*, *Wakelin* v. *L. & S.W.R.*, and *R.* v. *Stoddart*, cited *sup.*).

The *onus probandi* in this sense rests upon the party who would fail if *no evidence at all, or no more evidence, as the case may be,* were given on either side—*i.e.* it rests, *before* evidence is gone into, upon the party asserting the affirmative of the issue; and it rests, after evidence is gone into, upon the party against whom the tribunal, at the time the question arises, would give judgment if no further evidence were adduced (Best, s. 265 *n*; *Abrath* v.

N. E. Ry., 11 Q.B.D. 440, 456; *Wakelin* v. *L. & S. W. Ry. Co.*, 1896, 1 Q.B. 189 *n*, 196 *n*). This rule holds not only as to matters which are the subject of express allegation, but to those which relate merely to the admissibility of evidence or the construction of documents—*e.g.* if either party desires to impeach the competency of a witness (*Harrod* v. *H.*, 1 K. & J. 4), or to give secondary evidence of a lost deed, the burden of proving the incompetency or loss is upon him (Steph. art. 97); so, with the party who contends that a written contract is incomplete and desires to add parol terms thereto (*Tucker* v. *Bennett*, 38 Ch. D. 1, 9); and if a contract is ambiguous the plaintiff has the burden of showing that his interpretation is correct (*Falck* v. *Williams*, 1900, A.C. 176, 181). As to the burden of proving documents duly stamped, see *post*, 5.

New Trials. An erroneous decision as to the onus of proof will, if it has occasioned substantial injustice, entitle the injured party to a new trial (*Pickup* v. *Thames Ins. Co., sup.; The Glendarroch, sup.;* see *post*, 39).

EXCEPTIONS. There are commonly said to be *two cases* in which the burden of proof (in the sense of adducing evidence) does not rest upon the party substantially asserting the affirmative; or which, if they occur during the trial, will operate to shift such burden to his opponent.

(1) **Where a disputable presumption of law exists, or a prima facie case has been proved, in favor of a party,** it lies upon his adversary to rebut it.

The burden of proof may be shifted, not alone by rebuttable presumptions of law as contended by Mr. Taylor (s. 367 *n*), but also by presumptions of fact of the stronger kind, or indeed, by any species of evidence sufficient to raise a *primâ facie case* (Best, ss. 273, 319-21; Odgers on Pleading, 7th ed. 293; *Abrath* v. *N. E. Ry., sup.; Pickup* v. *Thames Ins. Co., sup.*).

Rebuttable presumptions: Civil Cases. Thus, a party suing on a bill of exchange need not allege, nor at the outset prove, that he gave *consideration*, or is a *holder in due course*, since these presumptions are in his favour; but if fraud or illegality be shown, the burden is shifted and he must show that subsequently to such fraud, &c., he gave value in good faith (Bills of Ex. Act, 1882, s. 30; *Tatham* v. *Haslar*, 23 Q.B.D. 345). So, when suing upon any contract, he need not allege, nor at the outset prove, the defendant's *full age*, proof of a plea of infancy being upon the defendant (*Hartley* v. *Wharton*, 11 A. & E. 934), nor *sanity* (*Imperial Loan Co.* v. *Stone*, 1892, 1 Q.B. 599), proof of insanity and the plaintiff's knowledge thereof, an essential part of the plea, being also on the defendant (*post*, chap. xlviii.). So, a party impeaching a marriage on the ground of insanity must prove it (*Durham* v. *D.*, 10 P.D. 80); though in Probate cases an opposite rule prevails, the party propounding the will having, in addition to the burden of proving due execution, that of establishing testamentary capacity (*Tyrrell* v. *Painton*, 1894, P. 151, C.A.). Again, though a party asserting another's *death* must prove it, yet, if he show that such person has not been heard of for seven years by those most likely to hear, the burden of disposal is shifted to his adversary, for the law then presumes death (*post*, chap. xlviii.). So the *legitimacy* of a child born during wedlock is presumed; but if its parents are shown to have been judicially separated more than nine months before its birth, the presumption is reversed (*Hetherington* v. *Hetherington*, 12 P.D. 112; see fully *post*, chap. xlviii). In civil cases, too, the so-called presumption of *Innocence*, throws the burden of proof upon the party alleging an unlawful act. Thus, in an

action for shipping inflammable goods on a certain ship without giving notice to the captain, the burden of proving the failure to give notice was held to be upon the plaintiff, since a criminal act was thereby imputed (*Williams* v. *East India Co.*, 3 East, 192; as to what evidence is sufficient to shift this burden, see *post*, 35-6). The presumption *omnia præsumuntur ritè esse acta* will also generally suffice to throw the burden of proving fraud, &c., upon the party asserting it; though there is a conspicuous *exception* to this, where from the fiduciary or confidential relationship of the parties, or other circumstances, one of them has been enabled to exert *undue influence* over the other, in which case it lies upon the dominant party to support, and not upon the servient party to impeach, the righteousness of a transaction beneficial to the former. This exception applies not only to the relationships of parent and child, guardian and ward, solicitor and client, doctor and patient, but to all other cases where a predominant influence has in fact been obtained, and benefits *inter vivos* received (*Allcard* v. *Skinner*, 36 Ch. D. 145, C.A.; *Morley* v. *Loughnan*, 1893, 1 Ch. 736; Pollock, Contracts, 8th ed. 642-81; White & Tudor, L.C. 8th ed. 259-302). But it does not apply (1) to benefits received by *Will* (*Craig* v. *Lamoureux*, 1920, A. C. 349, which appears to supersede the dictum to the contrary of Ld. Hatherley, in *Fulton* v. *Andrew*, L.R. 7 H.L. 469-70); nor (2) to the relation of *husband and wife*, which in civil cases raises no presumption of *law* as to marital coercion (*Brown* v. *A.-G.*, 1898, A.C. p. 237; *Barron* v. *Willis*, 1899, 2 Ch. 578, 585; *Howes* v. *Bishop*, 1909, 2 K.B. 390, C.A.; and *cp. Bank of Montreal* v. *Stuart*, 1911, A.C. 120); though *aliter* in certain not very clearly settled cases of felony and misdemeanour if committed by the wife in the husband's *presence* (*R.* v. *Torpey*, 12 Cox 45; *R.* v. *Dykes*, 15 *id.* 771; *R.* v. *Caroubi*, 28 T.L.R. 248; *R.* v. *Green*, 30 *id.* 172; 1 Russ. Cr. 7th ed. 91-100; Ros. Cr. Ev. 13th ed. 816-18; Archb. Cr. Pl. 25th ed. 21-3).

Criminal Cases. Generally in criminal cases (unless otherwise directed by statute), the presumption of innocence casts on the prosecutor the burden of proving every ingredient of the offence, even though *negative averments* be involved therein (Tay., s. 371; *Over* v. *Harwood*, 64 J.P. 326). Thus, on charges of rape, indecent assault, &c., the burden of proving non-consent by the prosecutrix is on the prosecution (*R.* v. *Bradley*, 4 Cr. App. R. 225; *R.* v. *Horn*, 7 Cr. App. R. 200.) And the prosecution is bound to negative any exception favourable to the defendant which is engrafted in the statutory description of the offence, though not one contained in a separate clause (*Roberts* v. *Humphreys*, L.R. 8 Q.B. 483; *R.* v. *James*, 1902, 1 K.B. 540; *R.* v. *Audley*, 1907, 1 K.B. 383). If, however, the facts proved raise a rebuttable presumption of law against him, the burden is shifted; thus on an indictment for manslaughter by negligent driving, proof of the killing, which is presumed to be unlawful, throws on the prisoner the onus of showing proper care (*R.* v. *Cavendish*, I.R. 8 C.L. 178; *R.* v. *Elliott*, 16 Cox 710; *R.* v. *Murphy*, 49 Ir. L.T.R. 15; Archb. Cr. Pl. 22nd ed. 748). And, generally, facts in confession and avoidance are upon him, *e.g.* insanity (*R.* v. *Smith*, 6 Cr. App. R. 19; *R.* v. *Rutherford*, Times, Ap. 9, 1919; *cp.* The Trial of Lunatics Act, 1883), or in bigamy cases that the first marriage was void (*R.* v. *Lindsay*, 66 J. P. 505; *R.* v. *Thompson*, 70 *id.* 7; *R.* v. *Naguib*, 1917, 1 K.B. 359, C.C.A.; *post*, 233), or that the accused is not a British subject

(*R.* v. *Audley, sup.*). Moreover, the Legislature has, in many cases, relieved the prosecutor from his original *onus* by throwing the proof of *authority, consent* and *lawful excuse* on the defendant—*e.g.* on charges for the unlawful possession of house-breaking implements (24 & 25 Vict. c. 96, s. 58), coining tools (*id.* c. 99, s. 24), or explosives (46 & 47 Vict. c. 3, s. 4), or for selling goods with forged trademarks (50 & 51 Vict. c. 28, s. 2); and see for a long list of such statutes, Tay., s. 374 *n.* So the Summary Judisdiction Act, 1879 (42 & 43 Vict. c. 49, sub-s. 2, extending a similar provision in the Act of 1848, s. 14), dispenses with disproof by informants, or complainants, of "any exemption, exception, proviso, excuse or qualification, whether it does, or does not, accompany in the same section the description of the offence in the Act creating the offence," which would be in favour of the defendant (see *Roberts* v. *Humphreys, sup.*, as to a similar proviso).

Distinction when Burden on Prosecution or Prisoner. When the burden of the issue is on the prosecution, the case must as we have seen (*ante,* 10), be proved *beyond a reasonable doubt;* though a *primâ facie* case made by the prosecution and not rebutted by the accused, may often amount to this, and suffice for conviction (*R.* v. *Lovett,* 1 Cr. App. R. 111; *R.* v. *Schama,* 84 L.J.K.B. 396). When, however, the burden of an issue is upon the accused, he is not, in general, called on to prove it beyond a reasonable doubt or in default to incur a verdict of guilty; it is sufficient if he succeed in proving a *primâ facie* case for then the burden of such issue is shifted to the prosecution, which has still to discharge its original and major onus that never shifts, *i.e.* that of establishing, on the whole case, guilt beyond a reasonable doubt (*R.* v. *Cavendish,* I.R. 8 C.L. 178; *R.* v. *Stoddart,* 25 T.L.R. 612; *R.* v. *Schama, sup.; R.* v. *Ward,* 1915, 3 K.B. 696; *ante,* 30). Thus, on a charge of possessing house-breaking implements without lawful excuse, proof of such excuse being upon the accused, the latter proved that he was a bricklayer, which made his possession *primâ facie* lawful. At the trial, however, the judge directed that the burden was still on the accused to negative a felonious intent. On appeal it was held that this direction was wrong, and that when a *primâ facie* excuse had been shown, it was for the prosecution to rebut, and not for the accused to establish, an innocent intent (*R.* v. *Ward, sup.; R.* v. *Schama, sup.*). A defence of insanity must, however, be proved beyond a reasonable doubt (*R.* v. *Jefferson,* Times, July 20th, 1908, *per* Bigham, J., reversed on other grounds, 1 Cr. App. R. 95; *c.p. R.* v. *Wilson,* 55 L. Jo. 157); and in bigamy cases, strict proof must apparently be given of the validity of a former foreign marriage whether its onus is upon the prosecution or defence (*R.* v. *Naguib, sup*).

Conflicting presumptions, however, neutralize each other, and leave the case at large to be determined solely on the evidence given. Thus, X, having married A. in 1864, and B. in 1868 is, in 1868, convicted of marrying B. in A.'s lifetime. Having also in 1879 married C. and in 1880 married D., he is afterwards again tried for marrying D. in C.'s lifetime. To rebut the presumption that C.'s marriage is valid he proves the previous conviction for bigamy, showing A. to have been alive not only in 1868, but, since the continuance of life is presumed, also in 1879. Held, these presumptions being conflicting, the question whether A. was alive in 1879 was one of fact, to be determined solely upon the evidence given (*R.* v. *Willshire,* 6 Q.B.D. 366; *Westwood* v. *Chettle,* 98 L.T. Jo. 228).

Primâ facie Case. The burden of proof may also be shifted by evidence raising a *primâ facie* case. Thus, in a breach of promise action in which the defence, after admitting the promise and refusal, was that the plaintiff was unfit from illness to marry, it was held that the burden of proof that she was fit, *ie.* ready and willing to perform the contract, rested in the first instance on the plaintiff, but that very slight evidence thereof, *e.g.* that she was following the ordinary pursuits of life, was sufficient to shift the burden of disproof to the defendant (*Jefferson* v. *Paskell,* 85 L.J.K.B. 398,C.A.). So, in ejectment for underletting without a license, proof of the underletting is on the lessor, but if he show that some one other than the lessee is in possession, apparently as tenant, the onus is shifted to the lessee to show that the occupier is not such (*Doe* v. *Rickarby,* 5 Esp. 4). In an action against underwriters for the loss of a ship, to which the defence is concealment of material facts, the onus of establishing this defence is upon the defendants; slight evidence of non-communication, however, will suffice to throw on the plaintiff proof of the opposite—*e.g.* evidence that he knew the ship had been burnt at the time of the insurance, since no underwriter, had he known this, would have executed the policy (*Elkin* v. *Janson,* 13 M. & W. 655). Again, in an action of negligence against a solicitor for letting judgment go by default, proof of the default cast the burden of justification on the defendant (*Godefroy* v. *Jay,* 7 Bing. 413); and a similar burden is cast upon a mine-owner on proof of the neglect of statutory precautions (*Britannic Co.* v. *David,* 44 L. Jo. 764, H.L.). So, though the onus of proving contributory negligence is on the defendant (*ante,* 31), yet if the plaintiff's evidence, in chief or on cross-examination, discloses this, the burden of introducing evidence will shift (*Wakelin* v. *L. & S. W. Ry.,* 12 App. Cas. 41, 47-8). As to *primâ facie* evidence that the driver of a vehicle is the servant of the owner, see *Powell* v. *McGlynn,* cited *post,* 97, 236.

Similarly, on charges of stealing or receiving, proof of *recent possession* of the stolen property by the accused, if unexplained or not reasonably explained, of if though reasonably explained, the explanation is disbelieved, raises a presumption of fact, though not of law, that he is the thief or receiver according to the circumstances; and upon such unexplained, or not reasonably explained, possession, or disbelieved explanation, the jury may (though not must) find him guilty (*R.* v. *Schama,* 84 L.J.K.B. 396; *R.* v. *Norris,* 86 *id.* 810; *R.* v. *Badash,* 13 Cr. App. R. 17; *R.* v. *Aubrey,* 11 *id.* 182; *R.* v. *Hagan,* 9 *id.* 27). It is not, however, for the accused to prove honest dealing with the property, but for the prosecution to prove the reverse (*R.* v. *Lewis,* 14 *id.* 33); and if an explanation be given which the jury think may be true, though they are not convinced that it is, they must acquit, for the main burden of proof (*i.e.* beyond reasonable doubt) rests throughout upon the prosecution, and in this case, will not have discharged (*R.* v. *Schama, sup.; R.* v. *Grinberg,* 33 T.L.R. 428; *R.* v. *Norris, sup.; R.* v. *Badash, sup.; R.* v. *Brain,* 13 Cr. App. R. 197; *R.* v. *Sanders,* 14 *id.* ii.). As to what amounts to recent possession in such cases, see *post,* chap. ix. So, where a person is charged with having in his possession diseased animals without giving notice to the police, proof of the existence of the disease to the defendant's knowledge has been held sufficient to raise a *primâ facie* case, shifting the onus of proving that he gave notice on to the defendant [*Huggins* v. *Ward,* L.R. 8 Q.B. 521; in *Williams* v. *E. I. Co., ante,* 33, as the best evidence of non-notice had not

been given, the burden was held not to shift, but this case would probably not now be followed; see *post,* 46-8]. And on a charge of non-vaccination, testimony by the officer who produced the register showing that no certificate under the Act had been furnished by the defendant, was held to shift the onus to the latter (*Over* v. *Harwood,* 64 J.P. 326). So the inference of age from appearance may shift the burden of proof (Archb. Cr. Pl. 23rd ed. 890). But on a charge of receiving stolen goods mere proof of a previous conviction for larceny, though admissible by statute to show guilty knowledge (*post,* 174-5), is not sufficient to shift the onus of disproving such knowledge to the defendant (*R.* v. *Davis,* L.R. 1 C.C. 272). So, where a publican was charged with keeping open licensed premises after hours for the sale of intoxicants, proof that the premises were open after hours, though the witness had been refused intoxicants therein, was held to be equally consistent with guilt or innocence and not to raise a *primâ facie* case (*Harries* v. *Thomas,* 86 L.J.K.B. 812).

(2) **Where the subject-matter of a party's allegation (whether affirmative or negative) is peculiarly within the knowledge of his opponent,** it lies upon the latter to rebut such allegation [Tay., ss. 376*a*, 377; Best, ss. 274-277; Russ. Cr., 7th ed., 1995-7].

The principle of this exception has been recognised chiefly, though not exclusively, in the older cases and by the Legislature. This, in actions under the old game laws, though the plaintiff had to aver, and give general evidence, that the defendant was not licensed to kill game, yet proof of a definite qualification was on the defendant (Steph., art. 96 *d*); so in proceedings against an apothecary for practising without a certificate, the defendant had the onus of proving his certificate (*Apothecaries Co.* v. *Bentley,* 1 C. & P. 538). These cases, however, have been considered to rest partly upon the construction of the Acts; and in the absence of statutory provision, the better opinion now seems to be that, in general, some *primâ facie* evidence must be given by the complainant in order to cast the burden on his adversary. The difficulty of proving a fact peculiarly known to an opponent may, it has been said, affect the *quantum* of evidence demanded in the first instance, but does not change the rule of law (*Doe* v. *Whitehead,* 8 A. & E. 571; *Elkin* v. *Janson,* 13 M. & W. 655). "It has been said that an exception exists in those cases where the facts lie peculiarly within the knowledge of the opposite party. The counsel for the plaintiff has not gone so far as to say that in all such cases the onus shifts, and that the person in whose knowledge the truth lies is bound to prove or disprove the matter in dispute; this cannot be maintained, and the game law cases can be explained on special grounds" (*Abrath* v. *N. E. Ry.,* 11 Q.B.D. 440, 457, *per* Bowen, L.J. *Cp. Powell* v. *M'Glynn, sup.; Hibbs* v. *Ross,* L.R. 1 Q.B. 534, 541, 543). In Steph. art. 96, the rule is well stated as follows: "In considering the amount of evidence necessary to shift the burden of proof, the Court has regard to the opportunities of knowledge, with respect to the fact to be proved, which may be possessed by the parties respectively." Thus, in actions of ejectment on the ground of forfeiture for non-insurance, proof of non-insurance lies on the plaintiff, though the amount of evidence which is necessary to shift the burden will vary according to the circumstances, *e.g.* in *Price* v. *Worwood,* 4 H. & N. 512, the facts that the defendant had failed to insure for the two previous years, and on the occasion in dispute, had stated that he required the money for other purposes, were

held sufficient to effect this object; while in *Doe* v. *Whitehead,* 8 A. & E. 571, the mere refusal of the defendant, both prior to, and on notice at the trial, to produce the policy or receipt for premium, was held insufficient. So, where the forfeiture was in respect of a covenant not to permit an auction on the premises without the lessors' written consent, the onus was held to be upon the plaintiff, to prove the non-existence of such consent (*Toleman* v. *Portbury,* L.R. 5 Q.B. 288; *cp. Wedgwood* v. *Hart,* 2 Jur. N.S. 288). And, in *R.* v. *Harris,* 10 Cox 541, where the charge was of boarding lunatics without the necessary certificate, *primâ facie* evidence of the absence of a certificate was exacted before the onus was cast upon the defendant.

On the other hand, it was said by Littledale, J., in *Doe* v. *Whitehead, sup.,* and Willes, J., and Channell, B., in *Toleman* v. *Portbury, sup.,* that had the above actions been on the covenant, and not for the forfeiture, the onus of proving insurance would have lain on the defendant. So, where goods are booked with a railway company by through ticket, proof that the damage occurred *off* the defendants' line is upon them (*Mahony* v. *Waterford Ry.,* 1900, 2 I.R. 273; *Kent* v. *Midland Ry.,* L.R. 10 Q.B. 1). And proof of a matter peculiarly and solely known in the defendants' office, *e.g.* the date upon which they registered their own policy, has been held to lie upon them (*General Accident Corp.* v. *Robertson,* 1909, A.C. 404, 413; *cp.* also *Huggins* v. *Ward, ante,* 35). And in ejectment, where the plaintiff shows, but negatives, a source from which the defendant's possession may lawfully be derived, it lies upon the latter, as peculiarly within his knowledge, to show some other (*Magdalen Hosp.* v. *Knotts,* 8 Ch. D. 709, 724, C.A.). In many cases, indeed, the Legislature has expressly thrown the burden of proving matters of defence which may be supposed to lie peculiarly within the knowledge of the defendant upon the latter—*e.g.* under the Foreign Enlistment Act, 1870, ss. 8, 9, the burden is upon the builder of the ship to prove that he did not know she was to be employed in contravention of the Act.

RIGHT TO BEGIN. MATTERS NOT TO BE STATED. Civil Cases. The right to begin, which may prove a benefit or a burden according to the strength or weakness of a party's case—since in the former event it enables him to make the first impression upon, as well as, where his opponent calls evidence, to have the last word to, the jury; while in the latter it may cause the collapse of his own case before he has time either to profit by the weakness of his opponent's, or to trust to the effect of his address to the jury,—is partially, but not wholly, determined by the burden of proof. [Tay., ss. 378-84; Ros. N.P. 284-8; Best, ss. 637-9; Archb. Pr. 627-31.]

In one sense, the plaintiff always begins, for without an exception the pleadings are opened by him and not by the defendant. The following are the generally accepted rules, however, as to the right to begin in the sense of opening the case to the jury; (1) Where the onus of proving any *one* of the issues, however numerous they may be, rests upon the plaintiff, and he will undertake to give evidence upon it, he is entitled to begin. (2) Although there may be *no* issues lying upon the plaintiff, yet he is entitled to begin in all actions in which he claims *substantial* and *unliquidated damages,* (*e.g.* actions founded on libel, slander, injuries to the person, covenant, or assumpsit). (3) If the onus of proving all the issues lies on the defendant, he is, subject to the exception last mentioned, entitled to begin. But his mere admission at the

trial of the plaintiff's whole *primâ facie* case will not be sufficient to give him this right, if he might have made the admission by his *pleadings* [*Mercer* v. *Whall*, 5 Q.B. 447; *Pontifex* v. *Jolly*, 9 C.P. 202; *Price* v. *Seaward*, Car. & M. 23; Tay., s. 379; Ros. N.P. 284; 45 L.T. Jo. 196, 299].

In probate suits, the party propounding the will begins if either its validity or the competency of the testator be impeached (*Smee* v. *S.*, 5 P.D. 84); but if these points are admitted, and fraud, undue influence, revocation by a later will (*Hutley* v. *Grimstone*, 5 P.D. 24), or by destruction (*North* v. *N.*, 25 T.L.R. 322), or by a codicil (even though itself impeached for testamentary incapacity, fraud, or undue influence, *Riding* v. *Hawkins*, 14 P.D. 56), be pleaded, the party so pleading begins. In Nullity Suits, even where both sides allege incapacity, the petitioner begins (*L.* v. *L.*, 53 Sol. J. 32). On petitions for revocation of patents, the respondent is entitled to begin (O. 53A, r. 12).

Criminal Cases. In criminal trials the prosecution always begins. If the prisoner is defended, the counsel for the prosecution opens the case; if undefended, and there is no peculiarity in the facts, an opening statement is often omitted; while there is no prosecuting counsel, there can be no opening, since the prosecutor, not being a party (*post*, 270), is never allowed to address the jury, or act as advocate, [*R.* v. *Brice*, 2 B. & Ald. 606; *R.* v. *Gurney*, 11 Cox 414, 422 *n*].

In summary cases before justices, however, every complainant or informant is, by statute, entitled to conduct his own case, and to examine and cross-examine witnesses, as well as to give evidence [Summary Judisdiction Act, 1848, ss. 12, 14; *Duncan* v. *Toms*, 51 J.P. 631; 75 J.P. Jo. 495].

Matters not to be opened or stated to the Jury. In opening the case to the jury, no communication must be made of (1) the amount of damages claimed in any action (41 Sol. Jo. 204); nor of (2) the fact that money has been paid into court, nor its amount (O. 22, r. 22; *Williams* v. *Goose*, 1897, 1 Q.B. 471; *Jacques* v. *S. Essex Co.*, 20 T.L.R. 563; and this is so, even in libel actions, with a statutory plea of payment, *Veale* v. *Reid*, 117 L.T. Jo. 292; so, also now in Ireland, *O'Reilly* v. *Weldon*, 124 Ir. L.T.R. Jo. 170); nor (3) in criminal cases, of any previous conviction against the accused unless this is an essential ingredient of the offence, *i.e.* unless the act charged is only criminal if done after a previous conviction [see Previous Conviction Act, 1836; Larceny Act, 1861, s. 116; Prevention of Crimes Act, 1871, s. 9; *Faulkner* v. *R.*, 1905, 2 K.B. 76, 80-2; *R.* v. *Penfold*, 1902, 1 K.B. 507; as to when previous convictions, though not opened, may be proved before verdict, see *inf.* 41-2]. If any improper disclosure under (1), (2), or (3) has in fact been made, the case should be tried before a fresh jury. Similar crimes may, however, be opened when such evidence is admissible (*R.* v. *Richardson*, 8 Cox 448, 449; *R.* v. *Girod*, 22 T.L.R. 720; *R.* v. *Dale*, 16 Cox 703; *R.* v. *Smith*, 84 L.J.K.B. 215). (4) Although conversations or declarations by the accused may generally be opened to the jury, since any discrepancy between opening and evidence may operate favourably on their minds, a *Confession* should not be, as it may prove inadmissible [*R.* v. *Hartel*, 7 C. & P. 773, *per* Parke, B.; *R.* v. *Davis*, *id.* 785; *R.* v. *Creau*, 8 Cox 509; *R.* v. *Rouse*, 137 C.C.C. Sess. Pap. 220, *per* Darling, J., an objection, however, that might apply to all evidence; it is, however, not uncommon to state its general effect merely. (Archb., 23rd ed. 208)]. Nor (5) will counsel be allowed, either in civil or

criminal cases, *to open facts he does not intend to prove* (*Darby* v. *Ouseley,* 1 H. & N. 8; Resolution of the Judges, 1881, cited Ros. Cr. Ev., 13th ed. 186, and Archb., 23rd ed., 211); and should he inadvertently do so, a reply will be allowed (*post,* 44). So (6) he may not address the jury upon matters of *law* (1 Steph. Hist. Cr. L. 552; *R.* v. *Clarke,* 119 L.T. Jo. 287); nor (7) quote to them scientific works (*R.* v. *Crouch,* 1 Cox 94; *R.* v. *Taylor,* 13 *id.* 77; *post,* 392-3); nor (8) refer to the facts of *other cases* (*R.* v. *Spoden,* 119 L.T. Jo. 286; *Cann* v. *Gilmour,* 132 *id.* 474; *ante* 29; though in the Tichborne trial, vol. 7, p. 174, this rule was largely relaxed, and in *R.* v. *Courvoisier,* 9 C. & P. 362, the Court allowed counsel to read a judge's views on circumstantial evidence, provided he adopted them as his own). Relevant matters of public history or general notoriety may, however, always be referred to (*R.* v. *Dowling,* 7 St. Tr. N.S. 390; *R.* v. *Duffy, id.* 915-8).

New Trials. In civil cases, if an erroneous ruling as to the right to begin or reply (*Brandford* v. *Freeman,* 5 Ex. 734), or as to the course of evidence (*Doe* v. *Bower,* 16 Q.B. 805), has occasioned *substantial injustice,* but not otherwise, the injured party will, as in cases of erroneous decisions regarding the onus of proof, be entitled to a new trial (Tay., s. 387; Ros. N.P. 288; *ante,* 32). As to new trials for improper admission or rejection of evidence see, generally, *post,* chap. xlix.

COURSE OF EVIDENCE. Parties' evidence must be heard. Unless by consent, a judge cannot, as we have seen, decide for or against a party on his counsel's opening without hearing his evidence, or on merely taking it as read (*ante,* 13). The evidence must be heard.

Where One or Several Issues. Splitting a Case. Where there is a single issue only to be tried, the party beginning must *exhaust his evidence* in the first instance, and may not *split his case* by first relying on *primâ facie* proof, and when this has been shaken by his adversary, adducing confirmatory evidence (*Jacobs* v. *Tarleton,* 11 Q.B. 421; Ros. N.P. 278; Archb. Pr. 631). Where there are several issues, any one of which lies upon the plaintiff, he may at his option, either (1) go into his whole case (both original and rebutting) in the first instance; or (2) as is more usual, merely adduce evidence on those issues which lie upon him, reserving the right to call rebutting evidence should his opponent make out a *primâ facie* case (*Penn* v. *Jack,* L.R. 2 Eq. 314; Tay., s. 385; Ros. N.P. 278; Archb. Pr. 631). Thus, in a libel action where justification is pleaded, the plaintiff may formally prove the libel (or read it, if it has been admitted), but refrain from going into the box until the defendant's case is closed, when he may give evidence in reply; or he may be sworn at once and meet the defendant's case by anticipation. So, in a company's action for calls, the defence being misrepresentation in the prospectus, proof of which lies on the defendant, the plaintiffs may either prove the defendant's contract to take the shares and reserve their answer to his charge until the defendant has called his evidence, or elect to meet this as part of their original case (*Components Tube Co.* v. *Naylor,* 1900, 2 I.R. 1, 74, 84-5, where the disadvantage of the latter course was strikingly shown). The rebutting case, however, may not in general be divided any more than the original one (*Jackman* v. *Jackman,* 14 P.D. 62); although where three plaintiffs propounded a will to which undue influence by all was pleaded, counsel was allowed to open the whole case, call one plaintiff to prove due execution

and deny undue influence by him, but reserve the others for rebuttal (*Faldo* v. *Lovett,* 77 L.T. 220).

Evidence in Reply and Rebuttal. *Must not be confirmatory.* Evidence in reply, whether oral or by affidavit, must, as a general rule, be strictly confined to rebutting the defendant's case, and must not merely confirm that of the plaintiff (O. 38, r. 27; *Gilbert* v. *Comedy Co.,* 16 Ch. D. 594; *Trimlestown* v. *Kemmis,* 9 C. & F. 749, 781). Thus, where the latter had closed his case without calling a defendant, who did not appear, the plaintiff was not allowed to call him in reply (*Barker* v. *Furlong,* 1891, 2 Ch. 172). So, in an action on a bill, where endorsement to the plaintiff was in issue, his case resting on mere proof of the indorser's handwriting, and the defendant, denying knowledge of the transaction, or authority to sign, had tendered evidence that the plaintiff was too poor to give value, proof by the plaintiff to rebut this was excluded as being merely confirmatory (*Jacobs* v. *Tarleton, sup.;* Ros. N.P. 278). Moreover, where the issues on the claim and counterclaim are identical, evidence in rebuttal cannot be called, as it must necessarily be confirmatory (*Green* v. *Sevin,* 13 Ch. D. 589). *Exceptions.*—The judge, however, has a discretion to admit further evidence, either for his own satisfaction or where the interests of justice require it (*Doe* v. *Bower,* 16 Q.B. 805; *Budd* v. *Davison,* 29 W.R. 192); and confirmatory evidence in rebuttal will generally be allowed when the party tendering it has been *misled* (*Barker* v. *Furlong, sup.; Rogers* v. *Manley,* 42 L.T. 584), or *taken by surprise* (*Bigsby* v. *Dickenson,* 4 Ch. D. 24; *Budd* v. *Davison, sup.; Wright* v. *Willcox,* 9 C.B. 650).

A similar rule obtains in Criminal cases. Whenever the accused, in defence, gives evidence of fresh matter which the prosecution could not foresee, whether it be an *alibi* (*R.* v. *Froggatt,* 4 Cr. App. R. 115), lawful excuse, good character (*post,* chap. xiii.), insanity (*R.* v. *Smith,* 47 L. Jo. 689), or merely some collateral fact impeaching an opposing witness, the prosecution is entitled to contradict it, *provided* such evidence be not merely confirmatory of the original case, for then it should have been tendered at first (Archb. Cr. Pl. 21st ed. 199-200; Ros. Cr. Ev. 13th ed. 123). Thus, on a charge of theft, the defence being that the prisoner had bought the property from A., A., called as a witness, was allowed to deny the prisoner's statement, for this was strictly rebutting, but not to add that he had "seen the prisoner steal it," for this was merely confirmatory of the original charge [*R.* v. *Stimpson,* 2 C. & P. 418, cited, *post,* 143; *cp. R.* v. *Priestly,* 5 Cr. App. R. 155, where a prisoner's defence being that the property had been given him to sell by his fellow prisoner, who was a stranger to him, the prosecution were allowed to call a witness to prove that he had seen them together on two occasions prior to the date of the theft]. So, on a defence of *alibi,* witnesses for the prosecution, after disproving the alleged whereabouts of the prisoner, were not allowed to add that they saw the prisoner in or near the vicinity of the crime, since this was confirmatory and should have been produced at first (*R.* v. *Hilditch,* 5 C. & P. 299; *contra,* however, *Briggs* v. *Aynsworth,* 2 M. & Rob. 168; *R.* v. *Briggs, id.* 199; RUSS. Cr. 7th ed. 2327-9; *post,* 137). Where, however, A., who was B.'s mistress, was charged with the murder of C., B.'s wife, and testified that B. gave her a revolver before C.'s death, but that it had remained in A.'s own drawer till after C.'s death, the prosecution was refused leave to rebut (*R.* v. *Wheatley,* 50 L. Jo. 332). The *prisoner* is less often entitled to give rebutting evidence, since, knowing the depositions,

he can give it in defence. As in civil cases, however, the judge may when the interests of justice require it, admit such evidence although it was available in chief (*R.* v. *Crippen,* 1911, 1 K.B. 149; *R.* v. *Smith,* 11 Cr. App. R. 230) [*Cp.* Re-Examination, *post,* 483].

Where a rebuttal of relevant evidence has been improperly refused, a new trial may be granted (*Maclaren* v. *Davis,* 6 T.L.R. 372). But the rebuttal of irrelevant evidence will not be allowed (*R.* v. *Cargill,* 1913, 2 K.B. 271).

Anticipating and Interposing Evidence. In certain cases evidence is allowed to be given in *anticipation* of some obvious defence, *e.g.* similar facts to rebut accident (*post,* 172), or prior transactions between the parties, to construe a term in a contract, in rebuttal of a possible customary meaning (*Bourne* v. *Gatliff, post,* chap. xlvi.); or to be *interposed* out of the regular course—*e.g.* to show that a contract, as to which an opponent's witness is questioned, is in writing (*Cox* v. *Couveless,* cited *ante,* 12), or to disprove possession of a document as to which secondary evidence is about to be tendered (*Harvey* v. *Mitchell,* 2 M. & Rob. 366; *post,* 568-9). So, a document omitted *per incuriam* was allowed to be put in by the prosecution during the reply (*R.* v. *White,* 2 Cox 192). But where the plaintiff tendered an examination of the defendant taken in bankruptcy, which was *primâ facie* admissible, the latter was not permitted to call witnesses to show that it was incomplete and, therefore, inadmissible, the Court holding that such evidence, if not obtained by cross-examination, must be postponed and given as part of defendant's case (*Jones* v. *Fort,* M. & M. 196).

Recalling Witnesses. Examination by Judge. Recrimination. The judge has the power at any stage of the trial of *recalling* a party's witnesses, and putting to them such questions as justice seems to require (*post,* 483-4); or of *calling witnesses himself,* independently of the parties, and examining them with the same view (*id.*). Moreover, evidence not admissible in the usual course is sometimes allowed by way of *recrimination*—*e.g.* where witnesses have been called to impeach the veracity of an opponent's witness, witnesses to impeach the former may also be called (*id.; post,* 483).

Putting in Documents. As to putting in, and cross-examination upon, documents, see *post,* 43, 44, and 473, 476-7.

Previous Convictions Not Provable Until After Verdict: Exceptions. As to *opening* these to the jury, see *ante,* 38-9. Generally, previous convictions are not admissible against the accused until *after* a verdict of guilty, and to affect punishment (Previous Conviction Act, 1836; Larceny Act, 1861, s. 116; Prevention of Crimes Act, 1871, s. 9). They should not be disclosed after acquittal (*R.* v. *Smith,* 87 L.J.K.B. 676); and if wrongfully disclosed *before* verdict and substantial miscarriage of justice results, the conviction so obtained will be quashed (*R.* v. *Curtis,* 29 T.L.T. 512; *R.* v. *Lee,* 1 Cr. App. R. 5; *R.* v. *Warner, id.* 227; *R.* v. *Stewart,* 74 J.P. Rep. 246; *R.* v. *Culliford,* 75 *id.* 232), even though the judge may have cautioned the jury to disregard them (*R.* v. *Hemingway,* 29 T.L.R. 13). But, if the Court think that no miscarriage has resulted, either because the disclosure was sufficiently obviated by the caution (*R.* v. *Hargreaves,* 6 Cr. App. R. 97; *R.* v. *Stratton,* 3 *id.* 255), or, if none were given, that non-disclosure would not have altered the verdict (*R.* v. *Culliford, sup.; R.* v. *Warner, sup.; R.* v. *Metcalfe,* 29 T.L.R. 512; *R.* v. *Christie,* 30 *id.* 41; *R.* v. *Williams,* 36 T.L.R. 251), the conviction will be allowed to stand.

Moreover, the rule that previous convictions are only provable *after* verdict does not apply when they are tendered—(1) as an essential ingredient of the offence (*R.* v. *Penfold,* 1902, 2 K.B. 54; *ante,* 38; *post,* 189); or (2) to show *scienter* in receiving cases, or intent under the Vagrancy Act, 1824 (*post,* 174-5, 189); or (3) to rebut good character, or imputations on the prosecutor or his witnesses (*post,* 188-90; 454-5); or (4) to contradict the denial by a witness of his previous conviction (*post,* 482); or (5) to prove public rights (*post,* 298, 428); or (6) to prove a plea of *res judicata* (*post,* 412, 424-5); or, it seems (7) when tendered before justices on the hearing of summary offences (*R.* v. *Capping,* 50 Sol. Jo. 458). As to the various modes of proving previous convictions, see *post,* 557-9.

Reopening Case to Supplement or Correct Evidence. Where material evidence has inadvertently been omitted, the judge should allow the case to be reopened or adjourned to supply it (*Hargreaves* v. *Hilliam,* 58 J.P. 655; *Duffin* v. *Markham,* 88 L.J.K.B. 581; *R.* v. *Warren,* 14 Cr. App. C. 4). So, where a witness had, by inadvertence, not been sworn, a re-hearing on oath by the magistrate before any conviction was drawn up, was upheld, the defendant never having been in peril on the first hearing (*R.* v. *Marsham,* 1912, 2 K.B. 362; *post,* chap. xxxvi.). And the High Court will not interfere by *mandamus* with justices' discretion as to re-opening (*R.* v. *Knight,* 41 Sol. Jo. 276). As to the admission of fresh evidence on *appeal,* see *post,* 501, 513.

Fresh Judge, or Jury: Reswearing Witnesses. When a judge or juror becomes incapacitated, or a fresh jury is empanelled, the judge's notes of the evidence may be read over to the substitutes, the witnesses being re-sworn and liable to further questioning (*R.* v. *Jeffreys,* 22 L.T. 786; *Veronica Case,* 67 J.P. 267; *Exp. Bottomley,* 1909, 2 K.B. 14; *R.* v. *Laurence,* 25 T.L.R. 374; *contra, A.-G.* v. *Bertrand,* L.R. 1 P.C. 520, where the course was considered irregular, even with the prisoner's consent, though it was not held illegal). In general, however, one justice cannot act on evidence taken before another (*R.* v. *Guerin,* 58 L.J.M.C. 42).

Arguments as to Evidence in Absence of the Jury. To avoid prejudice to the accused the Court has a discretion to hear arguments as to the admissibility of evidence in the absence of the jury (*R.* v. *Ball,* 1911, A.C. 47, 50; *R.* v. *Thompson,* 33 T.L.R. 506, C.C.A.) In the last-mentioned case it was stated that such arguments should be heard in open Court so as to appear on the shorthand notes, but that the jury should retire. In the older cases they were usually heard in the judge's private room, and in one case were put into writing, and the decision given privately (see *R.* v. *Horsford, post,* 83; *R.* v. *Winslow, &c., post,* 180).

SPEECHES. SUMMING-UP EVIDENCE. REPLY. **Civil Cases.** When the party who began has closed his case, it is incumbent on his opponent, provided there is any case to meet, to announce whether he will adduce evidence or not, which decision he cannot afterwards alter (O. 36, r. 36; *Darby* v. *Ouseley,* 1 H. & N. 1, 8; Ros. N.P., 18th ed., 277, 287-8).

(*a*) *Where Opponnet adduces Evidence.* If the defendant decides to call witnesses, he must, in his turn, open his case, call them, and *sum up* (O. 36, r. 36, replacing C.L.P. Act, 1854, s. 18), which process need not be confined to the defendant's own evidence, but may include a complete commentary on the whole case (*R.* v. *Wainwright,* 13 Cax 171; *contra, Gilford* v. *Davis,* 2 F.

& F. 23, and *R.* v. *Plumb,* 28 Sol. Jo. 62). The plaintiff then, both in the High Court and County Court (*Clack* v. *C.,* 1906, W.N. 40), has a right to reply generally, even though the jury are prepared at once to find against him; unless he has reserved his rebutting case until the defendant's evidence is called, when the latter has a *special reply* on the plaintiff's rebutting evidence, though the plaintiff has the *general reply* upon the whole case.

Although the defendant calls no witnesses, yet if he *put in any document* during the case, or, even without putting it in, cross-examine the plaintiff's witnesses upon it, this will generally give a reply (*O'Keefe* v. *Walsh,* 114 L.T. Jo. 78, *per* Palles, C.B.; 49 Sol. Jo. 197; so, in criminal cases, *R.* v. *Jones,* Times, Jan. 18, 1905); but evidence addressed merely to the judge, *e.g.* to show that the defendant was not in possession of a document he had been notified to produce (*Harvey* v. *Mitchell,* 2 M. & R. 366), or, formally, putting in the record of a previous conviction against the plaintiff's witness to show the latter's incompetency (*Dover* v. *Maestaer,* 5 Esp. 92, 95), or commenting upon a document used only to refresh the memory of an adversary's witness, though reference be made to parts not looked at by such witness (*Pullen* v. *White,* 3 C. & P. 434; *R.* v. *Quin,* 3 F. & F. 818),—will not entitle the opposite party to reply. Formerly, if the defendant's counsel opened *new facts without proving them,* the plaintiff also had a reply; but as defendant's counsel must now announce that he will not call evidence, he will not afterwards be allowed to change his mind or read books or documents in proof of fresh facts (*Darby* v. *Ouseley,* 1 H. & N., pp. 8, 12-13; and see as to criminal cases, *inf.*).

(*b*) *Where Opponent does not adduce Evidence.* When his opponent decides not to call witnesses, and has not adduced other evidence as above, the party beginning is entitled to address the Court a second time, for the purpose of summing up his evidence, but his opponent has the reply (Ann. Pr., Notes to O. 36, r. 36).

(*c*) *Joint Defendants.* Where there are joint defendants, he who calls no witnesses has the right to reply, even though the witnesses called by the others have been favourable to him (*Ryland* v. *Jackson* 18 T.L.R. 574; *Hornsey* v. *Plater,* 87 L.T. Jo. 170; *Jeffree* v. *J.,* 54 Sol. Jo. 655; *contra* in Ireland, *Moore* v. *Ulster Co.,* 42 Ir. L.T.R. 173). If, however, co-defendants rely on the same defence, even though they appear by separate solicitors, they are only entitled to be heard by one counsel; while, if they rely on separate defences, they are entitled to separate addresses, even though they appear by the same solicitor (*Bagshaw* v. *Pimm,* 80 L.T. 360; *Medley* v. *London Tramways,* 26 T.L.R. 315; Archb. Pr. 634-635).

Criminal Cases. In Summary Cases, no reply is allowed on either side (11 & 12 Vict. c. 43, s. 14; 62 J.P. 683). In Jury Cases, after the witnesses for the prosecution have been called, counsel for the defendant must announce whether he will adduce evidence or not [Criminal Procedure (Denman's) Act, 1865, s. 2], which decision he may not alter (*ante,* 42).

(*a*) *Where Defendant calls Witnesses other than himself.* Whether he testifies himself or not, the defendant, or his counsel, has the right to open his case to the jury (*R.* v. *Hill,* 7 Cr. App. R. 1), call his witnesses (the defendant, if called, testifying either before, between, or after the others, as he pleases, *R.* v. *Olsen,* 62 J.P. 777; 42 Sol. Jo. 848, though in *R.* v. *Morrison,* 6 Cr. App. R. 159, the Court considered the prisoner should be called before

his other witnesses), and sum up (Cr. Proc. Act, 1865, s. 2; see *sup.*); the prosecution then relies unless the jury has stopped the case (*R.* v. *Perfitt,* 38 L. Jo. 479), or the defendant's *witnesses are only to character* [*R.* v. *Shrimpton* (1851), 2 Den. C.C. 319, 323, where Campbell, C.J., remarked, "The Crown has no right of reply on evidence to character," citing Resolution of the Judges on The Trials for Felony Act, 1836; *R.* v. *Dowse* (1865), 4 F. & F. 492; *contra, R.* v. *Stannard* (1837), 7 C. & P. 673; *R.* v. *Whiting, id.* 771]. The judge, but not the prosecution, may comment on the failure of defendants, or their consorts, to give evidence (*R.* v. *Rhodes,* 1899, 1 Q.B. 77; Cr. Ev. Act, 1898, s. 1); though breach of this rule will not necessarily invalidate a conviction (*Ross* v. *Boyd,* 10 Sc. L. T. Rep. 75; *R.* v. *Dickman,* 26 T.L.R. 640; *post,* 453).

Even if no witnesses are called for the defendant, yet if his counsel has at any time during the trial *put in any document,* or even without formally putting it in, cross-examined upon and read parts of it to the jury, the prosecution has the reply (*R.* v. *Jones, ante,* 43; *cp. post,* 473; Ros. Cr. Ev. 13th ed. 186; Archb. Cr. Pl. 190). As to evidence addressed merely to the judge, however, or documents used to refresh memory, see *sup.* Formerly, as in civil cases, if the defendant's counsel *opened new facts without proof,* the prosecution was allowed a reply; but now, after electing not to call evidence, he will not be allowed to open fresh facts, whether as the prisoner's explanation or otherwise (Resolution of Judges, Nov. 26, 1881, cited Ros. Cr. Ev. 13th ed. 186; *R.* v. *Everett,* 97 C.C.C. Sess. Pap. 335).

(*b*) *Where Defendant calls no Witnesses, or only himself.* If the accused elects not to call witnesses and not to testify, and is defended by counsel, but not otherwise, it is the right (28 & 29 Vict. c. 18, s. 2) but not the duty (*R.* v. *Holchester,* 10 Cox 226; Archb., 23rd ed., 208-9) of the prosecution to sum up before, but not after, the defence of any of the defendants has been entered upon (*R.* v. *Madden,* 12 Cox 239); and in doing so any sworn or unsworn statement made by the defendant before the magistrates may be put in and commented on (*R.* v. *Bird,* 19 Cox 180; *R.* v. *Gardner,* 1899, 1 Q.B. 150; *R.* v. *Boyle,* 20 T.L.R. 192). If, however, he elect to testify, such summing up is postponed till after he has done so, and it may then include a comment on his testimony (*R.* v. *Gardner, sup.*). The defendant, or his counsel, then replies, except in the two cases mentioned below, when the prosecution has the right, instead of summing up before defendant's address, to reply generally after it.

(*i*) *In Crown Cases in which the Attorney-General or Solicitor-General is personally engaged, but in no others,* the Counsel for the Crown have the right to a general reply, although the defendant calls no witnesses (Resolution of the Judges, Dec. 19, 1884, cited 5 St. Tr. N.S. 3 (c); Archb. Cr. Pl., 23rd ed., 212; *R.* v. *Osborn,* Times, Nov. 8, 1904). In Ireland, all prosecuting counsel in public prosecutions represent the A.-G., and, unless otherwise provided by statute, have the same privilege (Resolution of Irish Judges, Feb. 11, 1907; see 75 J.P. Jo. 54, and Times, Jan. 28, 1911).

(*ii*) *Where the prisoner makes an unsworn statement* to the jury, which he is entitled to do, whether defended or not, provided he calls no witnesses (*R.* v. *Millhouse,* 15 Cox 622; and in *R.* v. *Maybrick,* Liverpool Assizes, Aug., 1889, this was allowed even where witnesses were called), the prosecution used to have the right to reply (*R.* v. *Shimmin,* 15 Cox 122; *R.* v. *Doherty,* 16 *id.*

306). There was a conflict of practice, however, as to whether the statement should be made *before* (*R.* v. *Doherty, sup.; R.* v. *Masters,* 50 J.P. 104; Ros. Cr. Ev. 186) or *after* (*R.* v. *Shimmin, sup.; R.* v. *Millhouse, sup.*) his counsel's speech; while in some cases the prisoner was allowed to make a statement of facts, but not a speech, in lieu of his counsel (*R.* v. *Jones,* 114 C.C.C. Sess. Pap. 888; *R.* v. *Everett,* 97 *id.* 335, *per* Hawkins, J.). The right of the accused to make an unsworn statement or sum up, either without or in addition to testifying himself, is expressly reserved by the Cr. Ev. Act, 1898, s. 1 (*h*); but a reply thereon by the prosecution will probably not now be allowed, since under the Act, the accused must make his statement *before* the prosecuting counsel sums up, so that the latter has a sufficient opportunity of dealing with any new matter at that stage (*R.* v. *Pope,* 18 T.L.R. 717; *R.* v. *Sheriff,* 20 Cox 334; Archb. Cr. Pl., 23rd ed., 211; Ros. Cr. Ev., 13th ed., 186).

(*c*) *Joint Defendants.* Where several prisoners are jointly indicted, some calling witnesses and others not, the general practice is as follows: (1) If the offence is joint, and the evidence called by the former affects the defendants generally, the prosecution has a general reply; (2) if, however, the offences are distinct (*e.g.* stealing and receiving), or the defences separate (*e.g. alibi*), the prosecution replies specially, but must confine its remarks to those who call evidence, while the others address the jury last (*R.* v. *Trevelli,* 15 Cox 289; *R.* v. *Kain, id.* 388; *R.* v. *Serné,* 107 C.C.C. Sess. Pap. 147; Tay., s. 387 (c); Ros. Cr. Ev. 187). In *R.* v. *Burns,* 16 Cox 195, however, Day and Wills, JJ., though they declined to lay down any rule, refused a general reply to the prosecution, though the offence was joint (murder in a scuttling affray), and it did not appear that the evidence did not affect all the defendants. On cross-indictments, Gurney, B., refused a reply to either side (*R.* v. *Wanklyn,* 8 C. & P. 290).

[Tay., ss. 387-390; Ros. N.P., 18th ed., 287-289; Ros. Cr. Ev., 13th ed., 186-7; Archb. Pr., 4th ed., 642-645.]

THE BEST EVIDENCE RULE. STRICT PROOF. The maxim that "*The best evidence must be given of which the nature of the case permits,*" has often been regarded as expressing the great fundamental principle upon which the law of evidence depends. Although, however, it played a conspicuous part in the early history of the subject, the maxim at the present day affords but little practical guidance. [Tay., ss. 391-427; Best, ss. 87-92; Russ. Cr., 7th ed., 2056-7; Ros. Cr. Ev. 1-7; Thayer, Pr. Tr. Ev. 484-507; Cas. Ev., 2nd ed., 778-86; Salmond, 6 Law Quart. Rev. 75; Gulson on Proof, ss. 513-22.]

History of the Rule. The first mention of the phrase in the present connection, is believed to have occurred in the case of *Ford* v. *Hopkins,* 1 Salk. 283, decided in 1700; after this date, however, it became increasingly common, being used almost indiscriminately in three slightly different senses, the best evidence, *i.e.* that *the nature of the fact admitted,* or that *the circumstances would allow, or* that *the party could produce,* though, in whichever sense used, it appears never to have been true that absence of, or inability to obtain, better evidence, justified a resort to such inferior forms as hearsay, interested witnesses or copies of copies of documents.

Great prominence was given to the doctrine by the publication of Chief Baron Gilbert's work on Evidence in 1756, the following statement and com-

ment from which have been adopted, almost without question, by text-writers down to the present day: "The first and most signal rule in relation to evidence is this, that a man must have the utmost evidence that the nature of the fact is capable of. . . . The true meaning of which is that no such evidence shall be brought which *ex naturâ rei* supposes still a greater evidence behind in the party's own possession or power" (1st ed., p. 4). By evidence which supposed a greater behind, Gilbert apparently referred to the three great classes of "substitutionary evidence," *i.e.*, hearsay, secondary evidence, and proof of attested documents otherwise than by the attesting witnesses. It is to be observed, however, (1) that the 'best evidence' principle is not the true exclusionary ground of any of these rules, which have no common origin and are developments of no single principle; their beginnings, indeed, dating back to periods long anterior to the rule under discussion, or, in fact, to any formal rules of evidence at all (Thayer, Pr. Tr. Ev. 498; *post,* 48; chaps. xvii., xlii.); and (2) that the best evidence rule, during its currency, appears to have been by no means limited, as Gilbert's language would imply, to "substitutional" matter, but to have been of practically general application, excluding not only hearsay, secondary evidence, and proof of documents by non-attesting witnesses, but also circumstantial evidence if direct could be obtained (*Williams* v. *E. I. Co.,* 1802, 3 East, 192), real evidence if not physically produced (*Chenie* v. *Watson,* 1797, Peake Add. Cas. 123), proof of handwriting by opinion evidence if the writer himself could attend (*R.* v. *Smith,* 1768, 1 East, P.C. 1000), proof of consent otherwise than by calling the consenting party if alive (*R.* v. *Rogers,* 1811, 2 Camp. 654), and proof of attested documents, where the witness resided abroad, otherwise than by the issue of a commission to take his oral testimony (*Barnes* v. *Trompowsky,* 1797, 7 T.R. 265).

About the beginning of the nineteenth century, however, a notable reaction set in; and from that date forward, notwithstanding that the text-writers continued to stereotype the language of Gilbert, the actual decisions of the Courts show that by far the most conspicuous feature of the modern law of evidence has been its persistent recession from the 'best evidence' principle. In almost every instance, indeed, the former rulings began to be either set aside, or neutralised by exceptions. Thus, in *Barnes v. Trompowsky, sup.,* Ld. Kenyon, in allowing proof of the handwriting of an attesting witness resident abroad, instead of sending out a commission to examine him, remarked that this was a relxation of the old rule, admitted only of late years. In other cases, what were once objections to admissibility now went merely to sufficiency or weight; or what was insufficient before sufficed now (see proof of posting, *post,* 122; and of age, *R.* v. *Cox,* 1898, 1 Q.B. 179). Statutory alterations, *e.g.* as to the Competency of Witnesses and Proof of Documents, also operated in the same direction (*post,* chaps. xxxix., xliii.). Moreover, the presumptions of falsehood and concealment supposed to arise when the best evidence was withheld and which, if these suppositions were correct, would certainly arise with tenfold force to-day when it is so often in practice withheld, were no longer invoked; it began to be recognised that a prudent relaxation of strict rules tended not to encourage fraud or concealment, but to effect economy, convenience and despatch, while the risk of losing their cases was found to supply the parties with an ample inducement still to procure the best evidence available.

Its Present Scope: Strict Proof Not Generally Necessary. In the present day, then, it is not true that the best evidence must, or even may, always be given, though its non-production may be matter for comment or affect the weight of that which is produced. All admissible evidence is in general equally receivable. Thus, circumstantial evidence is no longer excluded by direct; and even in criminal cases the *corpus delicti* may generally be established by either species, or indeed, by the defendant's mere admissions out of Court (*R.* v. *Sullivan,* 16 Cox, 347; *post,* 233, 264). So, the production of "real" evidence—*e.g.,* on questions of the genuineness of a ring, the soundness of a horse, the equality of bulk with sample (*R.* v. *Francis,* L.R. 2 C.C. 128), or the infringement of an engraving or trade mark (*Lucas* v. *Williams,* 1892, 2 Q.B. 113; as to cinema films or wordless plays, see *Glynn* v. *Western, &c., Co.,* 1916, 1 Ch. 261), though often satisfactory, is not now compulsory (*ante,* 8); although where the real evidence is of a documentary character, *e.g.* an inscription on a ring, the ordinary rule as to primary evidence applies (*post,* chap. xliii.). Again, in proof of handwriting, it is not necessary, as formerly, to call either the writer or some one who saw the document written, the opinion of a witness who but once, and many years before, has seen the party sign is equally receivable, though its weight may be *nil* (*post,* 399, 402). Even on a charge of forgery, the prosecutor is not now an essential witness to disprove either the handwriting or his authority to sign (*R.* v. *Hurley,* 2 Moo. & Rob. 473); nor, to prove or disprove consent, need the person alleged to have consented be called [*id; R.* v. *Hazy,* 2 C. & P. 458; *R.* v. *Allen,* 1 Moo. C.C. 154; *Gleeson* v. *Hurley,* 1916, 2 Ir. R. 180; *R.* v. *Noble,* 60 J.P. 169; *R.* v. *Turner,* 1910, 1 K.B. 346; as to proof of the consent of the Public Prosecutor, &c., to judicial proceedings, see *post,* 189-90]. In the same way payment to a deceased person may be proved either by the "best evidence"—*i.e.* the oral testimony of the payer, or the hearsay receipt of the deceased (*Middleton* v. *Melton,* 10 B. & C. 317); and the estimated expense of paving as determined by a vestry surveyor, either by calling the surveyor or producing the estimate acted on (*Hobman* v. *Greenwich Board,* 58 J.P. 351, 703, C.A.). So, acting in a *public* though not generally in a *private,* capacity, is evidence of title thereto, without production of the document authorizing the appointment (*post,* 110).

Exceptions. On the other hand, there are certain cases in which the old rule still enjoys a precarious survival. Thus, strict proof of *marriage* is required in cases of bigamy, divorce, or petitions for damages for adultery, though not usually in other cases; of *age* on pleas of infancy (*Haines* v. *Guthrie,* 13 Q.B.D. 818), or on charges of carnal knowledge of girls under 16 (*R.* v. *Rogers,* 111 L.T. 1115), though not on charges of cruelty to children under 16, preferred under the Children Act, 1908, s. 123 (*cp. R.* v. *Cox,* 1898, 1 Q.B. 170; and 80 J.P. Jo. 181-2), nor on charges involving the age or fitness of children under the Factory and Workshop Act, 1901 (see s. 147; Tay., s. 1645), nor on charges against defendants over 16, of being habitual criminals (Prevention of Crimes Act, 1908, s. 10; *R.* v. *Turner,* 1910, 1 K.B. 346), nor for the purpose of detention under the Borstal System (*R.* v. *McCann,* 6 Cr. App. R. 115, the head note *contra* is incorrect). Under the last named Act, the three main *previous convictions* of the accused must be strictly proved, while any others alleged may be established less formally (*R.* v. *Franklin,* 3 Cr. App. R. 48; *R.* v. *Summers,* 10 *id.* 11; *post,* 189;

as to proof of previous convictions generally, see *ante,* 41-2). So, to prove *loss of custom* in libel actions, the customers themselves must, it seems, be called (*post,* 75). And, to prove that *premises are licensed,* or *persons rated or insured,* it has been held that the license, rate book, or policy must be produced; and parol testimony to the same effect has been rejected (*post,* 572-3). In a recent case also, the Return-book, produced from the custody of the Clerk of the Crown in Chancery, was rejected to prove the return of a member of Parliament, as not being the best evidence of that fact, although received by the House itself for that purpose (*Forbes* v. *Samuel,* 1913, 3 K.B. 706, 720; *sed. qu.,* and see *post,* 335-6).

But the chief illustration of the 'Best-evidence' maxim has always been found in the rule which demands that the *contents of a document* must, in the absence of legal excuse, be proved by primary, and not by secondary or substitutional evidence (*post,* 534-5). This rule, however, which is merely a survival of the ancient doctrine of *profert,* requiring the physical production of the instrument pleaded, existed long before the best-evidence principle was formulated; though it has, in fact, gone through a reaction not very dissimilar to that experienced by the best evidence idea. Thus, originally, at common law no secondary evidence was allowed (*Anon.,* 1741, 2 Atk. p. 61, *per* Ld. Hardwicke; *Sugden* v. *St. Leonards,* 1 P.D. 154, 238; Thayer, Cas. Ev., 2nd ed., 778); if the deed was lost, or in the possession of the adversary, the plaintiff failed. Afterwards, in cases of loss, equity relieved; then exceptions were allowed by the common law also (*Leyfield's Case,* 1611, 10 Co. 88, 92), marshalled, however, at first, strictly by degree, *i.e.* a counterpart, then a copy, then an abstract or recital, then parol evidence, the next best being let in only if the class above it were unavailable (*Villiers* v. *Villiers,* 1740, 2 Atk. 71; *Omychund* v. *Barker,* 1744, 1 *id.* 21, 49; *Bullen* v. *Michel,* 1816, 4 Dow. 297, 325; Stark. Ev., 2nd ed., 1834, p. 341; *Doe* v. *Wainwright,* 1836, 1 N. & P. 8, 13, when the point had become doubtful); until, finally, the present rule of "no degrees in secondary evidence" became established (*Brown* v. *Woodman,* 1834, 6 C. & P. 206, *per* Parke, B.; *Doe* v. *Ross,* 1840, 7 M. & W. 102; *post,* 542-3). As to the supposed application of the best-evidence principle to proof of *attested* documents, see *post,* 519, and to the two branches of the *parol-evidence* rule, *post,* 568, 574.

BOOK II.

ADMISSIBILITY OF EVIDENCE.

PART I. FACTS.

CHAPTER V.

FACTS IN ISSUE. RELEVANCY. ADMISSIBILITY.

SUBJECT to the various qualifications contained in Part I., the facts which may be proved in a judicial inquiry are *facts in issue; facts relevant to the issue;* in exceptional cases *hearsay, opinions, and judgments* as to such facts; and any facts, whether relevant to the issue or not, which affect the legal reception or weight of the evidence tendered.

[Steph. Introd. to Ind. Ev. Act; *id.* Digest, arts, 1 & 2 and App. Note 1; The Theory of Relevancy, by G. C. Whitworth, Bombay, 1881; An English Evidence Code, 20 Sol. Jo. 880; Pollock, Fortnightly Rev., Sept. 1877, pp. 385-90; Gulson on Proof, ss. 256, 499-508; Markby, Ind. Ev. Act, 17-20; Ameer Ali & Woodroffe's Law of Evidence in British India, 4th ed., Introd. pp. 17-39, 79-96; Text, pp. 25-27; Whart. Civ Ev. ss. 20-56; *id.* Cr. Ev. ss. 23-68; Thayer Pr. Tr. Ev. 264-6, 515-18; Wigmore, Ev. ss. 9-16, 24-43; *id.* Greenleaf, Ev., 16th ed. 35-91].

FACTS IN ISSUE, which are sometimes call 'principal' facts, are those necessary by law to establish the claim, liability, or defence, forming the subject-matter of the proceedings; and which, either by the pleadings or by implication, are in dispute between the parties (O. 19, rr. 4. 16; Steph, art. 1; I Benth. Jud. Ev. 40-44; Gulson, s. 256).—Facts in issue are, therefore, determinable primarily by the substantive law, and secondly by the pleadings (Steph. Introd, to Ind. Ev. Act, 10-13; Gulson, s. 257; Odgers, Pleading, 8th ed. 78).

FACTS RELEVANT TO THE ISSUE, which are sometimes called 'evidentiary' facts, are facts which render probable the existence or non-existence of a fact in issue or some relevant fact.

RELEVANCY AND ADMISSIBILITY. The legal admissibility of facts is for the most part determined by their logical revelancy to the issue, or that

connection between the two which, in the ordinary course of events, renders the latter probable from the existence of the former. But relevancy being founded on logic and human experience, and admissibility on law, which may change in different jurisdictions and periods, the two theories do not wholly coincide. Thus, many facts which in ordinary life are relied on as rendering other facts probable, the law on grounds of policy or precedent, rejects, *e.g.* as being too remotely connected, or slight in probative force, to form the basis of judicial decisions; or as tending to confuse the jury by a multiplicity of issues; or as creating unfair surprise and prejudice to the parties; or as infringing some safeguard of public policy or personal privilege. This exclusion of matter otherwise relevant has been called the distinguishing feature of the English law of evidence. On the other hand numerous facts are legally admissible, although they may have no logical bearing on the issue, *e.g.* the fact that a witness has or has not been sworn in a particular manner, or that a hearsay declarant is deceased at the date of the trial, or that proper search has or has not, been made for a lost document, which are conditions founded, not on logic, but on arbitrary juridical policy that may change from time to time (*post,* 221-2). The result is that relevant facts are often rejected and irrelevant facts often received. "Judicial evidence," Mr. Best remarks, "is for the most part nothing more than natural evidence restrained or modified by rules of positive law. Some of these rules are of an exclusionary nature, and reject as legal evidence facts in themselves entitled to consideration. Others again may be called *investitive, i.e.,* investing natural evidence with an artificial weight; and even, in some instances, attributing the property of evidence to that which, abstractedly speaking, has no probative force at all" (s. 34), [Steph. Dig. Introd. p. xiii.; Best, ss. 32-42].

Relevancy: Tests and Scope. (1) *Stephen's Rules.* In the two first editions of Sir. J. Stephen's Digest, relevancy was treated as "the connection of events as cause and effect" (Note vi.), the facts provable in judicial proceedings were stated to be "facts in issue, facts relevant to facts in issue, and no others" (art. 2), and the following specific rules or tests were, by art. 9, laid down:—"Facts whether in issue or not are relevant to each other when one is, or probably may be, or probably may have been—

(1) the cause of the other; the effect of the other; an effect of the same cause; a cause of the same effect;

(2) or when one shows that the other must or cannot have occurred, or probably does or did exist, or not; or that any fact does or did exist or not, which in the common course of events would either have caused or been caused by the other;

provided that such facts do not fall within "certain exclusive rules" (as to similar facts, hearsay, opinions and character), "or that they do fall within the exceptions to such rules."

These rules or tests, however, did not meet with general acceptance, the chief objections thereto being (1) that they did not sufficiently distinguish between the logical and the legal theory of proof; (2) that it is practically as difficult to determine what is a 'cause,' as what is 'relevant,' since not only do the popular, logical, and legal meanings of 'cause' conflict *inter se* (*Simpson* v. *Sinclair,* 86 L.J.P.C. 102, 106), but the very object of many trials is to decide whether given facts are, or are not, the result of others; and (3) that they were expressed with such almost necessary vagueness, as

to be of little practical help, the second group, in effect, relegating us to that unconscious logic of common sense which it was precisely the object of the definition to unravel.—In later editions of the Digest the theory of causation as a test of relevancy is, in terms at least, abandoned; and by art. 1 the word *relevant* is defined as meaning that "any two facts to which it is applied are so related to each other that, according to the common course of events one, either taken by itself or in conjunction with other facts, *proves or renders probable* the past, present, or future existence, or non-existence of the other," while by art, 2, it is said that: "Evidence may be given in any proceeding of any fact relevant to any fact in issue, unless it is hereinafter declared to be deemed to be irrelevant, and of any fact hereinafter declared to be deemed to be relevant to the issue, whether it is, or is not, relevant thereto. Provided that the judge may exclude evidence of facts which, though relevant or deemed to be relevant to the issue, appear to him too remote to be material under all the circumstances of the case." This is an obvious improvement on the earlier editions. The phrases 'deemed to be relevant,' and 'deemed to be irrelevant' are, however, apt to mislead, since they appear to imply that legal logic is something different from lay logic, and that the Court may regard facts as logically relevant or irrelevant when they are not really so, whereas, all that the author means is that in certain cases Courts admit or reject facts irrespective of their logical relevancy. In practice, therefore, it is preferable to use the terms 'relevant' and 'admissible' simply, meaning by the former that which is logically probative, and by the latter that which is legally receivable, whether logically probative or not. As to the two-fold standard of relevancy adopted in the Digest, *i.e.* relevancy to the issue (Art. 2.), and relevancy to the truth of the matter stated (Art. 14), see further *post*, 221-2.

Sir James Stephen, it should be noticed, distinguishes sharply between Relevancy (facts) and Proof (evidence, oral and documentary), or as he phrases it, between "what facts may be proved and how a fact must be proved assuming that proof of it may be given," and he remarks that "the neglect of this distinction, which is concealed by the ambiguity of the word Evidence (a word that sometimes means testimony and at other times relevancy), has thrown the whole subject into confusion and made what is really plain appear almost incomprehensible" (Dig. Introd, p. xi.). Unfortunately, however, in working out the distinction he so intermixes the two topics that confusion is merely increased. Thus, while in Part II, Proof is treated as synonymous with 'evidence' and so is contrasted with Relevancy, in Part I. it is included in, and made a sub-division of, the latter, a relevant fact being defined as one that '*proves*, or renders probable,' some other fact, and 'conclusive *proof*' being applied not only to 'evidence,' but to 'facts' as well (art. 1.). Moreover, 'Proof' is employed in a double sense: in Part II. it signifies "the means used of making the Court aware of the existence of facts" (Preface to 3rd ed. p. xxxi), while, in Part I., 'proves' means 'renders certain' (art. 1, *sup.*). Again, although the term evidence (*i.e.* Proof) is strictly confined to testimony and documents (art. 1), and so excludes facts, yet, as we have seen, by art. 64 primary 'evidence' of documents may be given by admissions, which are declared to be relevant 'facts' (art. 15); while, to the question: "What is evidence?" it is said, "the only possible answer is that one *fact* is, or is not, relevant to the other," which would admit facts, but exclude testi-

mony and documents. It seems, therefore, that the distinction between Relevancy and Proof and the narrow meanings here assigned to 'proof' and 'evidence' respectively, cannot be maintained, but that proof may be effected equally, by facts, testimony and documents, and that all three may properly be, as in practice they invariably are, classed as 'evidence' (*ante*, 1-2).

(2) *Views of Thayer, Wigmore and Chamberlayne.* Prof. Thayer rejects what he calls "the common but uninstructive distinction between logical and legal relevancy," which he remarks, "was not made by Stephen" (this is true only of the first two editions of the Digest, in later issues the distinction, in effect, though not in terms, is very clearly made). He holds that the law furnishes no test of relevancy, but for this refers tacitly to logic (Pr. Tr. Ev. 265-9, 516-8). By 'legal' relevancy, however, he refers only to those rules which by excluding remoteness, multiplicity of issues, &c., ensure *a more cogent form of logical relevancy* (*id.* 266, 516-17; see Chamberlayne's Best, 1883, s. 291 *n*; Law of Ev., s. 62 *n*); he does not contemplate, nor appear to have considered, the extension later formulated by Stephen, under which facts *logically irrelevant* are yet *legally received*. According to him, therefore, judicial decisions on relevancy involve no question of law, but where they *admit* facts, one merely of logic (*id.* 265-6. 269), and where they *exclude* relevant facts one chiefly of sound discretion (*id.* 516-18). Both propositions seem questionable. As to the first, many facts, as we have seen, are admissible, which have no logical bearing on the issue; indeed some American writers emphasize this by confining the term relevant to facts which are logically applicable to the issue and using 'competent' to denote those which though admissible are not logically connected (27 Am. L. Rev. 65; 94 L.T. Jo. 447). As to the second, it has been correctly said that judicial decisions on relevancy are just as binding as those on any other topic, so that logic, in being applied by the Courts, in effect becomes law (Wigmore, Ev., s. 12; Greenleaf, 16th ed., 36; 14 Harv. L. Rev. 39, 139). Finally, the author lays down two cardinal principles: (1) That *without any exception* nothing which is not logically relevant is admissible; and (2) that whatever is logically relevant is admissible, subject to many exceptions which are based on rules other than those of logic (Pr. Tr. Ev. 263-9). Thus, Thayer gives a much wider scope to the topic of Relevancy than Stephen, the latter excluding therefrom testimony and documents, the former including therein these and all other classes of admissible evidence, except, only, such as are not *logically* relevant.

Prof. Wigmore remarks that Admissibility is a quality standing between Relevancy (probative value) and Proof (weight of evidence). (*a*) It signifies that a fact is relevant and something more, viz., that it has satisfied all preliminary tests and privileges; (*b*) it does not signify that it has proved the issue, but only that it is entitled with other evidence to be weighed in the scale. He adds that proposition (*a*) has been questioned by two high authorities, although in opposite directions, *i.e.* by Stephen, who regards the *relevancy of facts as identical with their legal admissibility*, and by Thayer, who maintains that *there are no legal rules of relevancy at all*. He regards both views as erroneous; but on the other hand accepts Prof. Thayer's two principles quoted above as the cardinal axioms of admissibility (Wigmore, Ev. ss. 9-15). In effect, therefore, he adopts Thayer's view that 'relevancy' includes *all* kinds of evidence, facts, testimony and documents, but, with regard

to testimony, remarks that, although testimonial qualifications do involve a question of relevancy and may be expressed in terms thereof, this is not usual, nor necessary (s. 475; as to the latter point, see more fully *post,* 222). Like Thayer also, he ignores that considerable class of cases in which facts logically irrelevant are yet legally receivable.

Mr. Chamberlayne's conception of relevancy is the widest of all, embracing substantive law, logic, and weight of evidence. He divides the subject as follows:—(1) *Constituent, or legal, relevancy, i.e.* facts necessary by substantive law to establish the right or liability in dispute, facts relevant, that is, in the Scotch sense, but which are called by Stephen and in English law, facts in issue [Law of Ev., ss. 45-9, 54, 61-3 1713; his 'legal' relevancy, therefore, differs from both Stephen's and Thayer's, the latter of which he had previously adopted, see his ed. of Best, s. 291 *n,* cited *sup.*]; (2) *Probative, or logical, relevancy,* sub-divided into direct and indirect (ss. 54, 1711-12), and objective and subjective, the latter including testimony and admissible hearsay (ss. 54-9, 1714, 2695-6, 2725-6); and (3) *Deliberative relevancy,* or facts affecting the weight or credibility of evidence (ss. 60, 1714.) Nothing, however, seems to be gained by this multiplication of terms and distinctions; and in including substantive law among the sub-divisions of relevancy, Mr. Chamberlayne appears to stand alone, though he assumes that Stephen also intends to treat facts in issue as 'relevant' to 'rights and liabilities,' for he criticises him for 'embracing in the single term relevancy, and without warning or distinction, both facts in issue and relevant facts' (ss. 62, 1714-18*i*). But this is a mistake; Stephen never uses the word in that sense. Mr. Chamberlayne appears to have been misled by the loose phrase 'legal inference' in the following passage "Facts . . . may constitute such a state of things that the existence of the disputed right or liability would be a legal inference from them: such facts are called facts in issue' (Introd. to Ind. Ev. Act, 12; for a criticism of the phrase 'legal inference' by Prof. Thayer, see *ante,* 7). In the Digest, however, Stephen makes it clear that the 'legal' relevancy contemplated by him is one, not of substantive law subsisting between facts in issue and rights and liabilities, but of adjective law subsisting between 'facts deemed to be relevant' and facts in issue.

Miscellaneous. The term 'material' is often used as a synonym for 'relevant.' It is, however, sometimes confined to facts which are in issue, or pleadable (O. 19, R. 4); sometimes extended, as in perjury cases, to all admissible facts, whether in issue, relevant to the issue, or relevant merely to credit or punishment (*R.* v. *Baker,* 1895, 1 Q.B. 797, *R.* v. *Wheeler,* 1917, 1 K.B. 283); and sometimes used to indicate merely the weight or importance of the evidence (Steph., art. 2.) [See an article on Materiality in the Law of Perjury, by Prof. Chase, 3 Cr. Law Mag. (Am.), 459-83].

It is not necessary that the relevancy of a fact should appear at the time it is proved; the judge will always admit evidence on the undertaking of counsel to show its bearing or admissibility at a later stage, failing which it will be struck out (*Haig* v. *Belcher,* 7 C. & P. 389). If, however, irrelevant evidence has in fact been left to the jury, the party affected will not be allowed to rebut it (*R.* v. *Cargill,* 1913, 2 K.B. 272).

Evidence may, however, be admissible for some purposes and not for others *e.g.* complaints are receivable to corroborate the testimony of the prosecutrix,

but not to prove the facts asserted (*post,* 113); so, a confession, though it may implicate fellow prisoners, is, in general, only evidence against the maker (*post,* 269). In such cases the judge should caution the jury as to the limits of the evidence, and where he has failed to do so, and substantial miscarriage results, the convictions may be quashed.

The admissibility of facts in issue and of the chief classes of relevant facts commonly tendered in evidence, will form the subject of the remaining chapters of Part I.

CHAPTER VI.

THE FACT OR TRANSACTION IN ISSUE. *RES GESTA.*

ACTS, declarations, and incidents which *constitute,* or *accompany and explain,* the fact or transaction in issue, are admissible, for or against either party, as forming parts of the *res gesta.*

[Steph, art. 3 & 8; Tay, ss. 583-9; Best, s. 495; Ros. N.P. 51-3; Gulson on Proof, ss. 123-7, 359-61, 532-7; Thayer, 14 Am. Law Rev. 817, and 15 *id.* 1, 71; Cases on Ev., 2nd ed., 641-72; Wigmore, Ev., ss. 1745-84; Chamberlayne, Ev., ss. 2581-2623, 2644-67, 2984-3032; Wharton, Civil Ev., ss. 528-67; Cr. Ev. ss. 62-70; and for a detailed examination of this topic, see an article by the present writer, 19 Law Quart. Rev. 435].

Sir J. Stephen treats the above incidents as relevant facts (Digest, art. 3; Ind. Ev. Act, s. 7). Mr. Gulson, however, points out that the components of a principal fact are not properly speaking circumstantial evidence, which term is only applicable to those extrinsic facts from which the principal fact, with all or some of its details or components, are inferred or deduced (s. 200; see also Chamberlayne, Ev., s. 46). The English and leading American conceptions of the *res gesta* rule appear substantially to coincide; but in some U.S. jurisdictions the Latin phrase is used in a loose sense as equivalent to relevancy or admissibility (Chamberlayne, Ev., ss. 2581-4, 2984-2991; Introd. to Vol. iv., pp. xiii,-xiv.; and for this writer's own definition and user, see ss. 47-9).

History and Principle, The rule that declarations accompanying an act are receivable in explanation thereof, first appeared in 1693 (*Thompson* v. *Trevanion,* Skin. 402, cited *post,* 78). In 1736, declarations were again held to be admissible if 'concomitant with facts' (*Ambrose* v. *Clendon,* Cas. *temp.* Hardw. 267). The Latin phrase though used still earlier as a mere untechnical equivalent for "facts," or "events" (*e.g., The Ship Money Case,* 1637, 3 How. St. Tr. 988), is not, however, traceable in the present connection before 1794 (*R.* v. *Horne-Tooke,* 25 How. St. Tr. 440). At first the singular forms alone, *res gesta, pars rei gestæ,* were employed (*id.; The Juffrouw Elbrecht,* 1799, 1 Chr. Rob. Adm. Rep. 127-8; *Hoare* v. *Allen,* 1801, 3 Esp. 276; *Robson* v. *Kemp,* 1802, 4 Esp. 233; 2 Evans' Poth. 217), and much of the ambiguity which has since attached to the phrase might have been avoided had this early and correct usage been adhered to. It is the idea thereby conveyed, viz. that of a whole (some single act or transaction) in relation to its constituent, or quasi-constituent parts, that represents the true evidential notion: "The principle of admission is that the declarations are *pars rei gestæ*" (*Rouch* v. *G. W. Ry.,* 1 Q.B. 51, 60, *per* Ld. Denman, C.J.; Thayer, Pr. Tr. Ev. 523). The use of the plural form, first met with in the present relation in 1805 (*Aveson*

v. *Kinnaird,* 6 East. 188, cited *post,* 83), led to confusion and gave rise to at least four conflicting conceptions, *e.g.*, (*i*) one which applies the term *res gestæ* to the *main fact* in relation to its constituent details; (*ii*) one which applies it to the *details* of such fact merely; (*iii*) one which applies it to the "*surrounding circumstances*" of some central fact, called, in contradistinction, the "*principal fact*"; and (*iv*) one which applies it to the total whole composed of both principal fact and surrounding circumstances. Not infrequently, indeed, two or more of these meanings are confounded in the same definition. Thus, Starkie, after referring to "all the surrounding facts of a transaction, or as they are usually termed the *res gestæ*," speaks later of "the *res gestæ* or transaction," confusing conceptions (*iii*) and (*i*), (4th ed. pp. 78, 89); so Mr. Taylor, in laying down that the "circumstances and declarations must be so connected with the main fact as to illustrate its character, further its object, *or* form, in conjunction with it, one continuous transaction," appears to confound (*iii*) and (*iv*) (8th ed., s. 588); while the editors of the 9th and 10th editions of Taylor, after defining *res gestæ* as "the transaction looked at in its entirety and as a whole," refer, later, to the phrase as "including everything which can fairly be considered an incident in the event under consideration," apparently confusing (*i*) and (*ii*), (s. 583) [19 Law. Quart. Rev. 435-8.].

The term *res gesta,* though generally applied to the fact or transaction in issue may, as will be seen, be used in the present sense of any relevant act, *i.e.* to indicate the admissibility of its own accompanying declarations. This does not, of course, mean that such subordinate acts and declarations are to be regarded as forming any part of the main act or *res gesta* (*post,* 58). As to the relation of this topic to the hearsay rule, see *post,* 60, 218.

CONSTITUENT FACTS. *The Fact in issue per se.* (*a*). Facts whether in issue or relevant, are not always admissible in evidence in the sense of being the subject of direct assertion or denial, for they may involve inferences of law or fact which it is for the Court or jury and not for the witness to draw.

When such facts are of a simple nature, or can only be expressed by a direct statement, they will necessarily be receivable. But wherever the inference is remote or doubtful, the proper course is for the witness to state the incidents relied on as constituting or amounting to the main fact, and not the latter *per se* [Wharton, Civil Ev., ss. 15, 26, 509-513; Gulson, ss. 122-7; Chamberlayne's Best, s. 11 *n.*; *post,* 65, 401].

Constituent Incidents (*b*). These constituent incidents may vary, according to the nature of the case, from a single occurrence, lasting but a few moments, to a variety of acts, declarations, and circumstances, occupying a length of time, and occurring on distinct occasions; they may comprise things done, or omitted, either by the principal, or his agents (*post,* chap. vii), or partly by one and partly by the other (*R.* v. *Mean,* 69 J. P. Rep. 27; *post,* 69); and they may have occurred partly within and partly without the jurisdiction (*R.* v. *Ellis,* 1899, 1 Q.B. 230; *R.* v. *Oliphant,* 1905, 2 K.B. 67; *R.* v. *Mackenzie,* 6 Cr. App. R. 64; *post,* 99-100).

Cumulative and Continuous Transactions (*c*) Sometimes the main transaction can only be established by proving a series of *Similar facts,* which may happen either (1) because the nature of the case itself demands cumulative instances—*e.g.* Barratry; Common Cheating; Custom; Trading, under the

Bankruptcy Acts (*Re Griffin,* Times, Dec. 13, 1890, C.A.; but *cp. Cornelius* v. *Phillips,* 1918, A.C. 199, where a single instance of carrying on business as a money-lender otherwise than at his registered address, sufficed to avoid a contract); Pollution, under the Rivers Pollution Act, 1876, s. 2; practising without certificate, under the Apothecaries Act, 1815 (*Apothecaries Co.* v. *Jones,* 17 Cox 588); frequenting public places with intent (*Clark* v. *R.,* 14 Q.B.D. 92; *Whickham* v. *Ashe,* Times, Jan. 16, 1897); permitting a house to be used as a brothel (*Exp. Burnby,* 1901, 2 K.B. 458), or for betting (*Jayes* v. *Harris,* 72 J.P.R. 364; *R.* v. *Davies,* 1897, 2 K.B. 199, where a single instance was held insufficient; *McConnell* v. *Brennan,* 1908, 2 I.R. 411, where it was said a single instance might suffice; and *cp. R.* v. *Mortimer,* 74 J.P. Jo. 520, *post,* 69); or (2) because the similar facts have occurred in such close connection in point of time, place, or other conditions, as virtually to form but one entire or continuous transaction (*R.* v. *Ellis,* 6 B. & C. 145; *R.* v. *Salisbury,* 5 C. & P. 155; *R.* v. *Mean,* 69 J.P. Rep. 27; *post,* 69). In criminal cases charges for several offences, whether felonies or misdemeanours, may now be joined in the same indictment, if either founded on the same facts, or forming part of a series of offences of the same or a similar character (Indictments Act, 1915, sch. I.R. 3); though, where the accused is prejudiced by such joinder, or for other sufficient reason, separate trials may be ordered (*id.* s. 5 (3)).

Documentary Transactions (*d*). When a contract, will, or other formal transaction has been reduced into writing, the rules excluding extrinsic evidence in substitution or contradiction thereof apply (*post,* chaps, xliv.-v.), and the *res gesta* must consequently be established by production and proof of the instrument itself, or by secondary evidence as provided in chap. xliii. In cases not of a formal character, however, proof may generally be given of all facts constituting the transaction, whether oral, documentary, or otherwise (*Carmarthen Ry.* v. *Manchester Ry., post,* 66).

ACCOMPANYING FACTS. There are many incidents, however, which, though not strictly constituting a fact in issue, may yet be regarded as forming a part of it, in the sense that they accompany, and tend to explain, the main fact. Not only may the probability of an occurrence be tested by considering its attendant circumstances (*Dysart Peerage, post,* 77-8), but these undesigned incidents are often essential to elucidate its true character, to reveal the motives of the parties, or to establish their connection with the fact. In testifying to the matters in issue, therefore, witnesses are required to state them, not in their barest possible form, but with a reasonable fulness of detail and circumstance (Thayer, 15 Am. L. Rev. 92; *R.* v. *Stephenson,* 68 J.P. Rep. 524; Steph. art. 3). It is not, of course, all the incidents of a transaction that may be proved, for the narrative might be run down into purely irrelevant and unnecessary detail. Names, dates, places, and the description and circumstances of the parties, though not in issue, are, however, always admissible. So, often, the physical conditions under which the main fact happened; or any other matter so intimately connected therewith as to be necessary in order to present the case intelligibly to the jury (*R.* v. *Bond,* 1906, 2 K.B. 389, 400.) The particulars receivable, however, will necessarily vary with each individual case. The main conditions of admissibility are, that the matters tendered should form the natural incidents of the act; that

they should be substantially contemporaneous with it; and should qualify, explain, or complete it in some material respect (Greenleaf, s. 108; Whart., Civ. Ev., ss. 258-269). Even *similar facts* not strictly 'constituting' the main fact in the sense above stated, but yet closely connected with, and explanatory of it, may be received under the present head (*post,* 70); while, where the main fact is of a continuous nature, or forms part of a prolonged and connected course of conduct, a still wider field of enquiry may become permissible (*Dysart Peerage, sup.; Aylesford Peerage, post,* 77; *R.* v. *Wiseman, post,* 76).

Incidents other than Declarations (*e*). Questions of evidence in this connection usually arise with regard to declarations, since with other incidents there is less danger of the jury being misled, and the present principle consequently is less often invoked.

Declarations accompanying Acts (*f*). On this subject considerable diversity of judicial opinion exists, but the following points may be taken to be established:

(1) *The Act must be in issue or relevant; and the declarations must relate thereto.* The declarations are not admissible simply because they accompany an act; the act itself must be in issue, or relevant (*Wright* v. *Tatham,* 5 C. & F. 670, 689, cited *post,* 84; *R.* v. *Bliss, post,* 72; *Hyde* v. *Palmer,* 75; *Gresham Hotel* v. *Manning,* 75; *R.* v. *Christie,* 81); and, for the present purpose, *i.e.* of letting in their accompanying declarations, "acts by whomsoever done are *res gestæ* if relevant to the issue" (*Wright* v. *Tatham,* 7 A. & E. p. 355, *per* Parke, B.; as to this *dictum* see further 19 Law Quart. Rev. p. 442). Moreover, the declarations can only be used to explain the fact they accompany, and not previous or subsequent facts (*Hyde* v. *Palmer, sup.; Agassiz* v. *London Tram Co., post,* 71), unless, indeed, the transaction be of a continuous nature. Statements of *opinion* may, it seems, be tendered under this head, provided the act which they accompany is itself relevant (*Wright* v. *Tatham,* and *Gresham Hotel* v. *Manning, sup.; Manchester Brewery* v. *Coombs post,* 75).

It is not, however, every declaration that accompanies and purports to explain a fact that will be received—*e.g.* a declaration that is equivocal (*R.* v. *Bliss, sup.;* and see *R.* v. *Wainwright, post,* 79); or is obviously concocted to serve a purpose (*Thompson* v. *Trevanion, post,* 78; *R.* v. *Abraham,* 81; Whart. s. 259). So, in America, "it is not the law that any and all conversation that happens to be going on at the time of an act can be proved if the act can be," (*Com.* v. *Chance,* 174 Mass, 245, *per* Holmes, J., cited *post,* 80), *e.g.,* where the act itself is free from ambiguity (*Nutting* v. *Page, post,* 72), or needs no explanation, or is not explained in any material sense by the words (*Com.* v. *Chance, sup.*), or the declaration is inconsistent with the act (*State* v. *Shelley,* 8 Clarke (Iowa), 477).

(2) *Must be contemporaneous.* The declarations must be substantially contemporaneous with the fact—*i.e.* made either during, or immediately before or after, its occurrence—but not at such an interval from it as to allow of fabrication, or to reduce them to the mere narrative of a past event (*Thompson* v. *Trevanion, sup.; R.* v. *Christie,* 1914, A.C. 545, 556, 566; and cases *infra.*)

The question of contemporaneousness has given rise to much discussion. In *R.* v. *Bedingfield, post,* 80, it has been thought that Cockburn, C.J., applied

the rule too strictly; that case, however, was approved in *R.* v. *Christie, sup.* On the other hand, the *dictum* of Ld. Denman, C.J., in *Rouch* v. *G. W. R.*, 1 Q.B. p. 60, adopted by Mr. Taylor, s. 588, that "concurrence of time, though material, is not esential," seems to err in the opposite direction, substantial, though not literal, concurrence being indispensable (*Peacock* v. *Harris, post,* 85, *per* the same judge; *Thompson* v. *Trevanion, sup.; R.* v. *Gordon, post,* 79; *Lees* v. *Marton,* 76; *Agassiz* v. *London Tram Co.,* 71; *Smith* v. *Blakey,* 74; *R.* v. *Goddard,* 80; *R.* v. *Gibson, id.; R.* v. *Osborne,* 1905, 1 K.B. 551, 560-1; *Wolsey* v. *Pethick,* 1 Butterworth's W.C.C. 441 (C.A.) cited, *post,* 83; *R.* v. *Christie, sup.; R.* v. *Thompson,* 1912, 3 K. B. 19). *Rouch* v. *G. W. R.* it is to be noted, was a bankruptcy decision, and in some of the older cases of this class notoriously loose *dicta* occur, which, if correct, would certainly render the bankruptcy cases exceptional; their laxity, however, was not approved by Parke, B. and others and the whole of the bankruptcy *decisions,* with the exception of *Smith* v. *Cramer* and *Ridley* v. *Gyde, post,* 76-7, favour the rule requiring the declarations to be substantially contemporaneous with the act (see fully *post,* 75-7). Where, indeed, the act itself is continuous, or forms part of a connected course of conduct, the rule as to contemporaneousness is necessarily relaxed, and declarations made at any time during the currency of either may become admissible (*ante,* 58, *post,* 77).

(3) *By whom made.* It is sometimes said that the declaration and act must be by the same person (*Howe* v. *Malkin, post* 72). But though such declarations are often the only ones material, the rule is by no means so strictly confined. It is an everyday practice in criminal cases to receive the declarations of the victim, as well as those of the assailant. So, in cases of conspiracy, riot, and the like, the declarations of all concerned in the common object, although not defendants, are admissible (*R.* v. *Gordon, R.* v. *Hunt,* and *R.* v. *O'Connell,* cited *post,* 79). It has, indeed, been held that unless some such common object be proved, the declarations of participants, if neither parties nor agents, should be rejected (*R.* v. *Petcherini, post,* 79); but this limitation cannot be taken as invariable, for the exclamations of mere bystanders may sometimes be both relevant and admissible. (*R.* v. *Fowkes, post,* 80; *Milne* v. *Leisler,* 71; and see generally *Bennison* v. *Cartwright, post,* 73; *Stanley* v. *White,* 72; *The Schwalbe,* 71; Whart, Crim. Ev. s. 259; in Steph., art. 8, statements accompanying an act are limited to those made "by, or to, the party doing the act," but this article should probably be read with art. 3, in which *R.* v. *Fowkes, sup.,* is cited in illustration). As to declarations by *deceased persons,* see *infra,* 61.

(4) *Documentary declarations.* It is immaterial whether declarations accompanying and explaining an act are oral or written (the dictum, to the contrary, in *Tustin* v. *Arnold,* 84 L.J.K.B., 2214, that a written statement can never form part of the *res gestæ,* is not maintainable); though this principle will apply less often to declarations explanatory of formal documents, since here the intention must generally be gathered from the instrument itself (*post,* chap. xlvi), and moreover declarations, even though part of the *res gesta,* cannot be received to contradict or vary the document (*Kirk* v. *Eddowes,* 3 Hare, 509, 522). Still there are cases in which the *res gesta* principle may be invoked without infringing these rules, as where declarations at or about the time of executing or destroying a deed are received to show the intention of the act (*Young* v. *Schuler, post,* 75; *Perrott* v. *P.,* 14 East, 421),

or the identity of the subject-matter (*Parrott* v. *Watts, post* 72), though subsequent declarations for those purposes have been rejected (*Peacock* v. *Harris, post,* 85); so, with declarations accompanying the execution or destruction of wills (see *post,* chap. xxviii.). Moreover, the rule demanding primary evidence of documents is not always enforced in this connection (*Carmarthen Ry.* v. *Manchester Ry., post,* 66; *R.* v. *Hunt,* 79; *Bruce* v. *Nicolopulo,* 11 Ex. 19).

(5) *The Declarations are Original evidence, not Hearsay, and are no proof of the facts stated.* The declarations are no proof of the fact they accompany; the existence of the latter must be established independently (Tay., s. 586).

Nor, although admissible to *explain* or *corroborate,* are they, in general, any evidence of the *truth* of the matters stated (*Perkins* v. *Vaughan, post,* 74; *Milne* v. *Leisler,* 74; *Dysart Peerage,* 78; *Aylesford Peerage,* 77; *Parnell Commission,* 67, 75; *Lloyd* v. *Powell, &c., Co.* 1914, A. C. 733; *R.* v. *Christie, id.* 545, 553; *Carmarthen Ry.* v. *Manchester Ry.* 66; *R.* v. *Plumer,* 82; *Chase* v. *Lowell,* 72; Tay. s. 586; Steph. arts. 3, 8; Ros. N.P. 51, 53). Dr. Wharton, also, though treating them as exceptions to the hearsay rule when defined in its *wide* sense, is careful to show that they are not so in the *narrow* and usual one which excludes statements made out of Court as evidence of the *truth* of the facts asserted (*post,* chap. xvii). "Their admission," he remarks, "does not imply an acceptance of any facts they assert. The act of which they form a part may have taken place and yet the statement be in the main false. Thus, a party assailed may at the moment of an assault exclaim 'this was in revenge.' The exclamation is evidence as part of the transaction, but is no proof of an old grudge" (Cr. Ev., s. 266). On the other hand, Prof. Thayer considers that such declarations "may legitimately be used to prove what they import and to supply new and unproved or insufficiently proved elements of the *res gesta*" (15 Am. L. Rev. 96). He cites none of the above cases, however, and of the four American decisions given only one, *Ins. Co.* v. *Moseley,* 8 Wall, 397, goes to this length. Another writer, after asserting that *any* relevant statement is admissible if merely used circumstantially, argues therefrom "that the *res gesta* limitations would be meaningless unless the evidence were intended to be used testimonially" (17 Harv. L. Rev. 144-5; see also Chamberlayne, Vol. IV., p. ix). The first proposition, however, is not maintainable (see 'relevant statements,' *post,* 103), and the last would ignore all the cases *contra,* cited above. Prof. Wigmore, who examines the matter more critically, concedes that in the great majority of instances the statements are properly original evidence and not to be used testimonially, *e.g.* a bankrupt's declaration when leaving home, a testator's when destroying his will or an occupier's that "this land is mine, I bought it of A," which, though admissible to show adverse possession, is no proof that it is his, or that he did buy it of A.; but he claims that there is a special class of cases in which the words may be used testimonially, and which, therefore, forms a true exception to the hearsay rule in its narrow sense, viz. "Statements or exclamations by injured persons uttered immediately after the injury, or by those present at an affray or other exciting occasion, as to the circumstances thereof as observed by them" (ss. 1745-92).* There are American cases both for and against this

* In his valuable work on Evidence, Prof. Wigmore pushes this view to extreme and apparently untenable lengths, cutting these "injury" declarations altogether adrift from the *res gesta* class as supposedly governed by a different principle and subject to different

view; but in England the only decision which in terms supports it is *R.* v. *Foster,* cited *post,* 81. The law on this difficult subject is, perhaps, best summarised by Holmes, J.: "As a rule such declarations are not evidence of the past facts which they may recite. The cases in which they have been admitted to prove the cause of a wound or injury, if not exceptions to the rule, at least mark the limit of admissibility" (*Elmer* v. *Fessenden,* 151 Mass. 359).

(6) *Miscellaneous.* There is no distinction with regard to the admissibility of the declarations between *civil* and *criminal* proceedings. In both they may be used as evidence either *for* or (even when made in his absence) *against* a party (Tay., s. 585; *Fellowes* v. *Williamson, post,* 75; *Milne* v. *Leisler,* 74; for criminal cases, see *post,* 79-82); whether he be called as a witness or not (*Dysart Peerage,* 6 App. Cas. p. 516); or even though he would be incompetent if so called (*Bateman* v. *Bailey,* 5 T.R. 512; *Aveson* v. *Kinnaird,* 6 East, 188; *Aylesford Peerage,* 11 Ap. Cas. 1; Tay., s. 580 *n*). Nor is it material whether the declarant be *alive* or *dead* at the date of the trial (*Dysart Peerage, sup.*). Mr. Taylor, indeed, suggests (s. 684) that statements explaining the possession of *land* are only admissible under the conditions stated *post,* chap. xxiii, *i.e.* when made by deceased persons in disparagement of their own title; but see *Parrott* v. *Watts* and *Johnson* v. *Thompson, post,* 72; and *cp.* Wigmore, Ev., s. 1780. It may be added that *Complaints* in cases of rape (*post,* 115), and also *Admissions by Agents* (*post,* 246) are sometimes, although erroneously, referred to the *res gesta* principle.

Mental and Physical Condition. *Direct Testimony.* (*e*) Witnesses may speak directly as to what were their *own* feelings, motives, intentions, opinions, knowledge, and the like, at any given time, their testimony being based, not on inference, but consciousness, though little reliance can be placed on evidence of this class (*post,* chap xxxv.; Whart., s. 508). They may not, in general, however, testify to the state of mind of *others* as to which they can have no direct knowledge (*Re Beale,* 6 T.L.R. 308; *Coldwell* v. *Holme,* 23 L.J.Ch. 595; *Townsend* v. *Moore,* 1905, P. 66, 80; *R.* v *Wright,* Times, Jan. 16, 1905), but should detail the facts from which the given condition may be inferred.

Declarations out of Court. (*f*) Whenever the bodily or mental feelings of a person are material to be proved, the usual expression of such feelings made at the time may be given in evidence. If they were the natural language of the affection, whether of body or mind, they furnish original and satisfactory evidence of its existence, and the question whether they were real or

---

limitations. Thus he maintains (1) that such utterances are admissible, not because they are part of an act, but because they are spontaneous, *i.e.*, caused by "some startling occurrence likely to produce nervous excitement and spontaneous utterance"; though he adds, such startling occurrence "need not itself be relevant to the issue" (s. 1753). The latter proposition, itself somewhat startling, seems, however, to be qualified by other passages which, by requiring the utterances "to relate to the occurrence," impliedly enforce the latter's relevancy to the issue also (ss. 1750-54), otherwise, both the occurrence and the utterance might be wholly irrelevant to the case, which is obviously not the author's meaning. (2) That, unlike the *res gesta* cases, the "injury" utterances need not be literally contemporaneous, nor made by the actor himself (ss. 1750-66). The answer to this contention seems to be that neither of these conditions is really required by the *res gesta* principle as formulated either in the English or leading American decisions (*ante* 58-9). Mr. Chamberlayne's view is somewhat similar, for he apparently holds (1) that, *any* extra-judicial statement, if *spontaneous,* is evidence of the truth of the matter asserted; and (2) that while the mere fact that a statement is part of the *res gesta* does not, of itself, have that probative effect, yet if the element of spontaneity be added that effect will follow (ss. 2984-91). Neither doctrine is recognized in English law.

feigned is for the jury to determine. [Tay., ss. 580-586, 606; Steph., art. 11; Ros. N. P. 52; *id.* Cr. Ev. 26-27; Whart., Civ. Ev., ss. 268-9, Cr. Ev. 271-4; Wigmore, Ev. ss. 1714-40; Chamberlayne Ev. ss. 2624-2687.]

Such declarations are sometimes considered to fall within the *res gesta* principle (*Doe* v. *Ridgway,* 4 B. & Ald. 53, 55; *Gardner Peerage,* Le March, p. 174; *Lloyd* v. *Powell &c., Co.* 1914, A.C. 733, 748, 752; Tay., s. 584), and sometimes to form a special category of their own (*post,* 63). In either view, however, they are admissible merely as *conduct* manifesting the existence of the given condition, *i.e.* as original, circumstantial, or presumptive evidence, and not (except against the declarant himself) as *assertions* establishing the truth of the facts asserted, *i.e.* as exceptions to the hearsay rule:

"They (declarations by a deceased putative father of his intention to marry the mother and support the child) are acts, matters of conduct, and strong pieces of evidence on the issue of paternity, inasmuch as they show the character in which the parties regarded the child and desired to treat it. . . . To treat them as statements against interest and therefore, though hearsay, proof of the facts stated, is wholly to mistake their true character and significance. This significance consists in the improbability that any man would make these statements, true or false, unless he believed himself to be the father . . . The testimony of the witnesses is to the act, *i.e.*, the speaking of the words, it is that which possesses evidential value. The evidence is, therefore, not in any respect open to the objection that it is secondary or hearsay" (*Lloyd* v. *Powell, &c., Co., sup. at* 740-1, 752). "The declarations (of the testator) are to be received as mental acts or conduct, their truth or falsity is of no consequence; as narratives they are not receivable as evidence of the facts stated (*Shailer* v. *Bumstead,* 99 Mass. 112, 120). "Though such declarations (threats of suicide by the deceased), when conscious and voluntary, have in them some of the elements of hearsay, yet they closely resemble evidence of the natural expression of feeling which has always been regarded in the law not as hearsay, but as original evidence. . . . They are acts from which the state of mind or intention may be inferred in the same manner as from the appearance of the person, or his behaviour, or his actions generally" (*Com.* v. *Trefetham,* 157 *id.* 180, 188). See also Tay. s. 580; Steph. art. 11, where such declarations are treated as relevant facts, and not as hearsay admitted by exception; and Chamberlayne Ev., ss. 2630-1, 2638, 2641, 2647, 2654, 2657.

The contrary view that they are admissible to prove the *truth* of the facts stated, *i.e.* as exceptions to the hearsay rule, is, however, maintained by some American authorities [Wigmore, Ev. ss. 1714-40; *Mutual Ins. Co.* v. *Hillmon,* cited *post,* 79; *Throckmorton* v. *Holt,* 180 U.S. 552; 26 Harv. L. Rev. 146. See *post,* 218-9, 325].

(1) *As to Health or Feelings.* The statements of patients to medical men and others are presumptive evidence of their state of health, provided they are confined to contemporaneous symptoms, and are not in the nature of a narrative as to how, or by whom, such symptoms were caused (*Gardner Peerage,* Le March, 169-179; *R.* v. *Gloster,* 16 Cox 471; *Gilbey* v. *G. W. Ry.,* 102 L.T. 202; C.A.; *Amys* v. *Barton,* 1912, 1 K.B. 40, C. A.; *post,* 83). And if the condition of the patient before or after the time in issue be material, his declarations at such times as to his then present condition are equally receivable (*Aveson* v. *Kinnaird,* 6 East 188; *R.* v. *Johnson,* 2 C. & K. 354). It is usually said that such declarations are receivable though they form the *only proof* of the given condition (Tay., s. 580); but this has been doubted, and it has been suggested that the *manifested condition,* and not the *sickness* itself, is the true *res gesta* to be explained (Thayer, 15 Am. L. Rev. 98-104). So, when the *terms* upon which two parties have lived are material, their letters to each other (*Trelawney* v. *Coleman,* 1 B. & Ald. 90), or to third persons (*Willis* v. *Bernard,* 8 Bing, 376), are admissible evidence of that fact, though

not of the truth of all the matters stated. When there is reason to suspect collusion, however, proof, irrespective of their dates, must be given that they were written at a time when such suspicion could not attach (*Wilton* v. *Webster,* 7 C. & P. 195; *Houliston* v. *Smyth,* 2 C. & P. p. 24).

(2) *As to Intention and Motive.* When the question of intention arises in relation to an act done, it may, as has been shown, be proved either by declarations made at the time of the act or when the latter is of a continuous nature—*e.g.* longer user of property, the protracted absence of a debtor, or settled residence in cases of domicil, by declarations made at any time during its currency (*post,* 73, 75-7). How far *bare* declarations of intention, made on occasions prior or subsequent to, but unconnected with, an act, are admissible either (a) to *prove the intention,* or (*b*) to *explain the act,* seems doubtful. Although the two questions are not often discriminated, the general rule has hitherto been to exclude such declarations for both purposes, except when tendered against a party as admissions:

"What the accused said may be evidence against himself, but cannot be evidence for him, unless connected with the time spoken to by the prosecution. There cannot be a doubt of it, his motive cannot be proved by his own private declaration" (*R.* v. *Gordon,* 1781, 21 How. St. Tr. 542-3; *R.* v. *O'Brien,* 1848, 7 St. Tr. N.S. 262-3). "Nothing is so clear as that all declarations which apply to facts, or even to the particular case that is charged, though the intent should form a part of that charge, are evidence *against* a prisoner and not *for* him, because the presumption is that no man would declare anything against himself unless it were true, but that every man if he were in a difficulty, or in view of one, would make declarations for himself" (*R.* v. *Hardy,* 1794, 24 How. St. Tr. 1093-4, *per* Eyre, C.J.; cited *post* 85-6). "I have always understood the general rule to be that a verbal statement is not receivable unless made at or about the time of an act done and in order to explain that act" (*Thomas* v. *Connell,* 1838, 4 M. & W. 267, 269, *per* Parke, B.). "A contemporaneous declaration may be admissible as part of a transaction, but an act done cannot be varied or qualified by an insulated declaration made at a later time" (*Peacock* v. *Harris,* 1836, 5 A. & E. 449, 454, *per* Ld. Denman, C.J.). Declarations accompanying acts are admissible to show the intention at the time, but not declarations on former unconnected occasions—otherwise it would be easy for a man to lay grounds for escaping the consequences of his wrongful acts by making such declarations" (*R.* v. *Petcherini,* 1856, 7 Cox, 82-3, *per* Crampton, J., and Greene, B.).

This exclusion, however, has not been uniform, and the modern tendency is apparently towards greater latitude in both respects. Thus, with regard to (*b*), in *Sugden* v. *St. Leonards,* 1 P.D. 154, 251, Mellish, L.J., enunciated what is sometimes considered the true principle, viz., "that wherever it is material to prove the state of a person's mind, or what was passing in it and what were his intentions, there you may prove what he said, because that is (often) the only means by which you can find out what his intentions were." So, in *Lloyd* v. *Powell Co.,* 1914, A.C. pp. 751-2, Ld. Moulton remarked: "It is well established in English jurisprudence in accordance with the dictates of common sense that the words and acts of a person are admissible as evidence of his state of mind. It was urged that, although the acts of the deceased might be put in evidence, his words might not. I fail to understand the distinction. Speaking is as much an act as doing. . . . The testimony of the witnesses is to the act, *i.e.* to the deceased speaking these words, and it is the speaking of the words which is put in evidence, and which possesses evidential value." And in *Re Fletcher,* 1917, 1 Ch. 339, 342, Ld. Cozens-Hardy stated that, "Intention might be established by means of an expressed intention at the time. The declaration of intention might be verbal." This principle which renders the support of an act unnecessary to the admissibility

of the declarations, and admits the latter irrespective of the *res gesta* rule, has occasionally been followed in America where, however, a similar divergency of view exists. Thus, in a leading case, there, the Court remarked: "When the intention to be proved is important only as qualifying an act, its connection with that must be shown in order to warrant the admission of declarations of the intention; but whenever the intention is of itself a distinct and material fact in a chain of circumstances, it may be proved by the contemporaneous oral or written declarations of the party" (*Mutual Life Ins. Co.* v. *Hillmon,* 145 U.S. 285, followed in *Com* v. *Trefethan,* 157 Mass. 180; *post,* 79-80). In a later case in the same Court, however, declarations of intention, when not part of the *res gesta,* were held inadmissible, except to show mere mental capacity (*Throckmorton* v. *Holt,* 180 U.S. 552, 573; and see *Siebert* v. *People,* 143 Ill, 571; *Chicago Ry.* v. *Chancellor,* 165 *id.* 438; and 36 Harv. L. Rev. 157-160).—With regard to (*b*) notwithstanding the exclusionary rule above stated, declarations of intent are sometimes received to explain an act, although made prior or subsequent thereto and on occasions unconnected therewith, apparently on the presumption of the continuance of mental states (*post,* 104, 148, 153) *e.g.* to show intent in cases of merger (*Re Fletcher,* 1917, 1 Ch. 339, C.A.), or the person intended to be benefited under an insurance policy (*Newman* v. *Belsten,* and *Shilling* v. *Accidental Death Co., post,* 85, 153, or on questions involving the factum of a will, or to rebut presumptions, though not generally to aid interpretation (see *post,* chaps. xxviii., xlvi,-vii. In *Re Fletcher, sup.,* indeed two of the L.L.J.'s, in dicta which were not necessary for the decision, purported to lay down the rule that in all cases, civil and criminal, declarations, prior or subsequent to an act, are admissible to explain its intent. This proposition, however, is not sustainable; it is founded on a passage from Tay., s. 1209, which referred exclusively to 'equivocations,' *i.e.,* to the single *exceptional* case in which such declarations are admissible in aid of the interpretation of documents; and it ignores all the cases *contra,* and also the fact that in criminal trials the declarations of the accused are in general tendered *against* him as admissions or confessions, and not *in his favour* under the present head. (*c*) There is a third purpose for which such evidence is sometimes tendered, viz., to prove the *occurrence* of the act intended. Here the existence of the intent, evidenced by the declarations, is relied on as rendering it more probable than not, that the intent was fulfilled and the act done. In England, however the weight of authority is against such a user, at all events in criminal cases [*R.* v. *Wainwright,* 13 Cox 171; *R.* v. *Pook, id.* 172 *n* (both cited with approval in *R.* v. *Christie,* 1914, A.C., 545, 567); *R* v. *Thompson,* 1912, 3 K.B. 19, C.C.A.; *contra, R.* v. *Cowper,* 13 How. St. Tr. 1166-9; *R.* v. *Buckley,* 13 Cox 293; *R.* v. *Jessop,* 16 Cox 204; and *cp. Mutual Life Ins. Co.* v. *Hillmon, sup.*]. In civil cases, they have been received to corroborate direct testimony as to an act, though not as evidence of the act itself (*Sugden* v. *St Leonards,* 1 P.D. pp. 184, 226 242, 251; *Saxlehner* v. *Apollinaris Co.,* 1897, 1 Ch. 893, 900-1; *post,* 148, 331). As to the exclusion of oral by documentary declarations of intent, see *post,* chap. xxviii. and chaps. xlv,-xlvi.; and generally, as to prior and subsequent facts to show the intention of an act, *post,* 148-9, 153-4.

(3) *As to Opinion.* Where a person's opinions at a given time are material, *per se* and irrespective of any act, expressions thereof, made at such time, are receivable (*R.* v. *Hardy, post,* 85; *A.-G.* v. *Bradlaugh, post,* 121; and

cp. Cook v. *Ward,* and *Du Bost* v. *Beresford, post,* 384, where, to prove that a caricature resembled a party, expressions of recognition by the spectators were admitted.) In America, however, the fact of inspecting an object has been considered as an *act* which such declarations could accompany and explain, so that in such cases the *res gesta* principle could be appropriately applied (*Chase* v. *Lowell, post,* 72). As to expressions of opinion explanatory of acts see *ante,* 58; *Manchester Brewery* v. *Combs* and *Gresham Hotel* v. *Manning, post,* 75; and *Wright* v. *Tatham, &c., post,* 84, 116-7, 134-5.

(4) *As to Knowledge.* A person's bare *assertion,* out of Court, that he knew a fact, has been rejected to prove that he knew it (*R.* v. *Gunnell, post,* 86); but when the existence of the fact is proved *aliunde,* his knowledge thereof may, in general, be shown either by his own declarations manifesting such knowledge, or by those of others conveying notice or information to him (*Vacher* v. *Cocks,* and *Thomas* v. *Connell, post,* 87). Such statements need not, of course, be made contemporaneously with the happening of the fact; nor even at the precise time when the existence of the knowledge is in issue, since previous knowledge may be evidence of subsequent knowledge, though not *vice versâ* (*R.* v. *Gunnell, sup.; R.* v. *Kay, post,* 87); and mere admissions by a party as to his knowledge would only be evidence against himself (*id.*) As to extrinsic facts to show knowledge, see generally *post,* 146-8, 151-3.

EXAMPLES.

CONSTITUENT FACTS.

Admissible.

(*a*) *The fact in issue per se.* A. sues B. for slander. A witness who heard the words complained of, may testify that A. used them, and B. may testify that he did not use them, although the utterance of the words is a fact in issue (*Clark* v. *Main,* Times, Mar. 24, 1904; *Higgins* v. *Malyon, id.* Nov. 23, 1905). But they would not be allowed to testify that B. had, or had not, slandered A., for this is for the tribunal (*post,* chap. xxxv.).

A. is charged with the murder of B. A witness who was present at the crime may testify, directly and positively, to A.'s identity, although that is a fact in issue; and his mere opinion as to such identity would also be admissible. So, though he might, if the facts were so, state that A. 'shot B.' yet he would not be allowed to testify that A. had 'murdered B.,' nor even probably, that A. had 'killed B.', for these are inferences which must be drawn by the tribunal. [Wharton Civil Ev. ss. 15, 26, 509; *id.* Cr. Law 7th ed. s. 733; Steph. (A Reply to Dr. Wharton) 3 Southern Law Rev. (Am.) p. 571; Gulcon, s. 125; *ante* 56; *post,* 401].

Inadmissible.

(*a*) *The fact in issue per se.* The question being whether the defendant's trade-name so nearly resembled the plaintiff's as to be calculated to deceive;—witnesses may not be asked this question, as it is for the Court alone. [*North Cheshire Co.* v. *Manchester Co.,* 1899, A. C. 83, 85; *Payton* v. *Snelling,* 1901, A.C. 308, 311; *Bourne* v. *Swan,* 1903, 1 Ch. 211, 224; *Hennessy* v. *Keating,* 1908, 25 R.P.C. 361 (H.L.); *Graphic Arts Co* v. *Hunters,* 27 *id.* 677; *Royal Warrant Holder's Assn.* v. *Deane,* 1912, 1 Ch. 10, 14-15; *Crossfield* v. *Technu Chemical Labs.* (1913), 29 T. L. R. 378; *post* chap. xxxv. In *Bourne* v. *Swan, sup., Farwell, J.,* added the further reason, that though witnesses might say that they themselves would be deceived, they might not testify as experts in human nature, *i.e.,* that others would or would not be.].

A. sues B. for infringement of patent:—an expert, though he may give his opinion on the points of science involved, may not testify that there has, or has not, been an infringement (*Seed* v. *Higgins,* 8 H.L. Cas. pp. 565-6; see fully as to experts, *post* 393).

The question being whether A. sold goods to B. solely, or to B. and C. jointly;—A. may not be asked "with whom he dealt?" though he may state what was

Admissible.

(*b*) *Constituent Incidents.* A. sues B. for money paid by A. to C. at B.'s request, the defence being that the money had not been paid at the date of the issue of the writ, *i.e.* Feb. 26 The facts (testified to by A.) that he posted a cheque for the amount to C. on the 25th, and received from C. a receipt on the 26th; and the facts (testified to by C.) that he received the cheque from A. as payment on the morning of the 26th, and forwarded the receipt;—Held admissible as part of the *res gestæ* and constituting payment, though the cheque was not cashed till after the 26th, nor was it produced; and the receipt, though produced, would, as the mere admission of a stranger, have been inadmissible *per se* as hearsay. [*Carmarthen Ry.* v. *Manchester Ry.*, L.R. 8 C. P. 685; *R.* v. *Mohr*, 2 Cr. App. R. 39; as to the date on which cheques become payment, see *Mears* v. *Western Co.*, 1905, 2 Ch. 353]. So, to prove not only the *fact*, but the *purpose* of a payment, declarations made at the time are admissible (*Walters* v. *Lewis*, 7 C. & P. 344; *post*, 73).

In an action against the owners of a sunken wreck for causing a collision by neglecting to safeguard the spot;—the facts, deposed to by the master of a passing tug, that the mate of the wreck had instructed him to report the matter to the nearest harbour authorities, and that on

Inadmissible.

said or done at the time (*Bonfield* v. *Smith*, 12 M. & W. 405).

So, in a breach of promise action, the plaintiff may not testify that "the defendant promised to marry her," but should state what the defendant said or wrote (*Law* v. *Capron*, Nov. 6, 1889, *per* Denman, J., *ex rel*).

To prove that a railway platform was dangerous:—witnesses may not testify directly that it was or was not dangerous, but should state wherein the danger consisted *e.g.* that it was slippery, &c. (*Rigg* v. *Manchester Ry.*, 14 W.R. 834; *Rotherham* v. *M.G.W. Ry.*, 37 Ir. L T.R. 23).

So, where the question was whether a certain company was a "gold-mining company" experts were not allowed to be asked this question as it depended on the construction of the prospectus, and other matters which were for the Court. (*Grove* v. *Buluwayo Co.*, Times Mar. 30, 1898, C.A.).

On a charge of riot;—a question to a police-constable, called by the prosecution, "whether in his opinion it would have been safe to allow the meeting called by the defendants?" was disallowed as being for the jury; though, in cross examination "whether in his judgment calling out the military, was necessary?" was permitted (*R.* v. *Graham*, 107 C.C C., Sess. Pap. pp. 389, 408-9, *per* Charles, J. See, also, *R.* v. *Sullivan*, *infra*, p. 67).

(*b*) *Constituent Incidents.* A. (a patient) sues B. (a hospital surgeon) for performing *double* ovariotomy without A.'s consent. Evidence (1) that A. told a nurse before the operation (but not in B.'s presence or shown to have been communicated to him) that she would only consent to *single* ovariotomy; and (2) that, on returning to consciousness after the operation, she made a *complaint* to a priest of what B. had done;—held not admissible to prove such restricted consent [*Beatty* v. *Cullingworth*, 60 J. P. 740, *per* Hawkins, J., aff'd Times, Jan. 14, 1897, C.A. *Semble*, that evidence of complaints is only admissible in cases of rape, &c.; see *post*, 114].

Admissible.	*Inadmissible.*
his return he told the mate he had done so, and that they had promised to send the proper wrecklights immediataely, are admissible as constituting measures of diligence taken by the mate to safeguard the navigation (*The Douglas*, 7 P.D. 151)	
The question being whether a certain district was disturbed;—local landowners were allowed to testify (1) that their tenants had given up farms alleging fear of outrage as their reason; (2) that their herds had, in the course of duty, made reports to them of injury done to cattle in their charge; and (3) that the landowners had made claims to the Sessions in respect of such injuries;—these reasons, reports and claims being admissible as part of the *res gestæ*, though not as evidence of the truth of the statements made (*Parnell Commission.* Times, Nov. 10, 14, 1888; *post*, 75). *Qu.* whether the mere opinion of a constable that "the district was disturbed would be admissible." (*R.* v. *Sullivan*, 24 L.R.I. 191, 201, *per* Palles, C.B.; see *R.* v. *Graham*, *ante*, p. 66).	
(c) *Cumulative and Continuous Transactions; Similar Facts.* To prove that the defendants were common cheats;—the facts that they falsely represented themselves to be persons of property on *several* occasions and to *different* persons are admissible (*R.* v. *Roberts*, 1 Camp. 399).	(c) *Cumulative and Continuous Transactions; Similar Facts.* A is charged with stealing a (marked) shilling from B. A constable on arresting A. and finding the shilling upon him, asked if he had any more of B.'s property upon him, whereupon A. gave up some more money and made a statement as to it. Held that this statement was inadmissible as referring to a distinct felony (*R.* v. *Butler*, 2 C. & K. 221).
To prove a custom of a manor; particular instances in which the custom was acted on are admissible, although they do not appear on any of the manorial records (*Johnstone* v. *Spencer*, 30 Ch. D. 581; *post*, 106-7).	
To prove the delivery of goods by A. to D.;—intermediate deliveries from A. to B., B. to C., and C. to D. are admissible (Indian Evidence Act, 1872, illus. to s. 6).	
A. is charged with stealing (marked) money from B.'s till. Evidence of the history of the till from the time the money was put in until it was found in A.'s possession, though embracing several abstractions, was admitted as forming one entire transaction and showing the character of the various takings (*R.* v. *Ellis*, 6 B. & C. 145). So, on a charge of receiving stolen tin, the fact that the police, on searching A.'s premises, found stolen iron and brass, was held admissible as part of the transaction, though the iron and tin were the subjects of other charges (*R.* v. *Mansfield, Car. & M.*, 140, following *R.* v. *Ellis*, *sup.*).	A. is charged with stealing four articles from B. Evidence that A. entered B.'s shop and took away one of the articles, but returned with it two minutes later, and then took it away again together with two more of the articles, having been admitted as proving one continuous taking,—evidence that A. returned again, half an hour later, and took away the fourth article—held inadmissible as relating to a distinct offence (*R.* v. *Birdseye*, 4 C. & P. 386).
A. is charged with rape on a child. Evidence of repeated similar acts 2 and 4 days later, and prior to the child's complaint to its mother, it appearing that A. threatened to beat the child if she told;—Held admissible as one continuous offence (*R.* v. *Rearden*, 4 F. & F. 76, *per* Willes, J.).	A. is charged with rape upon B. in a boat. Evidence having been given of several rapes committed on B. in the same boat, other rapes committed in another boat to which B. was carried from the first boat were not offered in evidence, being the subject of a separate charge (*R.* v. *Lea*, 3 Rus. Cr., 6th ed., 407; *cp. R.* v. *Lloyd, &c.*, *post*, 185).

Admissible.

To prove the stealing of gas from the prosecutor's main on a *particular date*, by means of a pipe inserted in the main;—Evidence of the abstraction of gas intermittently for several years by the same method is admissible, as forming one continuous taking [*R.* v. *Firth*, 38 L.J.M.C. 54; Lush, J., remarked that the means and the intent were continuous]. So, to prove the stealing of coal by A., a mine owner, from B., an adjoining owner;—evidence that A. had stolen coal intermittently for four years from B. and thirty other adjoining owners, held admissible to show A.'s intent, as one continuous transaction, all the coal being raised at one shaft (*R.* v. *Bleasdale*, 2 C. & K. 765).

A, a post-office servant, is charged with stealing a letter of B.'s, containing bank-notes. Evidence that, about the same time, a letter of C.'s was opened, B.'s notes put therein, and C.'s notes to the same amount (afterwards found upon A.) abstracted;—Held admissible as part of the transaction, though there was a separate indictment as to C.'s notes (*R.* v. *Salisbury*, 5 C. & P. 155: *cp. R.* v. *Plumer*, *post*, 82).

A. is charged with obtaining a subscription from B. by false representations as to the funds of a club. The false statement was made in July when B. declined to join: but in August A. repeated his representations, but omitted the false statement, and B. then paid her subscription: Held that both statements were admissible, since they were capable of being connected as one continuing representation, and whether they were so connected was for the jury (*R.* v. *Welman*, 22 L.J.M.C. 118).

A., B., and C. are charged with burglary at railway station X. Evidence that on the same night burglaries were committed at stations Y. and Z., articles from the two latter stations, but not from X., being found on A.; and articles from X. found upon B. and C.; and that jemmies corresponding with marks at one or other of the stations were found upon all the prisoners;—Held admissible (1) the three events being so intermixed that it was impossible to separate them; and (2) to explain why none of the X. articles were found on A., *i.e.*, that his share of the booty might have been derived wholly from the Y. and Z. articles. [*R.* v. *Cobden*, 3 F. & F. 833; *R.* v. *Stonyer*, 2 Rus. Cr. 7th ed. 2064, 2103]. So, where A. had committed three burglaries in one night, stealing a shirt at one place and leaving it at another, the Court admitted evidence of all (See *R.* v. *Whiley*, 2 Lea. 983, 985, and *cp. R.* v. *Voke, &c.*, *post*, 70).

To prove that A. had forged a mortgage deed of certain property;—evidence that he had forged other deeds, being leases at enhanced rentals which increased

Inadmissible.

A. is charged under the Children's Act, 1894, with cruelty to children, "between Nov. 9, 1900, and April 9, 1901." Evidence of cruelty to them on prior dates, held not admissible either (1) under s. 18 (4) of the Act, by which it is not necessary to specify the dates of the acts constituting a continuous offence; or (2) to rebut the theory of accident. [*R.* v. *Miller*, 65 J.P. 313, *per* Phillimore J. No reasons are stated: but it was said to be otherwise, perhaps, if dates had not been given; and the evidence was in fact admitted on A.'s cross-examination, see *post*, 185; *cp. R.* v. *Hill*, and *R.* v. *Mean*, *infra*, 69].

Admissible.

the mortgage security, and also an authority by the owner of the property to his solicitor to act in the matter; Held admissible [*Roupell* v. *Haws*, 3 F. & F. 784; *Richardson* v. *Neaves*, *id*, 815; the fact that A. was in financial straits at the time was also admitted; *op. post*, 118, 120].

To prove that A., on a *particular day*, lived on the earnings of B., a prostitute;—the relations of A. with B. on prior and subsequent days are admissible [*R.* v. *Hill*, 10 Cr. App. R. 56; *cp. supra*, 68, and *post*, 185.

A. is charged with using B.'s public-house for betting on Nov. 13, slips relating to the persons, horses and sums involved being found both on A. and in B.'s parlour. Evidence that slips with corresponding details had on prior dates been received by B. from customers and sent by him to A.;—Held admissible (1) as part of, and completing, the transaction; and (2) as showing that B. acted as A.'s agent [*R.* v. *Mean*, 69 J. P. Rep. 27; in *R.* v. *Mortimer*, 74 J.P.Jo. 520, only one act of betting was proved. As to *agency*, see *post*, 160, 166].

(*d*) *Documentary Transactions.* *A.*, a contractor, sues B., one of a committee superintending the construction of a railway, for work done thereon. Resolutions passed by the committee, at which neither A. nor B. were present, are admissible, for or against either, to show the fact and terms of the employment (*Rennie* v. *Clarke*, 5 Ex. 292; *cp. Wright* v. *Day*, 1895, 2 I.R. 337; *R.* v. *Stacy*, &c., *post*, 128; and *Re Pyle Works*, *post*, 592).

So, in an action against a householder, to recover a proportion of the 'estimated expense of paving a new street as determined by the vestry surveyor, pursuant to statute';—the signed estimate of the surveyor, acted on by the Board in passing resolutions as to such paving, is some, though not the best, evidence for them of the amount claimed, without calling the surveyor to prove the making of the estimate or his determination (*Hobman* v. *Greenwich Board*, 58 J.P. 351, 703, C.A.; *aliter* if not so acted on).

For facts partly written and partly oral, constituting a contract of insurance, see *post*, 153; and as to the admissibility of a marriage certificate as part of the *res gestæ*, see *Stockbridge* v. *Quicke*, *post*, 290-1.

Inadmissible.

(*d*) *Documentary Transactions.* A. sues a Corporation on an agreement by letters, to take his house for £400. A. had written offering to accept this sum if £150 were apportioned for the lease (which he had mortgaged) and £250 for his own trade damage. The Corporation, acting on their surveyor's report, passed a resolution accepting these terms and their solicitor so replied. Afterwards, A. being unable to obtain the lease, the Corporation repudiated. At the trial A. tendered the report as evidence that the Corporation knew of the imperfect state of his title and based their resolution and apportionment thereon. Held, though the letters and resolution were admissible, the report was not: (1) *per* Lindley, L.J., as being a privileged communication; (2) *per* Fry, L.J., as being neither evidence itself (because if admissible *for* A., it would also be so *against* him, and it would be hard that he should be bound by the statements he had never seen), nor as an admission (there being no statements of the facts said to be admitted); (3) *per* Cotton L.J., as an attempt to construe the Corporation's letter by showing the instructions therefor [*Cooper* v. *Met. B. Works*, 25 Ch. L. 472, 475-6, C.A.; *cp.* reports by agents, *post*, 246-7].

ACCOMPANYING FACTS

(e) Incidents Other Than Declarations,

Admissible.

Collision Cases. The question being which of two vessels was to blame for a collision, the following incidents are admissible as parts of the transaction;—The hour of the day or night; the state of the wind, weather and tide; the course and speed of the two vessels at the time; the lights carried by each; and the parts of the two vessels which came into contact [O. 19 R. 28. For *declarations* in collision cases see *The Schwalbe and Agassiz* v. *London Tram Co., infra,* 71-2].

Murder &c. A. is charged with the murder of B. by the explosion of grenades;—the fact that other persons were killed or wounded at the same time and place is admissible to show the character of the explosive. (*R.* v. *Bernard,* 1 F. & F. 240; see *R.* v. *McGrath,* 14 Cox, 598, as to an explosion by dynamite.)

A. is charged with stabbing B. Evidence that about the same time and place C. was also stabbed by A., is admissible to identify the instrument used (*R.* v. *Fursey,* 6 C. & P. 81; *R.* v. *Crickmer,* 16 Cox, 701).

A. is charged with maliciously shooting B. B. had arrested A., who fired at him and escaped, but 15 minutes later, being re-arrested, shot at B. again. Evidence of the second shot, though a distinct felony, was admitted as part of one continuous transaction and to rebut the defence that the first shot was accidental. (*R.* v. *Voke,* R. & R. 531; *cp. post,* chap. xii.). So, where A. was charged with murder by shooting B., his wife;—evidence that shortly afterwards, in another room, he shot his two daughters whom he had asked to see their mother, was admitted as part of the *res gestæ* and to negative the defences of accident and ignorance that the revolver was loaded (*R.* v. *Greenley,* 10 Cr. App. R. 273). F. P. A. is charged with setting fire to B.'s rick. Evidence that the prisoner, immediately afterwards, set fire to the ricks of C. and D. was received (*R.* v. *Long,* 6 C. & P. 179; *cp. post,* 183-4).

Larceny, &c. A. and B. are charged with stealing C.'s purse at a horse sale. Evidence that, just before, they co-operated in hustling and attempting to pick the pockets of others at the same sale, is admissible to rebut accident (*R.* v. *Evans,* 12 Cr. App. R. 297).

A. and B. are charged with stealing goods from a warehouse. The fact that A., a week before the theft, had proposed to C., a fellow employee at the warehouse, to steal similar goods from the same warehouse, though by different means;—Held (1) admissible as an essential part of the

Inadmissible.

Admissible.	*Inadmissible.*
res gestæ; and (2) if proved to be a part of a system, also admissible to negative innocent mistake (*post*, 182). [*R.* v. *Hill*, 1 Cr. App. R. 158. *Sed. qu.* as to the first ground].	
A. is charged with obtaining B.'s money by means of palmistry. Evidence that, at the same interview, A. also pretended to foretell B.'s future by crystal gazing and clairvoyance, held admissible as a material incident of the transaction (*R.* v. *Stephenson*, 68 J.P. 524).	
A. is charged with obtaining £2 from B. by a card trick in a train. Evidence that, on the train arriving at the terminus, where A. was arrested, a stranger handed B. £2;—Held admissible as a part of the *res gestæ* (*R.* v. *Moore*, 10 Cr. App. R. 54).	
A. is charged with robbing B. of money and a coat, by threatening to accuse him of crime. On B. giving up the property A. said he would pawn the coat and return the ticket. Evidence that, the following day, A. attempted to obtain further money from B. by the same threat and also brought with him the ticket, which, on B. having him arrested, he produced;—Held admissible (1) as confirmatory of B.'s evidence as to the former act; and (2) as showing the nature of the transaction (*R.* v. *Egerton*, R. & R. 375; *post*, chap. xl. 'Corroboration').	
Sedition. The question being whether a certain meeting was seditious:—evidence that bodies of men, organized in the same manner, had drilled at different places several days before the meeting and afterwards came from different quarters to attend the meeting, on their way acting riotously and using threatening language:—Held admissible as part of the transaction. (*R.* v. *Hunt*, 3 B. & Ald. 566, 573-4; *post*, 79].	*Sedition.* The question being whether a certain meeting was seditious;—evidence, tendered by the defendants, that the military used violence in dispersing the meeting.—Held irrelevant, the objects of the meeting being distinct from, and existing prior to, its dispersion (*R.* v. *Hunt*, *opposite*).

ACCOMPANYING FACTS

(f) Declarations Accompanying Acts (Civil Cases).

Admissible.	*Inadmissible.*
Declarations as to Accidents, &c. The question being which of the two vessels was to blame for a collision: an exclamation made by the pilot of one of them, after she was cut away and while she was backing, of "The d——d helm is still a-starboard'! — Held admissible as part of the *res gestæ*. [The *Schwalbe* Swab. 521; *The Mellona*, 10 Jur. 992; although it would not be evidence against the owners as an admission by their agent, *post*, chap. xix.). So, an exclamation by a bystander in a running down case, of "Shame!" if made at the time, would be receivable (*Milne* v. *Leisler*, 7 H. & N. 786, *per* Pollock, C.B., cited *post*, 74)].	*Declarations as to Accidents, &c.* The question being whether a collision, by which the plaintiff was injured, was due to the negligence of the defendants, a tramcar company;—a remark made by a fellow passenger of the plaintiff's to the conductor, a few moments after the collision, that "the driver ought to be reported," and the conductor's reply that "he has already been reported, for he has been off the line five or six times to-day; he is a new driver";—Held inadmissible (1) the transaction being over; and (2) the remark referring not to the *res*, but to the past acts of the driver (*Agassiz* v. *London Tram Co.*, 21 W.R. 199). So,

Admissible.

A. sues B. for damages for negligently causing a fire on A.'s landing stage. An exclamation by C., one of B.'s workmen, as he was escaping from a man-hole just after the fire occurred and near where it was first seen, of 'Oh, my God, the stage is on fire. I did it. I'm a ruined man!';—Held admissible as part of the *res gestæ*, not as narrative, but as conduct relevant to the issue [*Mersey Docks Board* v. *Liverpool Gas Co.*, Times, Aug. 23, 1875, *per* Huddleston, B.; explained by Walton, J., in 'Notes on Evidence,' read before the Medico-Legal Soc., 1905. (Transactions, vol. 2, pp. 81-2). C., in cross-examination, said he had no recollection of the exclamation, but if he said it, he must have been under that impression, not then knowing of other causes].

Declarations as to Identity, Ownership, Possession, &c. To identify land sold, declarations by a deceased vendor at the time of the sale, pointing out the parcels, are admissible as part of the *res gestæ*, *i.e.*, the delivery of the deed]*Parrott* v. *Watts*, 37 L.T. 755. In *Jervey* v. *Styring*, 29 L.T. 847, those of a living vendor were also received, *post*, 633, 655; *cp. Woolway* v. *Lowe*, *post*, 111].

The question being in what capacity A. (deceased) had claimed and enjoyed certain land;—declarations showing this, and made by him at the time of taking possession of the land, are admissible as part of the act (*Johnson* v. *Thompson*, 15 L.T.O.S. 437).

The question being whether certain trees, which had fallen on land occupied by A.'s tenant, belonged to A. or to B., the adjoining owner;—the facts that A. had omitted to claim the trees and that A.'s tenant had said, in explanation of the omission, that the trees belonged to B.—are receivable although the tenant's admission *per se* would be no evidence against A. (*Stanley* v. *White*, 14 East, 339-42).

In an action of negligence against a Corporation for not removing a dangerous tree from a public road;—declarations by passers-by, while in *the act of looking at the tree*, as to its dangerous character, held admissible as part of the *res gestæ*, not to prove the truth of the assertions, but to fix the Corporation with the notoriety of the danger (*Chase* v. *Lowell*, 151 Mass. 422).

A. sues B. to recover possession of land by reason of B.'s breach of covenant in sub-letting it to C. without A.'s consent, the only evidence of the sub-letting being a statement by C., a (living) occupier of the land, that he "held it as a tenant of B." :—Held admissible to show the char-

Inadmissible.

a written memo, by the driver, after the accident, that he was to blame, was held inadmissible either (1) as part of the *res gestæ*, because not spontaneous nor the natural consequence of the act; or (2) as an admission, because beyond the scope of his authority (*Tustin* v. *Arnold* 84 L.J. K.B. 2214). In America, a remark by one driver immediately after a collision that "the other was not to blame" was rejected—(1) as being a mere expression of opinion about a past occurrence; (2) as not being an admission; (3) as evidence contradictory of his testimony that the other was to blame, for such testimony was itself irrelevant (*Lane* v. *Bryant*, 75 Mass. 245). [In such cases the *res gestæ* have been said to consist of the alleged negligent conduct culminating in the accident (*Waldele* v. *N.Y. Ry.*, 95 N.Y. 274); though see *Tustin* v. *Arnold*, *sup.*, where the term was confined to the single act of the collision].

Declarations as to Identity, Ownership, Possession, &c. A. is charged with assaulting B., a little boy. Evidence is tendered that a short time after the assault, B. and his mother came up to A. and B., touching A.'s sleeve, said "That is the man, mum,' and then, being asked by a constable 'which man?,' went on to describe the details of the assault: Held that though B.'s first statement was admissible as part of the act of identification, the second statement was not, and that neither was admissible as part of the main *res gestæ* (*i.e.*, the assault) [*R.* v. *Christie*, 1914, A.C. 545; for further points decided in this case, see *post*, 259, 494].

The question being whether A., in building a wall, had encroached on land owned by B. in fee,—the fact that, at the time of building the wall, B.'s father (who was tenant for life of the land) had directed A, where to build the wall;—Held inadmissible on the ground that the act and the declaration were by different persons [*Howe* v. *Malkin*, 27 W. R. 340: see *ante*, 59. The statement was also rejected as an admission by B.'s predecessor in title (*post*, chap. xix.). In America similar declarations were rejected on the ground that the act of building being unequivocal, verbal explanations were incompetent (*Nutting* v. *Page*, 4 Gray (Mass.). 584.].

The question being whether a certain road was public or private;—a statement made by a deceased occupier of adjoining land, whilst planting a tree, that he did it "to show where the boundary had been when he was a boy" held inadmissible [*R.* v. *Bliss*, 7 A. & E. 550; *per* Williams, J., "the declaration had no connection with the act"; *per* Patteson J., "whether the declaration accompanied the

Admissible.

acter of C.'s possession, viz, that he did not purport to occupy as servant or caretaker (*Doe* v. *Rickarby*, 4 Esp., 4; *ante*, 61). So, a statement by C. that he paid rent to B. was received, though C. was incompetent as a witness. [*Doe* v. *Williams*, Cowp. 621; admissions by predecessors in title, (*post*, 238-241), and declarations by *deceased* persons against proprietary interest (*post*, 279, 284), must be distinguished from the above].

A. knocks down a wall built by B. to obstruct A.'s passage through B.'s garden. At a meeting, some days later, between A., B., and C. (their landlord's agent), A. claims to use the passage, as of right, to clean out his well, and threatens to remove future obstructions, C. remarking, "I don't see how it can be done any other way," In a subsequent action by B.'s successor against A.'s successor;—Held that these statements were admissible for the latter, not as part of the act of knocking down the wall, but to show that A.'s user of the passage, both *before* and *after* that act, was of right (*Bennison* v. *Cartwright*, 5 B. & S. 1; in this case C. was assumed to be a mere stranger). So, to disprove dedication of a highway,—evidence that the alleged dedicator had warned off persons, saying it was not a public way, is admissible (*Hyde* v. *Palmer*, 32 L.J.Q. B. 126, *per* Crompton, J.; see *post*, 129-131).

The question being whether A. (deceased) had given certain bank-notes to B., her housekeeper:—a statement made by B., upon being asked by A.'s executor, whether she had any property of A.'s and how she came by it, and when handing him the notes, that 'A gave them to me a fortnight before her death' held receivable in B.'s favour: (1) as explanatory of her possession of the notes; (2) as a statement made in the executor's presence and not denied by him, and so, as slight evidence of the truth of the statement (*post*, chap. xx.). [*Haysley* v. *Gymer*, 1 A. & E. 162; see *Walters* v. *Lewis* and *Re England*, *infra*].

So, declarations by the grantor of a Bill of Sale, while in possession of the goods, as to whose they were, have been admitted to show that the transaction was merely colourable (*Willies* v. *Farley*, 3 C. & P. 395).

A. sues B. for a libel, imputing that A. had received B.'s timber knowing it had been stolen by C. Declarations by C., when in A.'s yard with the timber;—Held admissible to show the felonious character of the transaction (*Powell* v. *Harper*, 5 C. & P. 590; *cp. R.* v. *Abraham*, *post*, 81).

Declarations as to business transactions, &c. To prove the purpose for which A. paid money to B.;—a statement made by A.'s wife to B., when handing him the

Inadmissible.

act as explanatory of it is equivocal, and in any case the question being not as to the boundary, but the character, of the road, the mere act of planting the tree was irrelevant"; *per* Denman, C.J., "a declaration to show that the party planted the tree with a *particular* object is inadmissible:" (this last objection would appear to apply only to declarations by deceased persons if tendered to prove *public or general* rights; *post*, 296, 301].

A testator having by his will in 1901 bequeathed a collection of coins to a museum, in Feb., 1912 executes a codicil in which, after reciting (erroneously) that he had given all the coins he intended to to give to the museum, he gives a part of his collection to another institution. Prior to Feb. 1912, he had in fact offered his collection to the museum but delayed delivery till a strong room was prepared by the latter. In Aug. 1912, the strong room being ready, he handed over a part but not all of his coins to the museum, and made certain declarations at the time as to his intentions with regard thereto. Held, that the revocation by the codicil in Feb. being an absolute one, the Aug. declarations were irrevelant and inadmissible (*Re Churchill*, 1917, 1 Ch. 206; *post*, 328-9.

Declarations as to business transactions, &c. To prove that A., in paying a foreign bill, which had been dishonoured by the acceptor, had paid it for the honour of B.,

Admissible.

money, is admissible (*Walters* v. *Lewis*, 7 C. & P. 344). So, the question being whether money paid by A. (deceased) to B. his son, by cheque, was a gift or loan, —an entry on the counterfoil of the cheque, of 'loan,' is admissible as part of the *res gestæ* (*Re England*, 134 L.T. Jo. 29). And where A. sent B. a letter enclosing a promissory note and requesting B. to obtain payment thereof from C., the indorsee; the contents of the letter were held evidence for A. of the purpose for which the note was sent. [*Bruce* v. *Hurley*, 1 Stark. 23; though they would not have been evidence of the truth of the facts stated (see *R.* v. *Plumer*, *post*, 82; and *A.-G.* v. *Stephens*, *post*, 130]. So, a witness was allowed to testify that a third person called on him, stating that his object was to inquire about a given note (*R.* v. *Patch*, Printed Report, p. 115).

A. (drawer), sues B. (indorsee) of a bill, for false imprisonment on a charge of forging C.'s acceptance thereon. Evidence by B. that C. had refused to pay the bill, stating that his name had been forged by A.;—Held admissible as part of the *res gestæ* to show B.'s good faith, in mitigation of damages, but not to prove the forgery (*Perkins* v. *Vaughan*, 4 M. & Gr. 988; 12 L.J.C.P. 38). So, where A. sued B. for false imprisonment on a charge of stealing C.'s goods, and A. testified that on a constable taking him before C. and asking, "Do you give A. into custody?" C. replied, "I will go and ask B.," and on returning, added—"B. says let A. be locked up." Held, C.'s statement, though made in B.'s absence, was admissible, as part of the transaction of the arrest, and as confirmatory of other evidence that B. had authorised A.'s arrest (*Harris* v. *Dignum*, 29 L.J. Ex. 23).

The question being whether A. sold goods to B. personally, or to B. as C.'s agent, the sale being made subject to inquiry from D., B.'s reference;—a letter written by A. to his own agent, asking him to "inquire from D. as to the credit of C. and also of *B., who is making large purchases for C.*";—Held admissible for A. as part of the transaction and in corroboration of other evidence, though no proof *per se* that B.'s purchase was for C. [*Milne* v. *Leisler*, 7 H. & N. 786; here the action was by A. against a third party to whom B. had pledged the goods. *Note.* This case is severely criticised by Mr. Tregarthen (Law of Evidence, 26-9, 128) under an apparent misconception, *i.e.*, (1) that the relevancy of A.'s statement, being dependent on its *truth*, it was really hearsay; and (2) that even if considered as *conduct*, it was still as much hearsay as is direct statement. Reliance on its truth was, however, *expressly negatived* by the Court, and

Inadmissible.

an indorsee;—a declaration made by A. to a notary, some time later, that the payment was for the honour of B., was held inoperative; though *aliter* if it had been made prior to, or at the time of, the act [*Vanderwall* v. *Tyrrell*, M. &. M. 37. In *Geralopulo* v. *Weiler*, 10 C.B. 690, 709, the Court remarked that no person paying money simply to the holder of a bill, could, by a subsequent declaration, cause it to assume the character of a payment for honour; the custom of merchants required that the declaration, to qualify the payment, should be made in the presence of a notary. *Cp. Peacock* v. *Harris*, *post*, 85].

The question being as to the terms upon which A., the country agent of B., bought goods from C.;—a letter written immediately after the sale by A. (deceased) to B., stating the terms and enclosing C.'s invoice and draft for acceptance by B., held not admissible as part of the *res gestæ* (*Smith* v. *Blakey*, L.R. 2 Q.B. 326, *per* Blackburn, J.).

Admissible.

conduct is not now classed as hearsay (see *Lloyd* v. *Powell*, *ante* 62; *post*, 219-220; and 13 Law Quart. Rev. 230)].

The question being whether A. signed a deed of contract as B.'s agent merely, or so as to render himself jointly liable with B. thereon:—statements made by A. at the time are admissible to show either intention (*Young* v. *Schuler*, 11 Q.B.D. 651, C.A.).

A, sues B. for damages for loss of a contract with C., in consequence of B.'s threats;—a letter from C. to A. enclosing B.'s written threat, and annulling negotiations for the contract on that ground, is admissible for A. (*Skinner* v. *Shew*, 1894, 2 Ch. 581).

So, declarations by tenants, on giving up their farms, that they did so from fear of outrage, are admissible to show their reasons for the act, but not the truth of the statements (*Parnell Commission*, *ante* 67).

The question being whether A. trusted B. with goods in consequence of C.'s representation that B. was solvent;—a statement made by A. at the time of supplying the goods to B. that "he had received a favourable account of him from C.," is admissible for A. as part of the transaction (*Fellowes* v. *Williamson*, M. & M. 306).

To prove that beer supplied by brewers to a publican was bad, loss of custom being alleged by the latter in consequence;—the fact that customers, after tasting the beer, left it or threw it away, complaining of its quality, held admissible (*Manchester Brewery* v. *Coombs*, 82 L.T. 347; *cp. Holcombe* v. *Hewson*, *post*, 167). [The complaints here, were part of the *res gestæ;* as to those made afterwards, see *post*, 113-116].

A., a stockjobber, sues C. for the price of stock sold to C., through B., a broker; C.'s defence is that credit was, according to custom, given to the broker and not to the client. To show that in this instance the custom was departed from because he didn't trust B., A. was allowed to prove a conversation he had with B. immediately after the transfer, in which he asked B. to give him C.'s cheque, whereupon B., instead, handed him his own asking him not to present it till the next day. [*Mortimer* v. *McCallan*, 6 M. & W. 58. Abinger, C. J., remarked that it was part of the evidence to show that A. did not trust B., and was a conversation at the time of dealing and before the transaction was concluded, *i.e.*, before payment made.]

Declarations as to Bankruptcy. To show that a debtor had departed the realm with intent to defeat his creditors;

Inadmissible.

A., a baker, sues B. for libel and consequent loss of custom. A.'s foreman having testified that, after publication of the libel, various customers ceased to buy A.'s bread, statements made by them at the time that this was in consequence of the libel, held inadmissible whether special damage was pleaded or not, and that the customers must be called to state their reasons on oath. [*Tilk* v. *Parsons*, 2 C. & P. 201; *Ashley* v. *Harrison*, 1 Esp. 49-50; *Barnett* v. *Allen*, 2 F. & F. 125; adopted by Odgers on Libel, 4th ed. 358. *Contra*, *Elmer* v. *Fessenden*, 151 Mass. 359, disapproving *Tilk* v. *Parsons*, *sup.* Here, in slander against B. for telling A.'s workmen that there was arsenic in A.'s silk, whereby they left A.'s employment, declarations by the workmen, when leaving, that they did so in consequence of what B. told them, were admitted not to prove that B. had told them this, but to show that their belief as to the poison was their reason in fact].

In an action for obstruction of light to the windows of an hotel, to prove the obstruction (no loss of custom being alleged) evidence was tendered that complaints of the darkness of the rooms had been made by customers, some of whom had left, alleging that as the reason of their going,—Held, that the complaints, *per se*, were inadmissible; and although vouched by the departure, yet that act being itself irrelevant, the statements of opinion accompanying it were not admissible as part of the *res gestæ* [*Gresham Hotel* v. *Manning*, Ir. R. 1 C.L. 125; *cp. Wright* v. *Tatham*, *post*, 84, as to declarations of opinion accompanying acts].

A. sues B. for infringement of a patent granted to A. in 1849, B.'s defence being want of novelty. B. having proved that C. (deceased) had in 1846 sold articles similar to those patented, A., in reply calls D. to prove that in 1850, C. when selling D. one of such articles said," This is a new article which I don't want publicly known." Held that C.'s statement was inadmissible (1) to explain or disprove the sales in 1846; and also (2) because the sale in 1850, which it did accompany and explain, was itself irrelevant being subseqeunt to A.'s patent (*Hyde* v. *Palmer*, 32 L.J.Q.B. 126; *post*, 87.

Declarations as to Bankruptcy. The question being whether a bankrupt absented himself from home on a certain

Admissible.

—letters manifesting that intent and written by him during his absence are admissible, since "departing the realm is a continuous act and the letters were written during its continuance." (*Rawson* v. *Haigh*, 2 Bing. 99, per Best, C.J.; *Rouch* v. *G.W.R.*, 1 Q.B. 61, *per* Denman., C. J.). So, where the debtor arrived home in the evening, a statement made by him later the same night was received (*Bateman* v. *Bailey*, 5 T.R. 512).

[*Note*: Although these cases are in strict accordance with principle, very loose dicta occur in them as to contemporaneousness—dicta which were quite unnecessary to the decisions. Thus, in *Bateman* v. *Bailey*, the Court remarked: "Whatever the debtor said *before* his bankruptcy is evidence to explain his act." Among "the ill-begotten progeny of this dictum," as Prof. Thayer calls them, are the remarks of Park, J. (who must not be confused with Parke, B., a far greater authority), in *Rawson* v. *Haigh*: "It is impossible to tie down to time the rule as to declarations. . . . If, as in the present case, there are connecting circumstances, a declaration made even a month after the fact may be admissible as part of the whole *re gestæ*": and that of Denman, C.J., in *Rouch* v. *G.W. Ry.*, that "concurrence of time, though material to show the connection, is by no means essential." As, however in both these cases, the act was *continuous*, there was no need so to strain the principle. The only cases which appear to go the full length of these *dicta* are *Smith* v. *Cramer*, and *Ridley* v. *Gyde*, *inf.*]

To show that a bankrupt absented himself from February 16 to March 19 with intent to defeat his creditors;—his letters written in the middle of January asking for further time for payments due in February, held receivable, as "within the rule which admits anything said or done by the bankrupt before his bankruptcy to explain an equivocal act. They were clearly admissible to show he was a needy man, and might fairly operate to give a colour to his absence from home" (*Smith* v. *Cramer*, *per* Tindal, C.J., 1 Scott, 541; 1 Bing. N.C. 585).—So, on a charge of fraudulently omitting assets from a statement of affairs, filed after a receiving order against him, explanations by the debtor, disclosing and accounting for them, made to his creditors at an informal meeting after the filing of the petition, but nine days before the receiving order, were received in his own favour to show his intent (*R.* v. *Wiseman*, 66 J.P. 40; 18 T.L.R. 117; 20 Cox, 144, C.C.R. The ground of admission, which is not stated in the reports, is said to have been that the declarations formed part of his whole course of conduct connected with

Inadmissible.

morning in order to defeat his creditors;—a statement made by him the same evening, held not admissible to explain such absence (*Lees* v. *Marton*, 1 M. & R. 210, *per* Parke, B.).

So, in *Ambrose* v. *Clendon*, Cas. *temp.* Hardw. 269, Lord Hardwicke rejected declarations by a bankrupt which were "not concomitant with facts"; and in *Robson* v. *Kemp*, 4 Esp. 233, Lord Ellenborough excluded others made "after" an assignment.

The question being whether A., in executing a trust deed for his creditors on Jan. 1, did so with intent subsequently to petition for relief under an insolvency Act;—statements in a schedule of his affairs delivered in connection with such petition filed in May, held inadmissible to show the alleged intent [*Peacock* v. *Harris*, 5 A. & E. 449, Denman, C.J., remarked: "Here the evidence is of something done under the statute *also intuitu*. And even if it were not so, an act cannot be qualified by insulated declarations made at a later time." *Cp. Re Churchill*, *ante*, 73; *Vandewall* v. *Tyrrell*, *ante*, 74; and *post*, 153-154].

A., the assignee of B., a bankrupt under a fiat in March, 1887, sues C., one of B.'s executors, to recover goods delivered by B. to C. in January, 1837, after certain alleged acts of bankruptcy had been committed by B. Evidence that prior to January other goods had been delivered by B. to other creditors, who, after the March fiat, had returned them to A., was tendered by A., not as mere declarations of opinion, but as acts which were part of the *res gestæ* of the delivery to C. in January and relevant to show its circumstances and motive. Held that opinions expressed and acts done after March were inadmissible to show the previous intentions either of these creditors or of B. [*Backhouse* v. *Jones*, 6 Bing. N.C. 65; cited *post*, 135, 165].

Admissible.

the bankruptcy, *ex rel.* S. Hutton). So, to show that he had fraudulently transferred his property on October 25; a conversation had by him with a creditor on November 20 *in resumption* of one immediately before the transfer, held receivable to explain the latter (*Ridley* v. *Gyde*, 9 Bing. 349, *per* Tindal, C.J., and Park, J.; *diss.* Gaselee and Bosanquet, JJ.—the last-named, however, considered the evidence admissible to show that the security was given under pressure). Prof. Thayer remarks that, in some of the above cases, a continuous act seems to be confused with a continuous intent; and he points out that, with regard to the latter, intent at one time may be evidential of intent at another [Cases on Ev. 2d ed. 646, 649; *cp. post*, 148, 153; and see 19 Law Quart. Rev. 443-7; Thayer, 15 Am. Law Rev. 15-20; and Wigmore Ev. s. 1783].

Declarations as to Domicil. The question being whether A., a foreigner, who resided in England from 1734 till his death in 1799, was domiciled here in 1744,—acts subsequent to that date and declarations contemporaneous, or nearly so, with such subsequent acts, held admissible to show his intention, although made *post litem motam* (*Re Grove* 40 Ch. D. pp. 229, 237, 239, C.A.). So, a declaration, during such residence, that he "meant to return to his own country when he had made a fortune" is admissible, although not accompanying any specific intermediate act (*Doucet* v. *Geoghegan*, 9 Ch. D. pp. 455-7; *Cruckenden* v. *Fuller*, 1 Sw. & Tr. 441; *Platt* v. *A.-G.*, 3 App. Cas. 336). Declarations by *living* persons as to their own domicil, whether *ante litem* (*Brodie* v. *B.*, 4 L.T., N.S. 307), or *post litem* (*Spurway* v. *S.*, 1894, 1 I.R. 385, 397), are also receivable. As to their testimony in Court, see *post*, 82.

Declarations as to Legitimacy, Marriage, Adultery, &c. The question being as to the legitimacy of a child born in wedlock in November, 1881;—letters from the mother to a friend in 1876, and a conversation between them in 1884, in which the mother stated that the adulterer was the father (*Aylesford Peerage*, 11 App. Cas. 1); statements by the adulterer about the time of the birth that the lady was his wife, and otherwise acknowledging the paternity (*Burnaby* v. *Baillie*, 42 Ch. D. 282); his entries in a register of birth to the same effect (*Evans* v. *E.*, 20 T.L.R. 612); and his subsequent statements that he intended to provide for the child (*Morris* v. *Davies*, 5 C. & F. 163; *Lloyd* v. *Powell, &c., Co.*, *ante*, 62);—Held admissible, not as evidence of the *truth* of the facts stated, but as parts of the adulterous intercourse and conduct showing they regarded and treated the child as their issue,—and so as presumptive proof of illegiti-

Inadmissible.

Declarations as to Legitimacy, Marriage, Adultery, &c. The question being as to the legitimacy of a child born in wedlock;—letters from the mother to the adulterer declaring that he was the father of the child, which letters were not proved to have been received by the addressee, or ever voluntarily to have left the writer's possession;—held inadmissible as "conduct" under the present head (*Legge* v. *Edmonds*, 25 L.J. Ch. 125, 139).

In a peerage case:—X., as the son of A. (a deceased peer) and of B. (A.'s alleged widow), claims the peerage as against Y. as the son of A. and of C. (A.'s alleged widow). On behalf of Y. it is proved that A. had in 1857 married C. in a parish church in England and died in 1871 leaving Y. as their issue. On behalf of X., B. swears that A. contracted a Scotch marriage with her *per verba de præsenti* in 1844 and afterwards cohabited with her in Scotland and elsewhere till 1849, leaving

Admissible.

macy, although the mother could not, as a witness, have testified directly to that fact (*post*, 198-9). *Cp.*, also *O'Gorman* v. *O'G.*, cited *post*, 84, 491.

A. sues B. for board and lodging supplied to C., B.'s wife, whom B. had turned out of doors. B. pleads C.'s adultery. Letters from men found in C.'s desk and a confession of infidelity made by her to a third person, held admissible as part of the transaction and as the cause and justification of B.'s act [*Walton* v. *Green*, 1 C. & P. 621; doubted Tay, s. 767, on the ground that the question was whether the wife *had* committed adultery, not whether the husband had reasonable suspicion thereof and that her admissions were mere hearsay of the former fact and so inadmissible against A. But the letters, &c., seem receivable not as admissions, but as parts of conduct tending to show adultery. Moreover, in the *Aylesford Peerage*, *sup.*, Lord Blackburn remarked that when a woman left her home, whether turned out or going voluntarily, her own declarations at the time were part of the *res gestæ* and evidence of adultery (p. 3). In Divorce Cases, incriminatory letters from men found in the wife's desk, are admissible on similar grounds as evidence of adultery (*Shackle* v. *S.*, Times, Dec. 24, 1917), and those of an opposite kind as evidence of her innocence (*O'Gorman* v. *O'G.*, 56 Sol. Jo. 634, cited fully *post*, chap xli, Corroboration; *cp. Willis* v. *Bernard*, and *Wilton* v. *Webster*, *post*, 83); but such letters are no evidence of the truth of specific facts stated therein. In *Cooper* v. *Lloyd*, 6 C. B.N.S. 519, and *Morrow* v. *M.*, 1914, 2 I.R. 183, the husband called his wife to prove her own adultery; *cp.* Questions as to Adultery, *post*, 216-7].

A. sues B. for the seduction of his wife, B.'s defence being that A. connived at her leaving home. Evidence that at the time of her leaving she told A. she was going to her uncle's,—Held admissible as part of the *res gestæ* (*Hoare* v. *Allen*, 3 Esp. 276; *cp. Willis* v. *Bernard*, *post*, 83. The evidence was here tendered, not to prove the wife's intent, but A.'s belief as to it; no distinction, however, was made by the Court).

A. and B. (his wife) sue C. for damages for wounding B. What B. said "immediate upon the hurt received and before she had time to devise anything for her own advantage"; — Held admissible [*Thompson* v. *Trevanion* (1693), Skin. 402. In *Aveson* v. *Kinnaird* (1805), 6 East, 188, Ld. Ellenboro' said that the above statement had been received by Ld. Holt "as part of the *res gestæ*."]

Inadmissible.

X. as their issue. Evidence is also tendered for X. that A. had *after* his marriage in 1851, declared that B. was his wife and not C.—Held that declarations were not admissible as part of the *res gestæ*, (*i.e.*, of the cohabitation, or course of conduct, confirming or rebutting the inference of marriage)—because such cohabitation, &c., was *over* as soon as A. had publicly and lawfully married B. *in facie ecclesiæ* [*Dysart Peerage*, 6 App. Cas. 489, 501-2, *per* Ld. Blackburn. They were also held inadmissible as *admissions* either by A. personally, since he was not in the position of a party to the suit (*id.* 499-501); or by A. as a predecessor in title, because his interest had passed (*id.*); or as declarations by a deceased person on a matter of *Pedigree*, for they were *post litem*, *i.e.*, after his marriage in 1851; *cp. post*, 241, 317].

Declarations Accompanying Acts (Criminal Cases).

Admissible.

Sedition. The question being whether a certain meeting was seditious, the following are admissible as parts of the transaction: (1) The cries of the mob at the meeting (*R.* v. *Gordon*, 21 How. St. Tr. 535-6), (2) the contents of seditious banners, placards, and inscriptions used in connection with the meeting, although the originals were not produced [*R.* v. *Hunt*, 3 B. & Ald. 566, 574-6. In *Jones* v. *Tarleton*, 9 M. & W. 675, 676, Parke, B., stated that in *R.* v. *Hunt*, *sup.*, these had been admitted as *res gestæ*: in *Butler* v. *Mountgarret*, 7 H.L.C. 633, 639, he ascribed the admission of their contents to the inconvenience and perhaps the impossibility of procuring the originals]; (3) seditious papers sold thereat, although the defendants were not shown to be connected with such sale (*R.* v. *O'Connell*, Armstrong & Trevor's Rep. 235-7); and (4) speeches made, and the contents of resolutions read, at the meeting (*R.* v. *Hunt*, *sup.*). As to speeches and declarations made prior to, and on occasions wholly *disconnected with*, the acts, or occasion in question,—see fully *R.* v. *Hardy*, &c. *post*, 85-6.

Murder, Assault, &c. The question being whether A. murdered B., a constable; —a verbal report made by B., in the course of duty to his inspector, that he was about to go to a certain place to watch A.'s movements, held admissible [*R.* v. *Buckley*, 13 *Cox*, 293. No reasons are given; and the statement may have been received either on the present ground, (*i.e.* as part of the act of departure), or as made by a deceased person in the course of duty, though the cases under the latter head have all related to *past* and not to *future* acts (*post*, chap. xxiv.). In the Bankruptcy cases, statements by debtors on leaving home have always been received as part of the act to show the object of their departure (*ante*, 75-6), and in *Mutual Life* v. *Hillmon*, 145 U.S. 285, letters expressing an intent to leave a certain place were received not as direct proof that the writer did leave, but as independent evidence of his intent and so as corroborative of other evidence that he left, the existence of such intent rendering its fulfilment more probable than the reverse: *cp. Sugden* v. *St. Leonards*, *post*, 331, and *Rishton* v. *Nesbitt*, 315. The American cases are conflicting, see *ante*, 64].

A. is charged with the murder of B. Defence, suicide. Evidence that B., before her death, was melancholy and depressed

Inadmissible.

Sedition. The question being whether a certain meeting was seditious;—evidence of declarations made by the defendants the previous night and subsequently to the meeting (*R.* v. *Gordon*, 21 How. St. Tr. 542-3); and of seditious expressions used by the crowd while dispersing, within an hour of the meeting and about half a mile from the spot;—Held inadmissible as part of the transaction. (*R.* v. *O'Connell*, 1 Cox, 403).

A. is charged with sedition. Evidence that he had on former occasions expressed principles of an opposite character, held inadmissible in A.'s favour (*R.* v. *Cantwell*, 120 C.C.C. Sess. Pap. 939, *per* Lawrence, J.; see *R.* v. *Hardy*, *post*, 356.

A priest, being charged with blasphemously burning certain Bibles;—(1) sermons preached by him some days before, on occasions unconnected with the burning, were rejected as evidence *for A.*, to show that he meant immoral books merely, and not Bibles to be burnt (*post*, 154); and (2) it having been proved that the Bibles were burnt by two boys employed by A.;—exclamations by another boy, not employed by A., but who was one of a crowd which assisted at the burning, were rejected as evidence *against* A., since no common object was proved (*R.* v. *Petcherini*, 7 Cox, 79; *ante*, 59).

Murder, Assault, &c. The question being whether A. murdered B.;—a statement made by B., some hours previous to the crime and while in the act of leaving her lodgings, that "she was going to meet A.," held inadmissible [*R.* v. *Wainwright*, 13 Cox, 171. Cockburn, C.J., observed, "it was no part of the act of leaving, but only an incidental remark that might, or might not, have been carried out. She would have gone away under any circumstances." A similar statement was rejected by Bovill, C.J., in *R.* v. *Pook*, *id.* 172, *n.* These cases were cited with approval in *R.* v. *Christie*, 1914, A.C. 545, 567; and the former was followed in *R.* v. *Thomson*, *infra*].

A. is charged with the murder of B. Defence, suicide. Evidence that, two years earlier, C., B.'s brother, had disappeared, leaving behind him a letter which showed his (C.'s) suicidal tendencies;—Held inadmissible (*R.* v. *Devereux*, Times, July 28, 1905, *per* Ridley, J.).

A. is charged with the murder of B., by poison. A statement made by B. to her doctor that "I have taken poison. A. sent it to me";—Held, inadmissible as to the last portion either to explain B.'s symptoms, or as part of A.'s act; though *aliter*, it was said, if tendered to rebut a defence of suicide (*R.* v. *Horsford*, Times, June 2, 6, 1898, *per* Hawkins, J.).

Admissible.

and had threatened to take her own life; —Held admissible (*R.* v. *Cowper*, 13 How. St. Tr. 1166-9; *post*, 143). So, where A. was charged with the murder of B., both being found poisoned, but A. surviving;—Evidence (1) that, some months before his death, B. had expressed his intention to commit suicide; and (2) that A., on being found, stated that he and B. had agreed to die together; Held admissible [*R.* v. *Jessop*, 16 Cox, 204, *per* Field, J., *cp. R.* v. *Horsford*, *ante*, 79. A further statement made by B., when purchasing some of the poison, was admitted against A. as being the words and acts of a co-conspirator; *cp. post*, 102. In America, the cases are divided; in *Com.* v. *Trefethan*, 157 Mass. 180, on a defence of suicide, similar evidence was received, not as part of the *rest gestæ*, but to show intent; and see Wigmore Ev. s 1726. *Contra*, *Siebert* v. *People*, 143 Ill. 571, where the Court, on being advised of the former case, still adhered to its own decision; see Thayer, Cas. on Ev. 2nd ed. 641*n*].

A. is charged with the murder of B. (his wife);—the fact that a week before the murder B. went to the house of a neighbour, and handing the latter an axe and a knife, said, "Please put these up, and when I want them I will fetch them, for my husband always threatens me with them, and when they are out of the way I feel safer": —Held admissible [*R.* v. *Edwards*, 12 Cox, 230, *per* Quain, J. No reasons are given; and the declarations could hardly have been received as accompanying and explaining the crime of a week later. The act of deposit, which they did accompany and explain, would seem to have been irrelevant; while, if tendered to prove previous threats, the declarations infringed the rule that they must explain the facts they accompany, and not prior or subsequent ones (*Hyde* v. *Palmer*, *ante*, 75. *Agassiz* v. *Lond. Trum. Co.*, *ante*, 71; *Com.* v. *Chance*, *opposite*; *ante*, 58 *cp. Hayslep* v. *Gymer*, *ante*, 73, where, though a past fact was stated, the possession thereby explained was continuous). *R.* v. *Edwards*, *sup.*, is doubted in Tay. s. 584*n*, and was cited, but not followed, in *R.* v. *Thomson*, *opposite*. As to threats by the *deceased*, to show apprehension by the prisoner, see *post*, 190-1].

On a trial for murder;—evidence by a witness that he was in a room with the deceased just before the latter was shot, and that, seeing a man with a gun in his hand pass the window, he (witness) exclaimed, "There's butcher" (a name by which the prisoner was known);—Held admissible [*R.* v. *Fowkes*, *per* Ld. Campbell, C.J., Steph. Dig. art. 3, illus. *a*; *Times*, Mar. 8, 1856. No reasons are given].

Inadmissible.

A. is charged with performing an illegal operation on B., deceased, on March 21st. Defence that B., and not A., had performed the operation. Evidence that B., (1) a month before her miscarriage, had expressed an intention of operating on herself; and (2) eight days after the miscarriage, stated that she had so operated, was tendered as part of the *res gestæ*, on the authority of *R.* v. *Edwards*, *opposite*, and of a remark by Collins, M.R., in his report upon the Beck case, that defendants in criminal trials are not confined to strictly legal evidence (see *post*, 144); Held not admissible [*R.* v. *Thomson*, 1912, 3 K.B. 19, cited on another point, *post*, 185].

A. is charged with the murder of B.; defence, suicide. An exclamation made to another woman by B., while rushing, with her throat cut, out of a house which A. had been seen to enter a minute or two before (he being subsequently found with his own throat partially cut, lying in one of the rooms), of "Oh, dear aunt, see what A. has done to me!" held inadmissible, the transaction being considered over [*R.* v. *Bedingfield*, 14 Cox, 341, *per* Cockburn, L.C.J., after consulting Manisty and Field, JJ.; (fuller) Times, Nov. 14, 1879. This case was defended in a pamphlet by the L.C.J. (from which B.'s full statement, as above, is quoted), and impeached in a reply by Mr. Pitt Taylor. It was also the occasion of a valuable series of articles by Prof. Thayer, cited *ante*, 55. In *R.* v. *Horsford*, *post*, 83. Hawkins, J., considered *R.* v. *Bedingfield* wrongly decided, stating it had been disapproved in a subsequent case, which he did not name; though in *R.* v. *Goddard*, 15 Cox, 7, he rejected a somewhat similar statement made ten minutes after the injury. *R.* v. *Bedingfield* was, however, approved in *R.* v. *Christie*, 1914, A.C. 545, 556, 566].

A. is charged with the murder of B. Evidence that, after the murder and during a quarrel between C. and C.'s wife (deceased), the latter taking two bullets out of a cupboard, said to C., "The third one killed B."—being tendered to show grounds for suspecting C. rather than A.; —held inadmissible, the presence of the bullets in the cupboard, or their being taken out by C.'s wife, being irrelevant, and, even if remotely relevant, needing no explanation and not being in fact explained in any material sense by her statement (*Com.* v. *Chance*, 174 Mass. 245).

A. is charged with wounding B. with a stone;—testimony by B. that, immediately after he was struck, a lady going past, pointing to the prisoner's door, said, though not in the prisoner's hearing, "the person who threw the stone went in there," held inadmissible as hearsay [*R.* v. *Gibson*, 18

Admissible.

A. is charged with the manslaughter of B. by driving a cabriolet over him. A witness saw the vehicle drive by, but did not see the accident, and immediately afterwards, hearing B. groan, went up to him, when B. stated that he had been knocked down by the cabriolet. Held, that the statement was admissible to prove this fact [*R.* v. *Foster*, 6 C. & P. 325, *per* Gurney, B., and Park and Patteson, JJ. This case is doubted in Ros. Cr. Ev., 13th ed. p. 25, and by Cockburn, L.C.J., in his pamphlet on the Bedingfield Case, but is supported by Mr. Taylor in his reply thereto, and is cited without apparent disapproval in *R.* v. *Christie opposite*, and it was followed in *Gilbert* v. *R.*, 38 Canada Sup. Ct. Rep. 284 (1907), where a statement made by the injured party as to the injury and its cause, in the absence of the accused and as the latter was going away, was admitted].

A. is charged with the murder of B. A witness who lived near, hearing a shout, went to the spot, when B. made a statement as to having been robbed by A.;—Held admissible [*R.* v. *Lunny*, 6 Cox, 477, *per* Monaghan, C.J. This case is doubted in 3 Ruas. Cr., 6th ed., 387, and by Cockburn, C.J., as above, but is supported by Mr. Taylor and is, like *R.* v. *Foster*, *sup.*, cited without apparent disapproval in *R.* v. *Christie*, *opposite*. In another Irish case, *R.* v. *Healihy*, 32 Ir. L.T.Jo. 38 (1898), O'Brien, J., ruled that the whole of a statement made to the police by an injured man, immediately after the injury, is admissible; but see *contra*, *R.* v. *Meath*, *opposite;* and *cp. Gilbey* v. *G.W.Ry., &c., post*, 83.

[As to declarations explanatory of *mental and physical conditions* in criminal cases, see *post*, 83-7].

Explanatory Statements by the Accused, and others. The question being whether A. stole certain property from B., which was found in A.'s possession;—a statement by A. before search was instituted or suspicion had attached to him, that he had "found the property," is admissible in A.'s favour [*R.* v. *Abraham*, 2 C. & K. 550, *per* Alderson, B.; followed in *State* v. *Daley*, 53 Vt. Supreme Court, 442; *cp*, *Hayslep* v. *Gymer*, *Willies* v. *Farley*, *Powell* v. *Harper*, *ante*, 73; and Wigmore Ev. 1781; contra, Russ. Cr. 7th ed. 2204*n*].

The question being whether A. had robbed B. with violence, and bloodstains being found on A.'s coat, which, it was suggested, had flowed from B.'s wounds; a witness for A. was allowed to state

Inadmissible.

Q.B.D. 537. The specific ground of *res gestæ* was not in terms argued in this case, but it could not have been considered tenable or the decision would have been the other way].

A. is charged with assaulting B. During the struggle A., hearing a constable come up, made off and B., in A.'s absence, then complained to the constable (who had not witnessed the struggle), that A. had kicked him;—Held, inadmissible [*R.* v. *Meath*, JJ., 43 Ir. L.T.Jo. 186, *per* Pallas, L.C.B. and Andrews and Johnson, JJ. So, a statement in the morning as to injuries received over night has been rejected as part of the *res gestæ*, *Wolsey* v. *Pethick*, *post*, 83].

A. is charged with indecently assaulting B., a boy. About five minutes after the assault B., having fetched his mother, returned and said, touching A., "That is the man," whereupon a constable asked —"What did he do?" and B. then in A.'s presence detailed what had happened. Held, that B.'s statements were not admissible as part of the main *res gestæ* (*i.e.* the assault): also (by a majority of the H.L.) that though B.'s first statement was admissible as part of the act of identification, his second statement was not [*R.* v. *Christie*, 1914, A.C. 545. For other points decided in this case, see Statements in Presence, *post*, 259; and Corroboration, *post*, 494].

A. is charged with indecently assaulting B., a child, at A.'s shop. After the assault B., on running to meet her companions, who had promised to return to A.'s shop for B., and being asked why she had not waited for them, said, 'Because I don't like A., and won't go near him again as he has assaulted me." Held, not admissible as part of the *res gestæ*, though *aliter* as a complaint (*R.* v. *Osborne*, 1905, 1 K. B. 551, 557, 560; *R.* v. *Lillyman*, 1896, 2 Q.B. 167, 175; *R.* v. *Osborne*, C. &. M. 622; *post*, 113-6).

Explanatory Statements by the Accused, and others. The question being whether A. stole certain property from B., which was found in A.'s possession;—A. was not allowed to give in evidence a copy of a letter which it was alleged he had sent to B., but which B. denied having received, informing B. of his proposal to remove the goods, although the posting and non-return of the letter were proved (*R.* v. *Longman*, 29 L. Jo. 32. *Aliter* if B. had received the letter).

A., a letter-carrier, was indicted for secreting a letter containing a bill of exchange, both of which were found in his possession. The letter, which stated that the bill was enclosed, was allowed to be read to the jury as being found in his possession; but held to be no proof that

Admissible.

that the day before the alleged robbery he met A. and saw bloodstains on his coat, which A. told him had come from a dead hare that he had been carrying over his shoulder (*R.* v. *White*, 2 Cox, 192). So, where A. was charged with receiving stolen tin, a statement by him to the police, who were searching his premises for stolen iron, both as to the tin and the iron;—Held admissible, since otherwise the statement about the tin, which was clearly evidence, would be garbled and might be misunderstood by the jury (*R.* v. *Mansfield*, Car. & M. 140).

On a charge of burglary, it appearing that a witness for the prosecution, who was in the house at the time, had concealed the fact of the burglary for several days; evidence of a direction given by him to his wife "not to tell it, as he was out late at night with the horses, and would not be safe," was admitted for the prosecution in explanation of conduct which, though not in issue, was relevant thereto [*R.* v. *Gandfield*, 2 Cox. 43; the fact and particulars of the direction were alone admitted, but not what he went on to tell his wife he had seen on the night in question, which was rejected as the mere narrative of a past event. In *Sharp* v. *Newsholm*, 5 Bing. N.C. 713, directions given by a debtor as to the disposal of goods were tendered as part of an act done by a third person. but received as showing the debtor's apparent ownership of the goods by dealing therewith].

Inadmissible.

the bill was enclosed [*R.* v. *Plumer*, R. & R. 264; *cp. R.* v. *Cooper*, *post*, 181, and *Bruce* v. *Hurley*, *ante*, 74].

A. was charged with stealing a (marked) shilling from B. On the constable who arrested A. finding the coin and asking if he had any more of B.'s money about him, A. produced some half-crowns and made a statement about them. Held, the statement was inadmissible as relating to a distinct felony [*R.* v. *Butler*, 2 C. & K. 221. This case was approved by Kennedy, J., in *R.* v. *Bond*, 1906, 2 K.B. 389, 399, where, however, the prisoner's statements as to both the crime in question and prior similar ones, were admitted on other grounds; see *post*, 185].

Declarations as to Mental and Physical Conditions and Their Cause.

(*e*) *Direct Testimony*, The question being as to A.'s motive in instituting criminal proceedings against B.;—A., as a witness, may state that "his motive was solely to further the ends of justice" (*Hardwick* v. *Coleman*, 1 F. & F. 531).

The question being as to A.'s domicil, A. may testify what his intention was in residing in a particular place (*Wilson* v. *W.*, L.R. 2 P. & D. 435, 444; *Bispham* v. *B.*, Times, June 18, 1903; as to declarations out of Court, see *ante*, 77).

A. sues B. for commission on the sale of B.'s house to C. C. may testify that "he thought he should not have bought the house but for A.'s card to view" (*Mansell* v. *Clements*, L.R. 9 C.P. 139).

A. sues B. for slander and consequent loss of C.'s custom. C. may state in cross-examination what third persons had said to him about A., and that it was in consequence of this, and not of B.'s words, that he ceased to deal with A. (*King* v. *Watts*, 8 C. & P. 614).

A. is charged with obtaining money from B. by a false pretence contained in a letter. To show that B. parted with his money in reliance upon the letter, B.

(*e*) *Direct Testimony.* The question being as to the sanity of A.;—A.'s friends, neighbours or servants may not, as witnesses, state directly that "A. was, or was not, insane" (*post* chap. xxxv.); although medical witnesses, provided they have personally examined A., may do so (*id.* As to declarations out of Court and letters by, or to, A., see *Wright* v. *Tatham*, *post*, 84).

The question being what was a witness's reason for being absent from Court at a certain time;—another witness cannot testify what the former's reason was (*R.* v. *Attenbury*, 148 C.C.C. Sess. Pap. 206).

Admissible.

may testify both to the opinion formed by him at the time as to its contents, and to his belief in their truth (*R.* v. *King*, 1897, 1 Q.B. 214; *Hardwick* v. *Coleman*, 1 F. & F. p. 532*n*; *R.* v. *Dale*, 7 C. & P. 352; *R.* v. *Hewgill*, Dears. C.C. 600; see Opinions of Non-experts, *post*, 400, 403).

The question being as to what was A.'s intention in signing a certain document;—A. may, or may not, testify as to what his intention was, according to the rules stated, *post*, chaps. xlv.-vi.

(*f*) *Declarations as to Health and Feelings.* A. is charged with poisoning B.;—evidence that shortly before the alleged administration of poison B. appeared to be, and expressed himself as being, in good health; and subsequently to such administration exhibited symptoms, and made statements expressive of present suffering, is admissible (*R.* v. *Johnson*, 2 C. & K. 354; *R.* v. *Lamson*, Browne & Stewart's Poison Trials).

A. sues an insurance company upon a policy upon B.'s (his wife's) life, the defence being misrepresentation of B.'s health. Declarations by B. to a doctor, during examination by him, as to her being in good health, having been proved by A., —declarations by B. to a friend a few days later (made while B. was in bed, looking ill and speaking faintly), that she was then very poorly, and had been so when she went to a doctor and was not fit to go and was afraid she couldn't live till the policy was made out;—held admissible (1) as evidence of B.'s health; and (2) as contradictory of her previous statements [*Aveson* v. *Kinnaird*, 1806, 6 East, 188. As to (1) references to a *past* condition are generally inadmissible; but the Court appears to have treated the illness as a continuing one. As to (2) the evidence was received on the analogy of statements by deceased attesting witnesses contradicting their own attestations. This ground, however, is now untenable (*Stobart* v. *Dryden*, and *Stapylton* v. *Clough*, *post*, 276-7; Thayer 15 Am. L. Rev. 102-3). As to declarations showing for whose *benefit* the policy was intended to be, see *post*, 84-5, 153].

In an action of *crim. con.*, the question being as to the state of the wife's feelings towards her husband;—a letter written by her to her brother-in-law, some time before her alleged misconduct, begging him to aid her in raising money on her property so as to pay her husband's debts and "thus procure me the greatest pleasure the money could ever afford me," is admissible as evidence of such feelings, though not of the facts stated (*Willis* v. *Bernard*, 8 Bing. 376; *cp. Wright* v. *Tatham*, 7 A. & E. 328-9); so, as to complaints of his treatment made by her to third persons (*Winter* v. *Wroot*, 1 Moo. & Rob. 404; *cp.* 113-6).

Inadmissible.

*(*f*) *Declarations as to Health and Feelings.* A. is charged with poisoning B.;—a statement made by B. to her doctor in explanation of her sufferings, that "I have taken poison. *A. sent it to me*";—Held admissible as to the first portion, but inadmissible as to last either, (1) to explain B.'s symptoms, or (2) as part of A.'s act in administering the poison, since the poison had been sent some time before; though *aliter*, it was said, to rebut a defence of suicide [*R.* v. *Horsford*, Times, June 2, 6, 1898,, *per* Hawkins, J.; cited *ante*, 79, and explained in *R.* v. *Rowland*, 62 J. P. 439; 33 L.Jo. 355. In the first-mentioned case part of the arguments were heard in private; see *ante*, 42].

A.'s widow sues A.'s employers for damages for an accident causing A.'s death. Declarations by A. to his wife, on returning home after the accident, are not admissible to show that his symptoms were caused by the accident [*Gilbey* v. *G. W. Ry.*, 102 L.T. 202, C.A.; *Amys* v. *Barton*, 1912, 1 K.B. 40 C.A.; *Wolsey* v. *Pethick*, 1 B.W. C.C. 41, C.A.; *Beare* v. *Garrod*, 85 L.J.K.B. 717 C.A. So, in Ireland: see *Shea* v. *Wilson*, 50 Ir. L.T. Rep. 73. C.A. and *Donaghy* v. *Ulster Co.*, 46 Id. 33, C. A. (not following *Wright* v. *Kerrigan*, 1911, 2 I.R. 301, C.A., and *Fitzgerald* v. *Murphy*, 45 Ir.L.T. Rep. 200. C.A., *contra*, on this point). As to their admissibility as admissions, or as declarations against interest or in course of duty, see *Tucker* v. *Oldbury*, U.D.C. 1912, 2 K.B. 317 C.A., cited *post*, 240, 282, 289.

In an action of *crim. con.*, the question being asked as to the state of the wife's feelings towards her husband;—letters written by the wife to her husband about the date of her alleged misconduct with the defendant are not admissible to show what was the state of her feelings towards her husband at that time, as they might have been written to serve her own ends (*Wilton* v. *Webster*, 7 C. & 7. 198).

In *Witt* v. *Witt*, 3 Swab. & Trist. 143, Sir C. Cresswell, while admitting *oral* statements, wholly rejected *letters* by a patient to a doctor describing his symptoms; this case is doubted by Tay. s. 580*n*.

A. sues her employer for damages for an accident which she alleges occurred on his premises. At the hearing she is cross-examined as to statements made by her to

Admissible.

A. petitions for a divorce from B., his wife, to whom he had been married less than two years, upon the ground of her adultery with C. It was admitted that B. had lived with C. prior to her marriage. Both B. and C. deny the adultery on oath. *Held*, that a letter from C. to B., written after the alleged adultery, but before any accusation thereof was made, in which C. wrote: "Just think, it is 2 years since I held you in my arms,'—was admissible in corroboration of their sworn denial [*O'Gorman* v. *O'G.*, 56 Sol. Jo. 634, *post*, 491.] The head-note to this case, which was reported by Mr. Tregarthen, author of 'The Law of Hearsay Evidence' (1915) stated that the letter was received to prove the truth of its assertion. This is not so; statements contradicting or corroborating witnesses are original evidence and not hearsay, and are no proof of their truth. (See *Milne* v. *Leisler*, *ante*, 74, and *cp. post*, 218, and 480, 488), nor did the Court decide that they were. Apart from this, the letter would appear to have been admissible *per se*, as part of the conduct of the parties and so as presumptive evidence of the innocent character of their relationship (*ante*, 77-8).

On a charge of conspiracy to procure crowds to assemble in order to excite terror in H.M.'s subjects;—evidence by the police of complaints of alarms and requests for military assistance made by several of the inhabitants, held admissible to show the state of public feeling, without calling the declarants (*R.* v. *Vincent*, 9 C. & P. 275).

So, on a charge of neglecting to supply a child with food, its complaints of hunger are evidence of its condition (*R.* v. *Conde*, 10 Cox, 547; *R.* v. *Nicholls*, 128 C.C.C. Sess. Pap. 489).

Declarations as to Mental capacity. The question being as to the sanity of a deceased testator;—his conduct in indorsing, answering, and acting upon letters received by him from third persons, is relevant; and, such conduct having been proved, the contents of the letters, showing that the writers by their treatment considered him sane,—are receivable as statements accompanying and explaining it. [*Wright* v. *Tatham*, 5 C. & F. 670. As to declarations showing sanity, &c., in criminal cases, see *R.* v. *Wells*, *post*, 86, 161, 167, 181.

Declarations as to Intent, Belief and Opinion. A. having insured his life, but neither the proposal nor agent's receipt for premium stating for whose benefit it was to be, and the policy being only com-

Inadmissible.

third persons that the accident had occurred at her own home, and A. having denied these, they were proved by the persons named. A. was not allowed in rebuttal, to call B., a friend and C., her doctor, to prove that two days after the accident she had complained to them of her injuries and where they had occurred, this not being a case of rape (*post*, 113-6), nor falling within the rule allowing similar statements to rebut a charge of recent fabrication (*Jones* v. *S. E. Ry.*, 87 L.J.K.B. 775 C.A.; *post*, 491).

A. is charged with causing B.'s death by an illegal operation;—statements made by B. to her doctor during her illness that A. had operated upon her, and that her illness was caused thereby (*R.* v. *Gloster*, 16 Cox, 471, approved in *R.* v. *Thomson*, 1912, 3 K.B. 19, cited *ante*, 80); or as to what her symptoms had been some days *prior* to such statements (*id.*; *Gardner Peerage*, *inf.*), are inadmissible. So, though a statement by B., that "he had received a wound" would be admissible, a statement that "he had met A., who had a sword and ran him through the body with it," would not be (*R.* v. *Nicholas*, 2 C. & K. 246, 248, *semble per* Pollock, C.B.).

In a case of adulterine bastardy, a midwife having testified as an expert that she had known cases where the period of childbirth exceeded ten months, testified further that in one case where the patient said she had gone beyond her usual time, the witness asked the patient's reason for this belief, and the patient replied from the fact of menstruation having taken place on a given day. Held these answers were inadmissible as going beyond the witness' opinion and stating facts, not within her own observation, which could only be proved at first hand (*Gardner Peerage*, 1824, Le March. 167-76; the *contents* of books upon which an expert's opinion is formed are also inadmissible, *id.* 175; *post*, 392-3.

Declarations as to Mental capacity. The question being as to the sanity of a deceased testator;—letters from third persons found in his possession with their seals broken, but without any evidence of their having been acted on by him, are inadmissible, the mere act of sending the letters to the testator being *per se* irrelevant [*Wright* v. *Tatham*, 5 C. & F. 670. In cases other than sanity this would generally be sufficient evidence of knowledge to admit the letters: *id.* p. 748; Tay. s. 573; *post*, 145; and as to what will amount to *admissions* of the truth of their contents, see *post*, 257-8].

Declarations as to Intent, Belief and Opinion. The question being whether A., an insolvent, in executing a trust deed for his creditors on Jan. 1, did so with intent to petition;—statements in a schedule of his

Admissible.

pleted after A. died;—declarations made by him to the agent, that it was for his wife's benefit, held admissible, the contract being partly written and partly oral. Similar declarations by A. to his wife and friends both *before* the proposal that he intended to insure for her, and *after* it, that he had done so, were also received, apparently in corroboration [*Newman* v. *Belsten*, 76 L.T.Jo. 228; aff'd. 28 Sol. Jo. 301, C.A.; *post*, 153].

In an action against an insurance office, on a policy on the life of A. (deceased), brought by his representatives, to which the defence was that A. had insured, not for his own benefit, but for that of his son, B.;—(1) Evidence tendered by plaintiffs of conversations some time before the insurance between A. and a witness for the plaintiffs, showing that A. intended to insure for his own benefit; and (2) Evidence tendered by defendants of conversations between B. (deceased) and a witness for the defendants, that B. intended to insure A.'s life as a provision for himself in case of A.'s death;—Held admissible as conduct relevant to the issue [*Shilling* v. *Accident Death Co.*, 1 F. & F. 116. In a short report of this case in 4 Jur. N.S. 244, it is stated that, on a witness being asked whether the intestate had *consulted* him about insuring his life, and the question being objected to as hearsay, Erle, C.J., remarked that there were cases where a man's words are his acts, and that this question came within the category and was not inadmissible as hearsay; *cp. post*, chap. xvii., Conduct as Hearsay]. For testamentary cases in which intent at one time (proved by the testator's own declarations) has been received to show intent at another, see *post*, chaps. xxviii., xlvi.

A. and B. in January, 1914, purchased certain freehold land, subject to a lease of part thereof. In Dec., 1914, they purchased this lease. In Oct. 1915, they mortgaged the freehold and lease as separate properties to C.—Held, that the mortgage deed was admissible as evidence that in Dec. 1914, they intended there should be no merger of the two estates and believed that there was none (*Re Fletcher*, 1917, 1 Ch. 339, C.A., cited more fully, *post*, 153-4).

A. is charged with treasonable conspiracy;—evidence having been adduced that, under the cloak of parliamentary reform, he meditated the establishment of a treasonable convention;—public speeches made, and books published, by him many years before the alleged conspiracy, and entirely disconnected therewith, held admissible for the defence [*R.* v. *Hardy*, 24 How. St. Tr. at 1066-1096, Eyre, C.J., though remarking that the general rule

Inadmissible.

affairs delivered in connection with a petition filed in May, held inadmissible to show such intent [*Peacock* v. *Harris*, 5 A. & E. 449. Denman, C.J., remarked: "Here the evidence is of something done under the statute *alio intuitu*. And even if it were not so, an act cannot be qualified by insulated declarations made at a later time"].

A. lodges certain securities at a bank in the joint names of himself and B., his daughter. After A.'s death, a memorandum, dated fifteen months subsequently to the deposit, is found in which he directs the securities to be applied to other purposes. Held, the memorandum was not admissible to rebut the presumption that the money was a gift to B. [*O'Brien* v. *Shiel*, I.R.7 Eq. 255; *Williams* v. *W.*, 32 Beav. 370; *post*, chap. xlvii. *Aliter* if the memorandum had been contemporaneous with the deposit, since the question was what was the intention *at the time* of the transaction and not what it was *subsequently*].

The question being whether A. (deceased), in transferring certain shares to his son B. intended merely to qualify him for a directorship, or to give them to him out and out; an endorsement by A. on an envelope containing the certificates for the shares to the following effect, "1050 shares in the B.T.Co. standing in the name of B. but belonging to me,"—held not admissible to show A.'s intention at the time [*Re Gooch*, 62 L.T. 384, 387, *per* Kay, J.; though *aliter* as corroborative evidence of the nature of the transaction. *Cp. O'Brien* v. *Sheil*, and *Williams* v. *W.*, *post*, chap. xlvii.; Examples of Advancement, &c.].

On a charge of treasonable conspiracy;—declarations made out of Court by the prisoner that "when he planned a certain convention, he had not intended it to destroy the king and government" held inadmissible [*R.* v. *Hardy*, 24 How. S.T. 1093-4, *per* Eyre, C.J.; *cp. R.* v. *Petcherini*, and *R.* v. *Cantwell*, *ante*, 66. As the above statement related to the declarant's *past* intention, it would seem also to be objectionable as hearsay.

Admissible.

was that a prisoner's declarations were evidence *against* but not *for* him, even where intent was involved, added, "but if the question be what was the political speculative opinion which he entertained touching the reform of parliament, we all think that that opinion may be learned by the conversations he has held at any time and any place." So, in *R.* v. *Horne Tooke*, 25 *id.* 344-61, where the prisoner was allowed to read extracts from works he had published at a former period of his life, the same judge remarked "that though to the conspiracy charged the evidence had no reference, yet to the proof offered it had, and that it seemed proper to rebut that proof by evidence of the principles, opinions, and fixed sentiments of the man; and that reform of parliament was the sincere object of his pursuits." Though the principle of these decisions was disapproved by Lord Ellenborough in *R.* v. *Lambert*, 31 *id.* at 355, and only reluctantly adopted in *R.* v. *Cobbett*, 2 St. Tr. N.S. 877-9, by Lord Tenterden, who had at first rejected similar evidence, they were followed in *R.* v. *O'Connell*, 5 *id.* at 538-42; *R.* v. *Martin*, 6 *id.* at 1033; *R.* v. *O'Brien*, 7 *id.* at 266 (but see as to this case, *opposite*) and *R.* v. *Duffy*, 7 *id.* at 927, in which case Lefroy, B., remarked: "These decisions are a sort of anomaly; but there they are, and I bow to their authority, although I am not satisfied with the reasons of them." In 3 Russ, Cr., 6th ed., p. 420, it is stated that the propriety of allowing such evidence has been questioned by very high authority (see *R.* v. *Lambert*, *sup.*). and the better opinion is that to admit the accused's prior declarations, they must in some way be connected with the acts proved against him. For further cases pro. and con. see *post*, 154].

A. is charged with the murder of her child, B.,—her defence being sudden mania. Evidence of a voluntary confession made by her as to how she had killed C., another child, held admissible to rebut this defence and to show her state of mind [*R.* v. *Wells*, 120 Sess. Pap. C.C.C., 1203, *per* Collins, J.; cited, *post*, 161, 167, 181].

Declarations as to Knowledge. A. sues the assignees of B., a bankrupt, for moneys paid by B. to C., as an alleged fraudulent preference. It having been proved that B. stopped payment a few days after the payments and so must then have been insolvent.—(1) Declarations by B. about the time of the payment, but not accompanying or connected with it, held admissible to show his *knowledge* of his insolvency; and (2) letters from D. to B. refusing B.'s request for pecuniary help, —Held admissible for the same purpose, and also as showing (*i.e.* constituting) D.'s refusal, though not as proving the

Inadmissible.

In *R.* v. *Lambert*, 31 St. Tr. 354-355, Ld. Ellenborough disallowed documents and evidence tendered by the defendant as to his former life in proof of his intention in publishing the libel for which he was charged and also an article published by another person in reply to the libel.

So, statements as to his intent, made by the accused to a private friend prior to setting out to a public meeting, held inadmissible, if objected to by the Crown (*R.* v. *O'Brien*, 7 St. Tr. N.S. 262-4; *contra*, as to his public opinions on constitutional matters, see *opposite*).

Declarations as to Knowledge. A. is indicted for fraud as a trustee, his defence being that he had "first disclosed" the offence on his compulsory examination in bankruptcy. To rebut this, and show that his guilt was known before that date to B., his solicitor, a witness testified that B., on the day of the examination, had stated to him (the witness) that A. had committed the offence in question. Held that B.'s statement was not admissible to prove B.'s previous knowledge of A.'s guilt [*R.* v. *Gunnell*, 16 Cox, 154; *per* Stephen, J. "The simple assertion of any man that he 'knew A. had committed a murder,' is

Admissible.

truth of any facts stated in the letters [*Vacher* v. *Cocks*, M. & M. 353; *Thomas* v. *Connell*, 4 M. & W. 267; *op. post*, chap. x. In the above cases the bankrupt's statements could not have been received as *admissions* (*Coole* v. *Braham*, 3 Ex. 183)].

Inadmissible.

not evidence that he did know A. had done so."]

The question being whether a certain article, patented by A. in 1849, had been known to B. (deceased) *before* that date: —a statement by B. in 1850 that he had not previously known of it, held inadmissible (*Hyde* v. *Palmer*, 32 L.J.Q.B. 126, 128, cited, *ante*, 75).

A. is charged with bigamy, the question being whether B., his first wife, knew at the time of her marriage that she had been falsely described by A. in the banns. The fact that B. admitted to her mother, after marriage, that she was aware, before it, of the false description in the banns, held not admissible to prove such knowledge [*R.* v. *Kay*, 16 Cox, 292. Held, also, that the fact that B. signed the register after the marriage in the same false name as that in the banns, was no proof of her knowledge before the solemnisation; following *R.* v. *Wroxton*, 4 B. & Ad. 640].

CHAPTER VII.

AGENCY, PARTNERSHIP, COMPANY, CONSPIRACY, CO-TRESPASS, &c.

Whenever a party is, by substantive law, rendered liable, civilly or criminally, for the acts, contracts, or representations of third persons, and such facts are material, they may be given in evidence for or against him as if they were his own.

The particular relationship rendering such evidence receivable must be proved, *primâ facie* at least, to the satisfaction of the judge (*ante,* 11-12), and cannot, except as against themselves, be established by the declarations of such third persons. Contracts and representations by agents, &c., which are original evidence, must be distinguished from their mere hearsay *admissions,* which are only receivable against, but not in favour of, the principal (*post,* chap. xviii.).

Principle. This rule, which is properly one of substantive law and not of evidence, is based on the *identity of interest* subsisting between the parties. In other words, to hold that an act or representation is not receivable against a party under this heading, is simply to hold that it cannot be used against him on the particular ground of his being, by law, civilly or criminally responsible for it, *i.e.* the act is reduced to the act of a stranger. The question of evidence, however, still remains, whether or not, as such, it is admissible. So, to hold that such acts and representations are receivable, is simply to hold that they are to be dealt with as if they were the party's own; but the question of evidence still remains whether as such they are admissible, and if so for what purpose and with what effect (Thayer, 15 Am. L. Rev. 80).

The following are the principal relationships of this kind:

AGENCY. Civil Cases. (*a*) In civil cases, the acts, contracts, and representations of the agent bind the principal when they have been expressly or impliedly authorized, or subsequently ratified, by him.

And there is implied authority to conduct the principal's business in the usual way, what is necessary for that purpose being determined by the nature of the business and the practice of those engaged therein; evidence on both points is therefore admissible (*Re Cunningham,* 36 Ch. D. 532). Moreover, if the act be within the scope of the agent's authority, it will bind the principal though done against his express instructions (*Watteau* v. *Fenwick,* 1893, 1 Q.B. 346), or fraudulently and for the agent's sole benefit (*Lloyd* v. *Grace,* 1912, A.C. 716, overruling dicta in *British Mutual Banking Co.* v. *Charnwood Ry.,* 18 Q.B.D. 714, 718, and *Ruben* v. *Great Fingall Co.,* 1906, A.C. 439, 465), or negligently (*Penny* v. *Wimbledon, U.C.,* 1899, 2 Q. B. 72; *Fitzsimons* v. *Duncan,* 1908, 2 I.R. 438, 513, C.A.), or maliciously (*Citizens*

Co. v. *Brown,* 1904, A.C. 423; *post,* 77). And the question whether the agent's act is within the scope of his authority is for the jury, unless it is beyond all doubt outside (*Hatch* v. *L. & N. W. Ry.,* 15 T.L.R. 246). So, *Knowledge* acquired in the course of the agency is imputable to the principal, but not generally that acquired otherwise (*Taylor* v. *Yorkshire Ins. Co.,* 1913, 2 I.R. 1; *Wells* v. *Smith,* 1914, 3 K.B. 722, 725; *post,* 77, 81). And *Notice* received by a mercantile agent in the course of business, binds the principal, unless, it seems, there is a strong probability of its non-communication, *e.g.* where it involves the agent's own misconduct (*Cave* v. *C.,* 15 Ch. D. 639; *Re Fitzroy Co.,* 50 L.T. 144), or he has declared his intention of concealing it (*Sharpe* v. *Foy,* 17 W.R. 65); though a mere interest to conceal will not rebut the presumption (*Thompson* v. *Cartwright,* 33 Beav. 178; *Bradley* v. *Riches,* 9 Ch. D. 189; *Rolland* v. *Hart,* L.R. 6 Ch. 678). And notice to a solicitor, or his managing clerk acting for the former with the client's consent, is notice to the client in a legal (*Re Ashton,* 64 L.T. 28; Conveyancing Act, 1882, s. 3), but not in a mercantile (*Tate* v. *Hyslop,* 15 Q.B.D. 368) transaction; nor will his signature to a contract bind the client (*Bowen* v. *D'Orleans,* 16 T. L. R. 226).

Criminal Cases. A party, however, is not in general criminally responsible for the acts or declarations of others, unless they have been expressly directed, or assented to, by him; *nemo reus est nisi mens sit rea* (*Bank of N. S. Wales* v. *Piper,* 1893, A.C. 383; *Coppen* v. *Moore,* 1898, 2 Q.B. 306; *Mousell* v. *L. & N. W. Ry.,* 1917, 2 K.B. 837). There are, however, certain exceptions to this rule, in which an innocent principal may be liable for quasi-criminal acts committed in the conduct of various trades by his agents or servants (*id.*; 68 J.P. 159), or even sometimes by strangers (*Parker* v. *Alder, post,* 81), and be punishable either under the Common Law or more often under some regulative statute or by-law; it being obvious that unless such liability were imposed the law itself might become a dead letter. Moreover, in the absence of restrictive words, the fact that the master is liable does not exempt the servant (*Hotchin* v. *Hindmarsh,* 1891, 2 Q.B. 181; *Brown* v. *Foot,* 17 Cox 509). The *possession* of an agent, wife or servant may also affect the principal provided the latter's knowledge and consent are shown (*R.* v. *Reason,* 1 Cr. App. R. 79; *R.* v. *Pritchard,* 109 L.T. 911; *R.* v. *Charles,* 17 Cox 499; *R.* v. *Pearson,* 72 J.P. Rep. 449, 451; *R.* v. *Mansfield,* Car. & M. 140; *R.* v. *Creau, post,* 139-40. And, to show a prisoner's *knowledge,* communications to his wife, brother and brother-in-law, have been admitted (*R.* v. *Chapple, post,* 101; *R.* v. *Thompson, post,* 272).

Proof of Agent's Authority. (*b*) As against the principal, the authority proved may be *express,* and, when so, must in some cases be in writing, and in some by deed (see *post,* 110-11, 127-8), or, inferred from the principal's *conduct* either in treating the party as agent *inter se* (Tay, ss. 173, 892), holding him out as such to third persons (Ros. N.P. 549), or adopting prior similar acts by him (*Blake* v. *Albion Soc.,* 4 C.P.D. 94; *post,* 97, 99, and chap. xi.). No multiplication of acts by a *special* agent will, however, turn him into a *general* agent (*Barrett* v. *Irvine, post,* 96; *Rutherford* v. *Ounan,* 1913, 1 I.R. 265); and the circumstances may be such that an agent, though purporting to act for one party to a contract, may be held the agent of the other (*post,* 99.) In cases of public agency, acting in that capacity is sufficient proof of author-

ity (*post,* 109-10); but where the agency is a private one the mere acts or representations of the agent, without showing the principal's adoption, are generally no proof against the latter (*post,* 110, 127-8); although the principal's own declarations will of course be evidence against himself. (As to the agent's admissions *after* proof of agency, see *post,* chap. xix.). The authority of the agent may, however, be limited by law, *e.g.* that of a Rate-Collector (*O'Neill* v. *Drohan,* 1914, 2 I.R. 41), or by custom, even unknown to those dealing with him (*Baines* v. *Ewing,* L.R. 1 Ex. 320; *post,* 106). Where the agent has contracted with third persons in writing, the agency, if not disclosed therein, may be proved by parol (*post,* chap. xlv.). So, an unauthorized act may be subsequently *ratified,* either by the principal (provided the agent purported to act for him at the time, *Keighley* v. *Durant,* 1901, A.C. 240), or by his agent (*Morison* v. *L. & C. W. Bank,* 1914, 3 K.B. 356, C.A.). As to a solicitor's privilege in proving his client's authority, see *post,* 205; and as to proof of agency against the agent or third persons, see *post,* 127-9.

PARTNERS. TRUSTEES. EXECUTORS. Partners. (*c*) A similar rule holds in cases of partnership, each partner being constituted the agent of the others for all purposes within the scope of the joint concern. Hence, after proof of association, the acts, contracts, and representations of each partner which have been expressly authorised, or are impliedly so (*i.e.* necessary for carrying on the business in the usual way), or which have been subsequently ratified, bind the firm and the other partners (Partnership Act, 1890, ss. 5-8); so, as to torts committed in the ordinary course of business, or with the authority of the co-partners (*id.* ss. 10-12; *Hamlyn* v. *Houston,* 1903, 1 K.B. 81; *Re Briggs,* 1906, 2 K.B. 209; though as to breaches of trust, see s. 13, and *Blyth* v. *Fladgate,* 1891, 1 Ch. 337); and a partner by "holding out" is only liable in contract and not in tort in respect thereof (*Smith* v. *Bailey,* 1891, 2 Q.B. 403). *Notice* to any partner who habitually acts in the partnership affairs also operates as to notice to the firm, except in the case of a fraud on the firm committed by, or with the consent of, that partner (s. 16). [Lindley, Partnership, 7th ed., 145-296].

Proof of Partnership. This may be shown by its *previous* existence (*post,* 121); or by *express agreement* between the parties (*post,* 572); or, subject to s. 2 of the Act, by their *conduct* between themselves or towards third persons (Lindley, 94-104); but not by proof of partnership in other transactions (*Kennedy* v. *Dodson,* 1895, 1 Ch. 334, C.A. cited *post,* 166), nor except as against himself, by the admissions of an alleged partner (Lindley, 94; Tay., s. 753). As to limited partners, see 7 Ed. VII. c. 24. As to admissions by partners *after* proof of partnership, see *post,* 242; as to Partnership books, *post,* 258; acknowledgments under Statutes of Limitation, *post,* 244; and Judgments affecting partners, *post,* 413-5. [Tay., ss. 598-601, 753; Lindley, *sup.;* Pollock, Partnership Act; Ros. N. P., 18th ed., 71, 555-558].

Trustees and Executors. In the case of Co-Trustees all must, generally speaking, join in the execution of the trust, and the act of one does not bind the rest (Lewin, Trusts, 11th ed., 284-302); but in the case of Co-Executors each has entire control over the property, and his acts do, in many cases, bind the others (Williams, Exors., 10th ed., 715-27). Now, however, both are, notwithstanding receipts signed for conformity, only liable for property

actually received by them, and for their own neglects and defaults and not for those of co-trustees, bankers, brokers, or agents; nor for any loss that has not occurred through their own wilful default (Trustee Act, 1893, s. 24). On the other hand, *Notice* to one of several trustees operates as notice to all, provided the trustee who received the notice is still a member of the trust (*Ward* v. *Duncombe,* 1893, A.C., 369; *Re Wyatt,* 1892, 1 Ch. 188; *Low* v. *Bouverie,* 1891, 3 Ch. 82; *Re Phillips,* 1903, 1 Ch. 183), and is not himself a beneficiary (*Lloyd's Bank* v. *Pearson,* 1901, 1 Ch. 865). And, in the absence of rebutting circumstances, notice to one *executor* will, perhaps, be presumed to have been communicated by him to his co-executors, unless he renounced before acting (Williams, Exors., 1468; *Re Dallas,* 1904, 2 Ch. 385). [As to *Admissions* by co-contractors, trustees, executors, &c., see *post,* 242-6; and as to joint contractors, generally, see Griffin on Joint Rights].

CORPORATIONS. COMPANIES. (*d*) A corporation or company is liable for the acts and representations of its directors, or other lawful agents, which are within the scope of their real or apparent authority (Lindley, Company Law, 5th ed., 155-158), even though such acts may be fraudulent (*Pearson* v. *Dublin Corp.,* 1907, A.C., 351; *Kettlewell* v. *Refuge Co.,* 53 Sol. Jo. 339. H. L.), malicious (*Citizens Co.* v. *Brown,* 1904, A.C. 423), or quasi-criminal, as in offences under the Sale of Food and Drugs Act, 1899 (*Chuter* v. *Freeth,* 105 L.T. 238). And, under the validating clauses in the Companies Cl. Cons. Act, 1845, s. 99, the Companies Act, 1908, s. 74, or those ordinarily inserted in Company Articles, this applies, although the directors were irregularly appointed, temporarily disqualified, insufficient in number, or acting otherwise than at a board meeting; and not only *against* the company in actions by outsiders who have no notice of the irregularity, *e.g.* that the company's seal was invalidly affixed (*County of Glos. Bank* v. *Rudry Co.,* 1895, 1 Ch. 629; *Biggerstaff* v. *Rowatt,* 1896, 2 Ch. 93; *Re Bank of Syria,* 1901, 1 Ch. 115; *Re Fireproof Doors,* 1916, 2 Ch. 142: *post,* 516, 518), but *for* the company in actions against its members (*Dawson* v. *African Co.,* 1898, 1 Ch. 6; *Briton Association* v. *Jones,* 61 L.T. 384; *Montreal Co.* v. *Robert,* 1906, A. C., 196). As to what contracts by a Corporation must be by deed, and what may be by parol, see Tay., ss. 976-84; but corporations may be liable on a *quantum meruit,* though the contract was not under seal (*Hodge* v. *Matlock, U.D.C.,* 75 J.P.R. 65, C.A.). The authority of a corporation to institute prosecutions, and the appointment of solicitors to represent them thereat, should in general, be by resolution, a sealed copy being served on the defendants, save in the case of town clerks acting under by-laws (47 L. Jo. 34).

Knowledge and Notice. Notice must usually be given to the company itself at its registered office [Comp. (Cons.) Act, 1908, ss. 62, 116]; but although it is the collective and not the individual directors who are the company's agents, yet where one such has authority to act for the company, his knowledge of matters within its ordinary scope will also affect the company (Lindley, 204-5; *Jaeger's Co.* v. *Walker,* 77 L.T. 180). This, however, does not apply to information obtained by him when acting as director of other companies, and which it was not his duty to receive or disclose (*Re Payne,* 1904, 2 Ch. 608), or which he obtained fraudulently (*Re European Bk.,* 5 Ch. Ap. 358), or not as agent in the particular transaction (*Peruvian Ry.* v. *Thames*

Co., L.R. 2 Ch. 617); and notice to the director of a "one-man" company, may (*Re Hirth*, 1898, 1 Q.B. 612, 625), or may not (*Bank of Ireland* v. *Cogry Co.*, 1900, 1 I.R. 219), bind the latter. So, formal, but not casual, notice to the *secretary* (*Société Générale* v. *Tramways Union*, 14 Q.B.D. 424, affd. 11 App. Cas. 20), or even to his *clerk* left in charge of the office (*Re Brewery Assets Co.*, 1894, 3 Ch. 272), will bind the company. But knowledge obtained by him when acting for other companies (*Re Fenwick*, 1902, 1 Ch. 507), or in other capacities (*Building Assoc.* v. *Smee*, 34 L. Jo. 346), will not bind the company, unless it was his duty to communicate it. A railway company has been affected with knowledge of facts proved in the presence of their agent and traffic-manager at a reference to which it was a party (*G. W. Ry.* v. *Sutton*, L.R. 4, H.L. 226).

Acts not Binding. On the other hand, (1) a company is not, like an ordinary partnership, liable for the acts of its members; indeed the shareholders, merely as such, are not its agents for any purpose whatsoever (*Burnes* v. *Pennell*, 2 H.L.C. 497). Nor (2) is it, in general, liable for contracts made *before* its formation by its promoters or trustees, and such contracts cannot be afterwards ratified by the company, though fresh ones to the same effect may be entered into (*Natal Co.* v. *Pauline Syndicate*, 1904, A.C. 120); as to fraud by promoters, &c., see, however, *Hilo Co.* v. *Williamson*, 28 T.L.R. 164, C.A., and *Components Tube Co.* v. *Naylor*, 1900, 2 Ir. 1, 74. Nor (3) is it liable for acts done, contracts made, or knowledge obtained in transactions which are *ultra vires*.

Personal Liability of Directors, &c. The above-named are not individually liable, merely on account of their common object, for the acts or defaults of their colleagues, whether done before, or after, the company's incorporation; nor does the knowledge of the company necessarily bind a director (*post*, 145-6). But they may, of course, render themselves so liable, either expressly or constructively (Ros. N. P. 558-560); and as to untrue statements in the prospectus, &c., by directors, promoters and others, see Comp. (Cons.) Act, 1908, s. 84.

As to *Admissions* by the officers of a company, see *post*, 247-8; as to Corporation and Company *Books*, *post*, 145-6, 258, 372-7; and as to signature by Directors, chap. xlv. (Exception iv.).

CONSPIRACY. CO-TRESPASS. (*e*) On charges of conspiracy, the acts and declarations of each conspirator in furtherance of the common object are admissible against the rest; and it is immaterial whether the *existence* of the conspiracy, or the *participation* of the defendants be proved first, though either element is nugatory without the other (Wright on Conspiracy, 72; *R.* v. *Frost*, 9 C. & P. 129, 150; *R.* v. *Whitaker*, 10 Cr. App, R. 245). The same rule applies where the charge is not directly for the conspiracy, but for an act resulting therefrom (*R.* v. *Jessop*, 16 Cox 204; *R.* v. *Wark*, 33 L. Jo. 615).

[Tay., ss. 590-597; Russ Cr., 7th ed., 191-201, 2097-8; Best, s. 508; Ros. Cr. Ev., 13th ed., 79, 348-63; Archb. Cr. 1219-1220; Steph. art. 3; Wright on Conspiracy, 68-72].

The above rule holds, although the acts and declarations proceeded from conspirators not charged (*R.* v. *Duguid*, 94 L.T. 887); or were done in the absence of the party against whom they are offered; or without his knowledge;

or even before he joined the combination (*R.* v. *Brandreth,* 32 How St. Tr. 857; *R.* v. *Murphy,* 8 C. & P. 297, 311; *R.* v. *Dwyer,* 24 Ir. L.T.R. 111; *R.* v. *Newton,* 147 C.C.C. Sess, Pap. 946-7; Ros. Cr. Ev. 355-6); and the possession of one conspirator is that of all (*R.* v. *Charles,* 17 Cox 499; *ante,* 89). Moreover, after overt acts within the jurisdiction have been proved, others done beyond it are receivable (Russ. Cr. 7th ed., 835-7; *R.* v. *Quinn,* 33 Ir. L.T.R. 154). But the acts and declarations of other conspirators, before any particular defendant joined the association, are only receivable against him to prove the origin, character, and object of the conspiracy and not his own participation therein, or liability therefor (*R.* v. *Dwyer, sup.; O'Keefe* v. *Walsh,* 1903, 2 I.R. 681, 702); and if they were not in furtherance of the common purpose (*e.g.* were mere narratives, descriptions, or admissions of past events); or were done or made after his connection with the conspiracy had ceased, they will not be admissible against him (Tay., ss. 594-595). So, acts and declarations *after* the event conspired for has happened, are not generally receivable since these cannot be in furtherance of the common purpose (*R.* v. *Wark,* 33 L. Jo. 615; *R.* v. *Newton, sup.*). Still, acts of accomplices *after the arrest* of a conspirator may be received, if done in pursuance of prior instructions from him (*R.* v. *M'Cafferty,* I.R. 1 C.L. 363); as, also, writings found after his arrest, but which have existed previously [*R.* v. *Watson,* 32 How. St. Tr. 337-350; this applies even to unpublished writings on abstract subjects, if proof be given of an intention to have used them in furtherance of the common design (*id.*); or, possibly, if they were closely connected with its nature and object; though not where the abstract subject is merely of a kindred nature without having any direct relation to the charge, Tay., s. 596]; and in *R.* v. *O'Brien,* 7 St. Tr. N.S. 1, documents found in a locked portmanteau which had been out of the prisoner's possession for several days after his arrest, were received against him. So, the acts of a prisoner after his arrest may be admissible against those who have joined in a conspiracy to release him (*R.* v. *Desmond,* 11 Cox 146).

If a defendant is tried alone for conspiracy, he may be convicted although his co-conspirators do not appear, provided the jury are satisfied that the latter were also guilty (*Beechey* v. *R.,* 85 L.J.P.C. 32); but if tried jointly, one defendant cannot be convicted if the other, or all of the others, are acquitted (*R.* v. *Plummer,* 1902, 2 K.B. 339; *R.* v. *Manning,* 12 Q.B.D. 241).

Where several defendants are charged with a criminal act, but only one unidentified defendant commits it, the jury must, in the absence of proof of a common design, ascertain who was the actual perpetrator, or failing this must acquit all (*R.* v. *Price,* 8 Cox 96; *R.* v. *White,* R. & R. 99; *R.* v. *Manning & wife,* Wills Circ. Ev., 6th ed., 314-5; *R.* v. *Bird,* 5 Cox 11). So, where A. and B. were convicted of felonious damage, the evidence against A. alone being clear, but against B. alone very slight, B.'s conviction was quashed since though there was also evidence of their acting in concert, the jury were not directed as they should have been, that they could convict B. if they were satisfied he was acting in concert with A. (*R.* v. *Ashdown,* 12 Cr. App. R. 34). On the other hand, where several defendants commit a single act in concert, each may be convicted either of the same, or of different, offences arising thereout (*R.* v. *Connor,* 8 *id.* 152). With this may be compared the rule that in divorce cases the respondent may be found guilty of adultery and the co-respondent not, or *vice versa* (*Long* v. *Long,* 15 P.D. 218; *Wright* v. *Wright,* 49 Sol. Jo. 134).

At Common Law, husband and wife, being regarded as one person, cannot be charged with, or convicted of, conspiracy (*Director of P. P.* v. *Blady*, 1912, 2 K.B. 89, 92; *post*, 451).

Proof of Agreement. To prove the conspiracy, there need not be evidence of direct concert, nor even of any meeting together of the defendants; the agreement may be inferred from collateral acts raising a presumption of the common design (*R.* v. *Murphy, sup.*; *R.* v. *Pridmore*, 29 T.L.R. 330; *R.* v. *Whitaker*, 10 Cr. App. R. 245; Wright on Conspiracy, 68-72; *post*, 100-1). And similar acts done by each defendant may be (*R.* v. *Murphy*, *R.* v. *Tibbitts*, *post*, 100-1), but are not necessarily (*R.* v. *Warren*, *post*, 100), evidence of concert.

Co-trespass. &c. Although in criminal cases it is the *agreement* which is the essential element, and in civil ones the resultant *damage* (*Quinn* v. *Leathem*, 1901, A.C. 495, 542; *O'Keefe* v. *Walsh*, 1903, 2 I.R. 677, 689, 700), yet the acts and declarations of co-trespassers in civil actions (*R.* v. *Hardwick*, 11 East, 578, 585; *Powell* v. *Hodjetts*, 2 C. & P. 432; *North* v. *Miles*, 1 Camp. 389; Tay., s. 597), and indeed of all persons combined for a common object whether civil or criminal (*Pilot* v. *Craze*, 52 J.P. 311), are governed by the same rules. The extension of this principle, *Wright* v. *Court*, 2 C. & P. 232, where expressions of malice used by one of the defendants some weeks after the transaction were admitted against the others, is doubted in Tay., s. 597, and would probably not now be supported; *cp. R.* v. *Wark*, *sup.* The acts and declarations of joint-tortfeasors are not, however, reciprocally admissible unless combination for a *common object* be proved (*Daniels* v. *Potter*, M. & M. 501, distinguishing *R.* v. *Hardwick*, *sup.*). As to admissions and Confessions by co-defendants, see *post*, chaps. xix, xxi.; and as to the admissibility of statements in rebuttal of charges of conspiracy and collusion in divorce cases, see *Farulli* v. *F.*, *post*, 156.

EXAMPLES.

(*a*) *Agency.*

Admissible.	*Inadmissible.*
A., a horse-dealer, instructs B., his servant, to sell a horse without a warranty. B. sells the horse with a warranty. The sale and the warranty bind A., as being within the usual course of a horse-dealer's business (*Howard* v. *Sheward*; L. R. 2 C.P. 148).	A., a private owner, instructs B., his servant, to sell a horse without a warranty to a private purchaser; B. sells the horse with a warranty. The sale, but not the warranty, binds A., as B. had no express or implied authority to give the latter (*Brady* v. *Todd*, 9 C.B.N.S. 592; *aliter*, perhaps, if the horse were sold at a public fair or mart).
A., as solicitor for B., obtains judgment against C., and, without instructions from B., issues execution against C.'s goods.—B. is bound by A.'s act, as being within the ordinary course of a solicitor's business (*Smith* v. *Keal*, 9 Q.B.D.. 340; *Morris* v. *Salberg*, 22 Q.B.D. 614).	A., as solicitor for B., a judgment creditor of C., issues execution against C., giving the sheriff special directions as to particular goods.—B. is not bound by such directions (*Smith* v. *Keal*, *opposite*); neither is he where, on the instruction merely of B.'s bookkeeper, A. wrongfully causes D.'s goods to be seized by mistake (*Hewitt* v. *Spiers and Pond*, 13 T.L.R. 64).
A. entrusts property for sale to B., managing clerk to C., a solicitor, and gives him the title deeds. B. fraudulently and for his own benefit, sells the property. Held that C. was liable to A. for B.'s acts (*Lloyd* v. *Grace*, 1912, A.C. 716).	
A. sues B. for negligence in injuring his ceiling. B. had offices above A., with a	A. sues B. for negligence in injuring his ceiling. B. had offices above A., with a

Admissible.

private lavatory attached, which B.'s clerks were prohibited from using; one of them used it, omitting to turn off the water. B. is not liable as the act was not incidental to the clerk's employment (*Stevens* v. *Woodward*, 6 Q.B.D. 318). So, also, if the act were done by an unauthorised third person (*Rickards* v. *Lothian*, 1913, A.C. 263, P.C.); or by a competent plumber employed to repair the cistern (*Blake* v. *Woolf*, 1896, 2 Q.B. 426). See further as to negligence and fraud by agents, *post*, 97; and as to acts by agents of corporations and companies, *post*, 98-9.

Inadmissible.

lavatory used in common by B. and his clerks. One of the latter omitted to turn off the water. B. is liable as the act was incidental to the clerk's employment (*Ruddeman* v. *Smith*, 5 T.L.R. 417.)

A., a shipowner, instructs B., a broker in Scotland, to re-insure an overdue ship. B., who has received confidential information of the ship's loss, puts the matter in the hands of C., his London agent, who insures with D., a London broker. None of the parties except B. know of the ship's loss, and B. receives no commission.—A. cannot recover on the policy, being bound by B.'s knowledge and concealment of a material fact (*Blackburn* v. *Haslam*, 21 Q.B.D. 144). As to knowledge, by an agent, of a trade custom, see *post*, 106.

A., shipowner, instructs B., a broker in Scotland, to re-insure an overdue ship. B., who knows, but conceals the fact of its loss, re-insures the ship with C., a London broker. Afterwards A., by an independent negotiation, not conducted through B., re-insures the ship for a further amount.—A. can recover on the second policy, as he is not affected with regard to it, by B.'s knowledge and concealment of the ship's loss (*Blackburn* v. *Vigors*, 12 App. Cas. 531); so, also, as to knowledge and concealment by A.'s solicitors (*Tate* v. *Hyslop*, 15 Q.B.D. 368); and the knowledge of Lloyd's agent is not that of each member (*Wilson* v. *Salamandra Co.*, 88 L.T. 96).

The question being whether A., the owner of a dog, knew of its mischievous propensities.—Complaints about the dog made to A.'s wife, who had charge of his business in his absence (*Gladman* v. *Johnson*, 36 L.J.C.P. 153; *Duncan* v. *Carleton*, 11 T.L.R. 524), or to A.'s coachman, who kept the dog at the stables (*Baldwin* v. *Casella*, L.R. 7 Ex. 325), are admissible to affect A. with knowledge.—So, also, it seems, complaints made to A.'s barman, who occasionally had charge of his business (*Applebee* v *Percy*, L. R. 9 C. P. 647; *inf.* 96). In *Elliott* v. *Longden*, 17 T.L.R. 648, the knowledge of A.'s son, aged eleven, was also held to bind A. *Cp. R.* v. *Chapple*, *post*, 101; *cp. post*, 152.

The question being whether A., the owner of a dog, knew of its mischievous propensities. — Complaints about the dog made to A.'s stableman, or domestic servant, neither of whom had charge of A.'s business or of the dog, are not evidence against A. (*Stiles* v. *Cardiff S. N. Co.*, 33 L.J.Q.B. 310; *Colget* v. *Norris*, 2 T.L.R. 471; *Cleverton* v. *Uffernel*, 3 T.L.R. 509). Nor is a complaint to A.'s deceased husband, taken alone, notice to A. (*Miller* v. *Kimbray*, 16 L.T. 360).—And see as to notice of a defect in a builder's plant, given to his foreman, the latter not being the manager of the whole work or of the particular part in question (*Gallaher* v. *Piper*, 33 L.J.C.P. 329).

A., a baker, is charged at common law with selling bread containing alum to a deleterious extent. The alum had, contrary to A.'s orders, been put in by his foreman, who was told only to put in a trifling amount.—A. is liable (*R.* v. *Dixon* 4 Camp. 12). So, under the Sale of Food and Drugs Act, 1875, s. 6, as to milk which, unknown to and unauthorised by A., his servant had adulterated and sold to customers (*Brown* v. *Foot*, 17 Cox, 509); or which had been adulterated in transit by strangers (*Parker* v. *Alder*, 1899, 1 Q.B. 20).

A. is charged under the Sale of Food and Drugs Act, 1875, s. 6, with selling lard of inferior quality to that ordered, without notifying the fact by label. A.'s shopman, by mistake and contrary to orders, put a "margarine" instead of a "lard compound" label on the parcel. A. is not liable (*Kearley* v. *Tylor*, 17 Cox 328). So, under the Merchandise Marks Act, 1887, ss. 2, 5, where A., a brewer, sold certain casks which his drayman fraudulently invoiced as "barrels" (*Budd* v. *Lucas*, 1891, 1 Q.B. 408). Or where A.'s servant misrepresented the weight of coal sold by him (*Roberts* v. *Woodward*, 25 Q.B.D. 412).

A. is charged with the statutory offence of "slaughtering or permitting to be slaugh-

A., a mine owner, is charged under the Cruelty to Animals Act, 1849, with work-

Admissible.

tered" sheep outside a slaughter-house and in view of other sheep. A.'s foreman, who was not the manager of his business, had so slaughtered them against A.'s orders and to save himself trouble. A. is liable (*Collman* v. *Mills*, 1897, 1 Q.B. 396).

So, a shop-owner has been held liable for the misrepresentation of his manager made against the former's authority or consent, as to the source from which he procured certain seeds (***Department of Agriculture*** v. ***Burke***, 1915, 2 I.R. 128).

A., a publican, is charged under the Licensing Act, 1874, with selling drink to an intoxicated person. The drink had been sold by A.'s barman when in charge of the bar. A. is liable (*Comrs. of Police* v. *Cartman*, 1896, 1 Q.B. 655). So, as to permitting drunkenness (*Worth* v. *Brown*, 62 J.P. 658), or gambling (***Bond*** v. *Evans*, 21 Q.B.D. 249), by a potman in charge at the time. So, where A. left a manager, and the manager left the "Boots" in charge, who suffered the gambling (*Crabtree* v. *Hole*, 43 J.P. 799). In *Worth* v. *Brown*, *supra*, statements in the presence of the barmaid by the police and others were received to show her knowledge of the guests' condition, so as to affect the master, *ante*, 95.

A. hires a motor-car and chauffeur from B., the owner. The chauffeur, against B.'s orders, allows A. to drive and damage results. B. is not liable therefor (*Coogan* v. *Dublin Co.*, 49 Ir. L.T.R. 24).

Inadmissible.

ing a horse, while in an unfit state, in a mine. The horse had been so worked by one of the miners, both A. and his manager being ignorant of the fact. A. is not liable (*Small* v. *Warr*, 47 J.P. 20; *Greenwood* v. *Backhouse*, 20 Cox, 196). So, where A., a surveyor of roads, was charged with leaving stones on a highway whereby an accident was caused, A.'s carter having left them there without A.'s knowledge (*Harcastle* v. *Bielby*, 1892, 1 O. B. 709).

A., a club proprietor, is charged with selling spirits to persons not members of the club. They had been wrongfully supplied, against A.'s orders, by the steward. A. is not liable, as the only sales authorised were those to members (*Newman* v. *Jones*, 17 Q.B.D. 132). So, as to permitting drunkenness (*Somerset* v. *Wade*, 1894, 1 Q.B. 574), knowingly selling intoxicants to children (*Emary* v. *Nolloth*, 20 Cox, 597), or suffering gambling (***Somerset*** v. *Hart*, 12 Q.B.D. 360), by a potman not in charge at the time. As to sales at an unlicensed place, see *Boyle* v. *Smith*, 22 T. L.R. 200.

A. is charged under statute with negligently using a furnace so as to emit smoke. Neither A. nor his foreman had been negligent, but the smoke was caused by A.'s stoker, who had improperly lighted the furnace. A. is not liable criminally, though he might have been civilly [*Chisholm* v. *Doulton*, 22 Q.B.D. 736. But see *Armitage* v. *Nicholson*, 29 T.L.R., 425, decided under a more stringent statute].

(*b*) *Proof of Agency and Authority.*

The question being whether A. had authorised B. to sign a policy of marine insurance for him;—evidence that a witness had frequently seen B. sign similar policies for A., though he did not know of any special authority in the case in question, held sufficient (*Neal* v. *Irving*, 1 Esp. 61; *Watkins* v. *Vince*, 2 Stark. 368). So, where B., as a witness, stated that he was authorised to sign for A. by a power of attorney, and that the latter had habitually paid losses on policies signed by him,—this was held sufficient as against A., without producing the power (*Haughton* v. *Ewbank*, 4 Camp. 88; *Brocklebank* v. *Sugrue*, 5 C. & P. 21; *cp. post*, 98-9, 538).

The question being whether A. had authorised B. to sign a policy of marine insurance for him;—evidence that a witness had seen B. sign other policies for A., but knew of no general or special authority to sign, nor of A.'s having paid any loss on such policies, held insufficient (*Courteen* v. *Touse*, 1 Camp. 43, note).

A. sues B. for the price of a horse bought by B.'s son C. (a minor);—Evidence that on certain other special occasions B. had to A.'s knowledge, paid for horses bought by C.:—Held inadmissible to show that C. was B.'s *general agent* for the purchase of horses (*Barrett* v. *Irvine*, 1907, 2 I.R. 462; *Rutherford* v. *Ounam*, 1913, 1 I.R. 265).

The question being whether A., a stockbroker, authorised B., his clerk, to make contracts with, or bind A. to accept orders from, B.'s clients:—the facts that B. was authorised to *receive* such orders and that A. accepted payments therefor, made through B., are no proof (*Spooner* v.

Admissible.

The question being whether A. had authorised B., his confidential clerk, to *indorse* a certain bill of exchange for him; —evidence that B. was in the habit of *drawing* cheques for A.; and that in one case A. had authorised him to indorse a bill, and in two others had received money obtained by bills indorsed by B., is admissible as showing a general authority to indorse in B. (*Prescott* v. *Flinn*, 9 Bing. 19; see *Edwards* v. *Stokes*, Times, April 5, 1897).

To prove that B. acted as agent for an insurance company in fraudulently obtaining a certain premium from C.;—the fact that B. obtained similar premiums from other persons to the company's knowledge and for its benefit is admissible (*Blake* v. *Albion Life Ass. Soc.*, 4 C.P.D. 94; *post*, 99, 160).

A. sues B., a shipowner, for the negligence of C., while in charge of B.'s ship. The fact that B. owned the ship (proved by the register. See *post*, 352) is presumptive evidence that those in charge were the servants of the owner (*Hibbs* v. *Ross*, L.R., 1 Q.B. 534); so of a tug-boat (*Joyce* v. *Capel*, 8 C. & P. 370), cab (*King* v. *London Cab Co.*, 23 Q.B.D. 281), or other *public* as distinguished from *private* vehicle (*Dowling* v. *Robinson*, 43 Ir. L. T.R. 210; though as to what is sufficient evidence that the driver of the latter was acting in the course of his employment, see *id.*)

A. sues B. for breach of trust committed twenty years before. To prove A.'s knowledge of the breach at the time, bills of costs furnished by B.'s solicitor to B.

Inadmissible.

Browning, 1898, 1 Q.B. 528, C.A.). Nor is a principal's authority to a broker to *effect* a policy any authority to the latter to *cancel* it. (*Xenos* v. *Wickham*, L.R. 2 H.L. 296).

The question being whether A. authorised B. to *accept* a certain bill of exchange for him;—the facts that (1) A. had admitted his liability on a prevous bill accepted by B. (*Llewellyn* v. *Winckworth*, 13 M. & W. 598); (2) had admitted that he was in the habit of indorsing bills accepted by B. (*Cash* v. *Taylor*, 8 L.J.K.B. (O.S.) 262); and (3) had paid a previous bill on which his name had been forged by B.:— are not admissible as evidence of a general authority in B. to accept (*Morris* v. *Bethell*, L.R. 4 C.P. 765; *id.* 5 C.P. 47; and see *McKenzie* v. *British Linen Co.*, 6 App. Cas. 82); though *aliter* to confirm such an authority if otherwise proved (*Llewellyn* v. *Winckworth*, *sup.*). The fact that B. had on former occasions forged letters from A., to different persons purporting to authorise B. to accept bills for A., is not admissible to disprove B.'s authority to accept in the case in question (*Prescott* v. *Flinn*, *sup.*; *post*, 160, 166).

A. sues B. for false imprisonment. The police had arrested A. and detained him, but there was no evidence at whose instigation. B. had, however, signed the charge sheet. Held, that this was no proof that B. had authorized either the arrest or continued detention of A. (*Sewell* v. *National Telephone Co.*, 23 T.L.R. 226, C.A. and cases cited).

To show that A. had authorised certain disparaging statements about B. to be made in a public newspaper on a particular date, the fact that A. had, in a letter to B.'s friends, told them that "something would appear in that issue."—Held no evidence against A. that he was responsible for the statements (*McCarthy* v. *Kennedy*, Times, Mar. 4, 1905, *per* Darling, J.).

A. sues B. for trover of A.'s goods. The facts that C. came with a cart having B.'s name on it and took away the goods saying B., his master, had ordered them, is no evidence against B. of C.'s authority (*Everest* v. *Wood*, 1 C. & P. 75; *post*, 225). So, ownership of a carriage (*Powell* v. *McGlynn*, *post*, 236), motor-car (*Dowling* v. *Robinson*, *opposite*), or traction-engine bearing the owner's name (*Smith* v. *Bailey*, 1891, 2 Q.B. 403), is not evidence that the driver is the owner's servant.

A. sues B. for breach of trust committed twenty years before. To show that A. knew of this at the time, B. tenders a letter by C., a deceased solicitor, purporting

Admissible.	*Inadmissible.*
in connection therewith, stating that the writer had seen A. on some of the matters, which bills were afterwards paid by B. and allowed by A. in accounts between him and B.,—held admissible against A. (*Bright* v. *Legerton*, 2 De G. F. & J. 606; *post*, 96. *Cp. Shrewsbury* v. *Blount*, 2 M. & G. 475, cited *post*, 154-5).	to be written on A.'s behalf to D., discussing A.'s claim. Proof was given of C.'s handwriting, that he was then in practice, and that the letter was produced from D.'s custody. Held inadmissible against A. (*Bright* v. *Legerton*, *opposite*). A. is indicted for falsely pretending to have lost luggage on a railway. It was proved that A.'s solicitor had written the letter making the claim "in consequence of an interview he had with A." The letter is not admissible against A. *Aliter* if the letter had been written "in pursuance of instructions received from A."; or if the proceedings had been civil (*R.* v. *Downer*, 14 Cox, 486). So, a letter written by the solicitor on merely general instructions from A. was rejected (*R.* v. *Joyce*, 119 C. C.C. S. ss. Pap., p. 296; see admissions by solicitors, *post*, 249-50). And, the fact that the prosecutor's agent had offered a bribe to a witness is not evidence for the prisoner, such an act not being within the scope of the agent's authority (*Queen's Case*, 2 B. & B. at 306-309; *aliter* where the prisoner's connivance is proved, *Moriarty* v. *L.C. & D. Ry.*, *post*, 134).

(*c*) *Partnership.*

A. and B. enter into a partnership as traders. A., in order to pay a partnership debt, accepts a bill in the name of the firm, and in the ordinary course of business. B. is liable (Lindley, Partnership, 7th ed., 154; *cp. Re Cunningham*, *infra*). A. and B. are partners as grain merchants. It being within the ordinary course of business for the firm, by legitimate means, to obtain information as to contracts and tenders made by competing firms with brewers, A., by illegitimately bribing a competitor's clerk, obtains such information. B. is liable (*Hamlyn* v. *Houston*, 1903, 1 K.B. 81, C.A.).	A. and B. enter into partnership as solicitors. A., unknown to B. but in order to pay a partnership debt, accepts a bill in the name of the firm. B. is not liable on the bill, as such an act is not within the usual course of a solicitor's business (*Hedley* v. *Bainbridge*, 3 Q.B. 316; *Garland* v. *Jacomb*, L.R. 8 Ex. 216). As to the acceptance of bills by partners who are auctioneers, see *Wheatley* v. *Smithers*, 1907, 2 K.B. 684, C.A.

(*d*) *Corporations. Companies.*

The directors of a company, having power to borrow money with the consent of an extraordinary general meeting of the shareholders, borrow money on debentures without calling a general meeting. The company is bound, for the act, though irregular, is *intra vires* (*Agar* v. *Athenæum Life Assurance Society*, 3 C.B.N.S. 725). A., the general manager of a railway company, orders medical attendance for a porter injured in the company's service. The company is liable, as the act is within A.'s implied authority (*Walker* v. *G.W. Ry.*, L.R. 2 Ex. 228); *aliter* as to a station-master (*Cox* v. *Midland Counties Ry. Co.*, 3 Ex. 268).	The objects of a company being "to contract to supply materials for making railways," a contract by the directors to *construct* a railway is *ultra vires*, and does not bind the company (*Ashbury Railway Carriage Co.* v. *Riche*, L.R. 7 H.L. 653). A., the manager abroad of a London company dealing in tinned provisions, contracts with B. to obtain tongues for tinning. B. having refused to supply the tongues unless guaranteed by C., C. guarantees B., upon receiving from A., as indemnity, a promissory note signed by A. on behalf of the company.—The company is not liable on the note, the matter not being one ordinarily necessary for the conduct of the business (*Re Cunningham*, 36 Ch. D. 532).

Admissible.	*Inadmissible.*
A., as agent of an insurance company, induces B. to insure his life by falsely promising to get him a loan on the security of his policy. The company knows of the promise and receives the premium. The company is liable to return the money so obtained (*Blake* v. *Albion Life Assurance Society*, 4 C.P.D. 94). So, where A. induced B., an ignorant man, unable to write, and who had only one eye, falsely to state that he had no physical infirmity, A.'s knowledge was held to render the company liable under an accident policy (*Bowdon* v. *London, &c., Ins. Co.*, 1892, 2 Q.B. 534; *Hough* v. *Guardian Co.*, 18 T.L.R. 273; *cp. British Co.*, v. *Cunliffe, id.* 502). See, also, *Ayrey* v. *British &c. Co.*, 1918, 1 K.B. 136, where the knowledge of its district manager was held to bind an insurance company. And, generally, fraud, but not innocent misrepresentation, by the agent will avoid the policy [*Refuge Co.* v. *Kettlewell*, 1909, A.C. 243; *Harse* v. *Pearl Co.*, 1904, 1 K.B. 558; *Phillips* v. *Royal Co.*, 105 L.T. 136. For cases where the company's agent has been held agent for the insurer, see *Biggar* v. *Rock Co.*, 1904, 1 K.B. 558; *Connor* v. *L. & P. Co.*, 47 Ir. L.T. Rep. 148].	A., the secretary of a company, induces B., unknown to the directors, to take shares in the company by falsely promising him the post of solicitor; the company is not liable, as this is outside the scope of A.'s duties (*Newlands* v. *National Assocn*, 54 L.J.Q.B. 428). So, as to a false statement that the company had in hand certain moneys charged to B. (*Barnett* v. *S. Lond. Tram. Co.* 18 Q.B.D. 815); or that certificates of shares had been lodged with the transfer, for he has no authority unless they are lodged (*Whitechurch* v. *Cavanagh*, 1902, A.C. 117). [*Cp. Estoppel, post*, chap. xlviii.]
A., the driver of an omnibus, has printed orders not to race. In violation of these and to prevent a rival bus from passing him, he does race, thereby upsetting the latter. The bus owners are liable, the act being done in their supposed interest (*Limpus* v. *Lond. Gen. Om. Co.*, 1 H. & C. 526). So, where a driver improperly left a vehicle in charge of a boy, who caused the accident, for the driver's negligence was the effective cause thereof [*Englehardt* v. *Farrant*, 75 L.T. 617; and *cp. Abraham* v. *Bulock*, 86 L.T. 796; *Reichardt* v. *Shard*, 31 T.L.R. 24 C.A.].	A., a bus driver, having a private quarrel with a tram conductor strikes at the latter while he is on the bus steps, thereby injuring a passenger. The bus owners are not liable, as the act is not done for their benefit. *Aliter*, if the blow had been struck in order to dislodge the conductor and free the bus (*Ward* v. *Lond. G. O. Co.*, 42 L.J.P.C. 265). Nor is the company liable if the driver, contrary to the printed rules, permits a passenger to stand on the front platform who thereby sustains injury (*Byrne* v. *Londonderry Tram. Co.*, 35 Ir. L.T.R. 205; *aliter* if it had been the common practice for passeugers to neglect the printed rules, *Freel* v. *Bury Tram Co.*, *post*, 111); nor if an accident occurs when, at the end of one journey and to prepare for the next, the *conductor* is driving instead of the driver, for that is not within the former's duties (*Beard* v. *Lond. G. O. Co.*, 1900, 2 Q.B. 530). So, where the chauffeur of a hired car, against orders, allowed the hirer to drive (*Coogan* v. *Dublin Co.*, 49 Ir. L.T.R. 24. See also *Sanderson* v. *Collins*, 1904, 1 K.B. 628, and *Cheshire* v. *Bailey*, 1905, 1 K.B. 237).
The directors of a gas company are criminally charged at common law with causing a nuisance by polluting a river with gas-refuse. The nuisance arose through the negligence of the superintendent and engineer, who had, unknown to the directors, exceeded their instructions. The directors are liable (*R.* v. *Medley*, 6 C. & P. 292; and see for a similar case *R.* v. *Stephens*, L.R. 1 Q.B. 702, in which it was held that the rule was the same as in civil cases).	

(*e*) *Conspiracy.*

A. and B. are indicted in Middlesex for a conspiracy to destroy property. After proof of acts done in Middlesex by both the conspirators acts done by either of them in Surrey in execution of the conspiracy are admissible against each other (see *R.* v. *Gordon*, 21 How. St. Tr. 535;	A. and B. are indicted in England for a conspiracy to commit a felony. The only evidence of the conspiracy consists of acts done by A. in Scotland, and letters written by him to B. in England inciting B. to commit the crime, but which letters B. did not answer or assent to. The acts

Admissible.

R. v. *Bowes*, cited 4 East. p. 171; *R.* v. *Quinn*, 33 Ir. L.T.R. 154).

A. and B. conspire to assault C. with their fists. In the struggle C. is killed by a blow from B. A. and B. are each criminally responsible for C.'s death [*R.* v. *Caton*, 12 Cox, 624; *R.* v. *Rubens*, 2 Cr. App. R. 163; and *cp. R.* v. *Jackson*, 7 Cox, 357].

A. and B. (poachers) are charged with shooting C. (a game-keeper) with intent to murder. No evidence that they agreed to act with this common purpose, or by whom the shot was fired, was tendered; but evidence of the nature of their enterprise and of conduct and gestures showing they both intended at all costs to prevent arrest by C., was given. Held admissible and sufficient (*R.* v. *Pridmore*, 29 T.L.R. 330).

A. a cardmaker, and his wife and servants are charged with conspiring to ruin B., another cardmaker. Evidence that the defendants separately bribed A.'s apprentices to adulterate A.'s card paste is admissible against each, though no communication between them is proved; the fact that they all belonged to the same family and trade being evidence of the conspiracy (*R.* v. *Cope* 1 Str. 144). So, the fact that they pursued the same object by the same means is evidence of combination (*R.* v. *Murphy*, *infra* 101; or that the acts could not, in the ordinary course of the defendants' business, have been done without their mutual co-operation (*R.* v. *Tibbitts*, 1902, 1 K.B. 77, 90).

A. joins a conspiracy on a certain day; evidence of a meeting of his co-defendants on previous days and of directions then given by some of them to others as to where they were to go and for what purpose, is admissible against A. (*R.* v. *Frost*, 9 C. & P. 129; *i.e.* to show the character of the conspiracy, though not A.'s participation therein, *R.* v. *Dwyer*, 24 Ir. L.T.R. 111). So, evidence having been given that, in pursuance of a conspiracy, armed men were to assemble on a certain night in different parts of London, the fact that a number of armed men did so assemble is admissible without otherwise connecting them with the conspiracy [*R.* v. *Cuffey*, 7 St. Tr. N.S. 467; *cp. R.* v. *Dwyer*, *sup.*, and *R.* v. *Hunt*, *ante*, 71].

A. (a bankrupt) and B. (his brother-in-law and manager) are jointly indicted, —A. for fraudulently transferring his business to B. in August, and B. for aiding and abetting A.; (1) representations made in the previous May to a creditor by A. that "he could sell the business for £1000," whereby he induced the creditor to supply goods which were never paid for are evidence against B.; and (2) the fact that B. was A.'s relative and manager is evidence that B. knew that the goods, which he

Inadmissible.

and letters are not admissible against either A. or B. [*R.* v. *Boulton*, 12 Cox, 87. As to acts of Treason committed without the realm, see *R.* v. *Casement*, 115 L.T. 277.]

A. and B. conspire to assault C. with their fists. In the struggle B. catches up a deadly weapon and kills C.—A. is not responsible for B.'s act, as it was not done in furtherance of the common design (*R.* v. *Caton*, *opposite*).

A. and B. being charged in one count of an indictment with conspiring to incite the *public* to commit a certain crime, and in another count with conspiring to incite *each other* to commit the same crime:—acts of incitement done by A. and B., *inter se*, are inadmissible on the former count, and acts done by them in public inadmissible on the latter (*R.* v. *Boulton*, 12 Cox, 87).

A. and B. are charged with conspiring to obtain employment from D. by a false character. Proof is given that A. advertised for a situation and D. answered it by a post-card. Also that some hours later B. presented himself to D. showing the post-card to the latter. Held, in the absence of evidence that A. and B. had ever met or communicated, the mere fact that A. had received the post-card and that it was afterwards found in the possession of B., was no evidence of concert (*R.* v. *Connolly*, 3 Cr. App. R. 27. A.'s defence was that he had innocently passed it to C., who had, innocently, passed it to B., who had used it criminally).

On a charge against five persons of conspiring together to defraud certain trades people, it was proposed to prove that three of them acted fraudulently in relation to tradesman A. and two others, acting independently, also acted fraudulently in relation to A., counsel for the prosecution asking would not this show that the whole five were acting in concert? The judge remarked, "In some cases it would, and in some it wouldn't. But if three people with fraudulent intent try to defraud various persons, and two other people defraud the same persons, that alone would be no proof that they all five were acting together" (*R.* v. *Warren*, 147 C.C.C. Sess. Pap. p. 1023, *per* Bosanquet, C.S.).

The officials of a Miners' Association are charged with conspiring amongst themselves, and also with the plaintiff's workmen, to induce the latter to break their contracts. Evidence having been given that on a certain morning only two workmen signed on to begin work, the majority refusing,—declarations by these two when signing on were tendered as acts and statements in pursuance of the conspiracy. Held inadmissible (1) only acts, and not statements, by the men being receivable;

Admissible.	*Inadmissible.*
took over with the business in August, were not paid for (*R.* v. *Chapple*, 17 Cox, 453; *cp. ante*, 89).	and (2) the statements not being made by, or to, any of the defendants (*Denaby Collieries* v. *Yorkshire Miners' Assocn.*, Times, Jany. 30, 1904. *Sed qu.* as to both points; and with regard to the first, one of the issues was whether those who signed on were willing, or intended, to return to work when signing).
A. and B., employees at the Custom House, are charged with conspiring to pass goods through the Custom House without paying full duty.—False entries made in the books for the purpose of carrying out the fraud by A. are admissible against B. [*R.* v. *Blake*, 6 Q.B. 126. As to what acts, &c., are admissible as parts of the transaction in a seditious conspiracy, see *R.* v. *Hunt*, *ante*, 71].	A. and B., employees at the Custom House, are charged with conspiring to pass goods through the Custom House without paying full duty.—An entry made by A. on the counterfoil of his own cheque-book showing how he had shared the proceeds of the transaction with B. is not admissible against the latter, not being in furtherance of the common plot (*R.* v. *Blake*, *opposite*). So, where A. B. & C. were charged with conspiring to defraud the Ministry of Munitions and bribe its officials, A.'s books showing payments by him to B. & C. were held inadmissible against them (*R.* v. *Pollock*, 4th Oct. 1920, *per* Swift, J., *ex rel.* See Daily Telegraph, Oct. 5th, 1920).
A. (an army officer) is charged with B. & C., agents for D., a contractor, with conspiring to take bribes to obtain contracts for D. Evidence having been given that A. had, at dates corresponding with the contracts, received cheques drawn on B.'s bank, the funds for which were supplied by D.;—a letter written by B. to C. as follows: "A. writes me to send him his six-months cheque privately as before. This I have done, £150. He adds—'I suppose the contract will require renewal. Let me hear. I have not yet met C., but hope soon to do so'";—Held admissible against A. (*R.* v. *Whitaker*, 10 Cr. App. R, 245, 247, 251).	
A. and B. are charged with conspiracy to defraud C. by a deed which falsely represented that A. owned certain property. B.'s defence is that he honestly believed the representation, but was duped by A. Letters between A. and B. (not communicated to C.) *prior* to the execution of the deed, in which A. made similar representations to B., held admissible, under the peculiar circumstances, *for* B., and as part of the correspondence had been put in *against* him (*R.* v. *Whitehead*, 1 Dowl. & Ry. 367-8, cited, *post*, chap. x., Examples).	A. and B. are charged with conspiracy to defraud C. by falsely pretending that A. owned certain property. B.'s defence is that he honestly believed the representation, but was duped by A. Letters between A. and B. written *subsequently* to the transaction and regarding it, held inadmissible *for* B. (*R.* v. *Whitehead*, *opposite*).
A. and others are charged with conspiring to defraud by means of a mock-auction. Defence that they were merely acting as the servants of B., the proprietress. The fact that B. was living with A. as his mistress, is relevant to rebut A.'s defence [*R.* v. *Kurasch*, 1915, 2 K.B. 749; this fact was held admissible on A.'s cross-examination, notwithstanding the Cr. Ev. Act, 1898, s. 1 (*f*); *post*, 454].	
A. and B. are charged with conspiring to annoy C., a broker, who had distrained for church rates;—evidence that A., in the presence of B., excited several persons at a public meeting to go riotously to C.'s house, and that such persons did so go, is admissible against A. and B., though neither of them went to C.'s house (*R.* v. *Murphy*, 8 C. & P. 297, 311).	*In R.* v. *Murphy* (*opposite*), evidence of what one of the persons who was at the meeting said, when he himself was being distrained on for church rates, is not admissible against A. or B.

Admissible.

A. and B. are indicted for conspiracy. A letter written by A. to B., but never received by B., in which A. described the proceedings which had already been taken as an encouragement to B. to proceed in the concern, is admissible against B. as an act done in furtherance of the common plot (*R.* v. *Hardy*, 24 How. St. Tr. 473-477).

A. and B. are charged with conspiracy to murder an infant of which B. was then pregnant;—A. writes an incriminating letter at 4 p.m. the day before the birth, which letter is *intercepted* and never reaches B. The child was born at 1 a.m. the next day, before the letter would in the ordinary course reach B. Held, in the absence of anything to counteract the letter, the jury might find that A.'s act continued until the letter was delivered at B.'s house; and (1) that if it had reached B., A. might have been convicted of inciting B. to commit murder; but that (2) as it did not reach B., either A. or B. might be convicted of the attempt (*R.* v. *Banks*, 12 Cox, 393).

So, where A. wrote letters to B. inciting him to murder C., which letters were intercepted and never reached B.;—A. was held guilty of the attempt, though not of the incitement (*R.* v. *Krause*, 18 T.L.R. 238; *R.* v. *Fox*, 19 W.R. 109; *R.* v. *Ransford*, 13 Cox, 9; and *cp. R.* v. *Cooper*, 1 Q.B.D. 19, cited, *post*, 181).

A. is charged with the murder of B., resulting from an abortion which A. and B. conspired to procure on July 22;—evidence by a doctor that B. called on him in June and asked for a remedy for her condition, is admissible against A. as an act in furtherance of the common purpose (*R.* v. *Wark*, 33 L.Jo. 615).

A. is charged with the murder of B. in pursuance of a conspiracy for both to take poison. A confession by A. that they so conspired is admissible to prove the agreement; and acts and declarations by B. when buying the poison to carry out the plan are also admissible against A. (*R.* v. *Jessop*, 16 Cox, 204; *ante*. 80).

Inadmissible.

A. and B. are indicted for conspiracy. A letter written by A. to C. (not a member of the conspiracy), describing the proceedings already taken, and enclosing songs composed by A. and sung thereat, is not admissible against B., not being a transaction in support of the conspiracy (*R.* v. *Hardy*, 24 How. St. Tr. 451-453).—A conversation held by D. and E., two other members of the conspiracy, on their return from a meeting of the conspirators, and about an hour after the meeting, held also inadmissible against A. and B. (*R.* v. *O'Connell*, 1 Cox, 403). So, a conversation held by A. with a witness who was not a conspirator, in which A. expressed himself as opposed to co-operating in the conspiracy, is not admissible *in A.'s favour* (*R.* v. *O'Donnell*, 7 St. Tr. N.S. 650-652; *aliter* as to a similar conversation held with a fellow conspirator, *id.*; and see *R.* v. *Whitehead*, *sup.*).

In *R.* v. *Wark* (*opposite*) the doctor was not allowed to state any narrative related to him by B., except such as was strictly necessary to explain the request. So, a diary kept by B., incriminating A., and a letter intended for, but not sent to, him, both written *after* the abortion, were rejected as not in furtherance of the common purpose (*cp. R.* v. *Gloster*, &c., *ante*, 84).

CHAPTER VIII.

FACTS RELEVANT TO PROVE THE MAIN FACT.

FACTS LOGICALLY RELEVANT. (*a*) Facts which, as a matter of ordinary logic of experience, tend to render the existence of the main fact probable or improbable, *e.g.* those which are only or chiefly consistent with its existence, and in rebuttal those which are inconsistent, or show it to have been impossible, —are relevant and in general admissible. Such facts may themselves be proved either by direct testimony or by circumstantial evidence (*i.e.* by other relevant facts).

On the other hand, facts which, though not wholly irrelevant, tend merely to create *prejudice, confusion of issues,* or *waste of time,* may, and generally will, be rejected [*ante,* 49-50. As to facts which are irrelevant in the sense of being excluded by the pleadings, or substantive law, see *ante,* 27].

Relevant Statements. Statements tendered under the last two, the present, and the next two chapters are, it is to be observed, receivable purely as *original* evidence, and not to prove the *truth* of any of the facts they assert (*ante,* 5-6; *post,* 218). And even as original evidence they are not necessarily and in all cases admissible. It is, indeed, sometimes said that statements which are used circumstantially and not testimonially are just as admissible as other relevant facts (*ante,* 60-1; Chamberlayne Ev. Vol. IV., Introd. p. ix; so, in Wills, Ev. 2nd ed., 92, "as soon as a statement is shown to be a relevant fact it is at once admissible as such.") This, however, is by no means the case. The fear of misuse by the jury has always caused the admission of statements of every kind to be jealously guarded, so that even where logically relevant they are often excluded, *quite irrespective of the hearsay rule.* Thus declarations not complying with the rules as to (1) *Res gesta* (*ante,* 58-9), (2) Ancient possession (*post,* 112-3), (3) Complaints (*post,* 113-5), (4) Corroboration of witnesses (*post,* 485-94), or (5) Refreshment of memory (469), respectively, will be rejected, though logically relevant, and though not offered to prove the truth of their contents. So, also, with declarations (6) contradicting entries made in the course of duty (*Stapylton* v. *Clough, post,* 288, 293), or (7) impeaching an attesting witness's signature (*Stobart* v. *Dryden, post,* 277); and for miscellaneous cases, illustrating the same point, see *R.* v. *Shippey, post,* 139; *Shrewsbury* v. *Blount,* and *R.* v. *Whitehead, post,* 155. Even where a statement is used merely as original evidence, therefore, it is generally subject to some further test than that of mere logical relevancy, before it will become admissible.

The following are some of the specific classes of facts which may be tendered as relevant to prove or disprove the main fact:—

PREVIOUS AND SUBSEQUENT EXISTENCE OF FACTS. Continuance. (*b*) States of mind, persons, or things, at a given time may in some cases be

proved by showing their previous or subsequent existence in the same state, there being a probability that certain conditions and relationships continue. The *presumption of continuance,* which is one of *fact* and not of *law,* will however weaken with remoteness of time, and only prevails till the contrary is shown, or a different presumption arises from the nature of the case. Moreover, the continuance of *unlawful* conditions will not generally be presumed. (*Price* v. *Worwood,* 4 H. & N. 512, 514). [Tay., ss. 196-205; Best, ss. 405-410; Russ. Cr., 7th ed., 2061-2; Whart., Civ. Ev. ss. 1284-1296.]

Previous Existence, The presumption from previous existence has been held to apply to *human life* [*R.* v. *Harborne,* 2 A. & E. 540; *Lapsley* v. *Grierson,* 1 H.L.C. 498; *Re Phene's Trusts,* 5 Ch. App. 139; *Re Perton,* 53 L.T. 707, 710; *R.* v. *Lumley,* L.R. 1 C.C. 196; in which cases it was held that, though there was no presumption of *law* as to the continuance of life, an inference of *fact* might legitimately be drawn that a person alive and in health at a certain time was alive a short time after; while in *R.* v. *Willshire,* 6 Q.B.D. 366, and *R.* v. *Jones,* 15 Cox 284, this doctrine was further extended, proof that A. was alive in a certain year being held evidence that A. was alive respectively eleven and seventeen years later. In *Re Perton, sup.,* Chitty, J., remarked that the presumption of the continuance of life in ordinary cases does not apply in criminal ones, where the question is one for the jury on the facts (*ante,* 26). As to the counter presumption of death from not being heard of for seven years, see *post,* chap. xlviii.]; *marriage* (*R.* v. *Jones,* and *R.* v. *Willshire, sup.;* but *cp. R.* v. *Curgenwen,* 10 Cox 152); *sanity* (*Dyce Sombre* v. *Troup,* Deane Ecc. R. 38; *Sutton* v. *Sadler,* 26 L.J.C.P. 284); *insanity* (*Smith* v. *Tebbitt,* L.R. 1 P. & D. 398; *Banks* v. *Goodfellow,* L.R. 5 Q.B. 549, 570); *religious opinions* (*Att.-Gen.* v. *Bradlaugh,* 1 C. & E. at 467-469); *partnership* (*Brown* v. *Wren,* 1895, 1 Q.B. 390); *agency* (see *Smout* v. *Ilbery,* 10 M. & W. 1); *seisin* (Best, s. 405); *tenancy* (see *Pickett* v. *Packman,* 4 Ch. App. 190); *possession of land* (*Magdalen Hosp.* v. *Knotts, per* Fry, J., cited *post,* 120); *domicil* (see Dicey on Domicil); the *holding of a public office* (*R.* v. *Budd,* 5 Esp. 230; *Steward* v. *Dunn,* 12 M. & W. 655; *aliter* if the office be an annual one); the *settlement of a pauper* (*R.* v. *Tanner,* 1 Esp. 304); the existence of a *debt* (*Jackson* v. *Irvin,* 2 Camp. 50; *cp. post,* 118), *or of a custom* (*Scales* v. *Key,* 11 A. & E. 819); the *stamping of documents* (*post,* 532); or the *driving of motor-cars* (*Beresford* v. *St. Albans,* 22 T.L.R. 1, cited *post,* 121). So it may apply to the existence of a party's *knowledge* or *intention* where his previous knowledge or intention is shown (*ante,* 65, *post,* 148). As to the continuance of *parental influence,* see *Lond. & W. Loan Co.* v. *Bilton,* 27 T.L.R. 184; and of an *adulterous connection, Turton* v. *T., post,* 121.

Subsequent Existence. The above probability may also operate retrospectively. Thus, the fact that an adult person was alive at a given date would be conclusive that he was alive at a prior date. So, proof of official character at a certain time is evidence of official character within a reasonable time before (*Doe* v. *Young,* 8 Q.B. 63; *cp. R.* v. *Cork, JJ.,* 1914, 2 I.R. 249, 256-7). The fact that a ship has, shortly after sailing, and without visible cause, become unseaworthy, is evidence that she was unseaworthy at the time of sailing (*Pickup* v. *Thames Ins. Co.,* 3 Q.B.D. 594; *Ajum* v. *Union Ins Co.* [1901] A. C. 362). And where a title to certain payments accrued in 1833, proof that they had been made from 1866 to 1877 was held evidence that they had

also been made from 1833 to 1866 (*Sanders* v. *S.*, 19 Ch. D. 373; *cp post*, 117; and see *Bristow* v. *Cormican*, 3 App. Cas. 641, 669-70, where acts of ownership from 1837 to 1872 were held evidence of similar acts from 1661 to 1837). So, a letter received unsealed was inferred to have been so posted (*R.* v. *Burdett*, 4 B. & Ald. 95, 124); and insufficient distress on premises at a certain date has been held some evidence of such insufficiency at a prior date (*Doe* v. *Fuchau*, 15 East., 286). As to subsequent knowledge and intention being evidence of prior knowledge and intention, see *ante*, 65, and *post*, 148.

COURSE OF BUSINESS. (*c*) To prove that an act has been done, it is admissible to prove any *general* course of business or office, whether public or private, according to which it would ordinarily have been done; there being a probability that the general course will be followed in the particular case. [Tay., ss. 179-183; Best, s. 403; Ros. N.P. 43; Steph., art. 13; as to course of business to interpret documents, see *post*, chap. xlvi.]

Public Offices. Post Office. This probability is especially strong in the case of public offices, *e.g.* the Post Office, and has in several instances received statutory recognition. Thus:

> Where an Act passed after the commencement of this Act authorizes or requires any document to be served by post whether the expression 'serve' or the expression 'give' or 'send,' or any other expression be used, then, unless the contrary intention appears, the service shall be deemed to be effected by properly addressing, prepaying and posting a letter containing the documents, and, unless the contrary is proved, to have been effected at the time at which the letter would have been delivered in the ordinary course of post [Interpretation Act, 1889, s. 26; R.S.C. 1883, O. 67, R. 3; *cp. Watts* v. *Vickers*, 86 L.J.K.B. 177 C.A.: as to proof of posting and delivery, see *post*, 122]. Under the Valuation (Metr.) Act, 1869, ss. 9, 65, the due postage of notices is conclusive evidence of their receipt, though not in fact received (*R.* v. *Westminster &c. Committee*, 1917, 1 K.B. 832).

Moreover, when it is within the contemplation of the parties that the post may be used, but not otherwise, a contract is complete when the acceptance is *posted* (*Dunlop* v. *Higins*, 1 H.L.C. 381; *Henthorn* v. *Fraser*, 1892, 2 Ch. 27, C.A.; *Bruner* v. *Moore*, 1904, 1 Ch. 305; *Wilkins* v. *McGinity*, 1907, 2 I.R. 660), and the same rule has been applied to a letter constituting a breach of contract (*Holland* v. *Bennett*, 1902, K.B. 867), or an assignment of property (*Alexander* v. *Steinhardt*, 1903, 2 K.B. 208; but see 20 Law Q. Rev. 8), though not to one countermanding payment of a cheque (*Curtice* v. *London, &c., Bank*, 1908, 1 K.B. 293). As to how far records kept at the Post Office, &c., are admissible as public documents, see *post*, 348.

Private Offices. Evidence of the general practice in private offices or employments (*Lucas* v. *Novosilieski*, 1 Esp. 296; *Evans* v. *Birch*, 3 Camp. 10; *post*, 122), as distinguished from the personal habit of individuals (*post*, 158), may also be given for the same purpose.

CUSTOM AND USAGE. (*d*) Usage is admissible to *annex unexpressed incidents* (provided they are *not inconsistent* with those which are expressed) to oral or written contracts, grants, or wills; it being presumed that the parties have not intended to express the whole of their meaning in words, but tacitly to adopt the usages of the particular market or place (*Hutton* v. *Warren*, 1 M. & W. 466; *Dashwood* v. *Magniac*, 1891, 3 Ch. 306, C.A.; *Produce Brokers Co.* v. *Olympia Co.*, 1916, A.C. 314. [Tay., ss. 1168-1192; Ros. N.P. 21-27; *Wigglesworth* v. *Dallison*, 1 *Smith* L.C., 10th ed., 528. Unexpressed incidents

implied or annexed by the general law, or law merchant, will be judicially noticed without proof (*ante,* 20); but may in some cases be overridden by usage, &c. (*post,* chap. xlv.). As to usage to contradict written contracts, see further, *post,* chap. xlv., and to explain them, chap. xlvi., Rule v.]

The above rule is not confined to mercantile transactions, but applies to all others in which established usages prevail (*Hutton* v. *Warren, sup.*). Independent matters, however, not in any way incidental to a contract, cannot be annexed by usage (*Phillips* v. *Briard,* 1 H. & N. 21; *Allen* v. *Sundius,* 1 H. & C. 123; *Trueman* v. *Loder,* 11 A. & E. 589).

Knowledge of Usage, when material. Formerly, evidence of usage was admitted only on the ground that both parties were cognizant of, and so presumed to have contracted with reference to, it [*Kirchner* v. *Venus* (1859), 12 Moo. P.C. 361]. But the modern rule is more elastic and under it a party who deals, either personally or by agent, in a particular market is held bound by its reasonable usages even though he was ignorant of them [*Bayliffe* v. *Butterworth,* 1 Ex. 425; *Robinson* v. *Mollett,* 7 H.L. 802, 836; *Forget* v. *Baxter,* 1900, A.C. 467, 479; 1 Sm.L.C. 12th ed., 633-6; Aske, on Custom and Usages of Trade (1909), 188-199]. A mere practice, however (*Womersly* v. *Dally,* 26 L.J. Ex. 219; *Sweeting* v. *Pearce,* 9 C.B.N.S. 534; *post,* 124), or a usage that is unreasonable or illegal (*Harker* v. *Edwards,* 57 L.J.Q.B. 147; *Blackburn* v. *Mason,* 68 L. T. 510; *Perry* v. *Barnet,* 15 Q.B.D. 388), only binds those who know and assent to it; and in such cases the knowledge of an agent will not be imputed to the principal (*id.*).

Proof of Usage. A business usage, as distinguished from a common law custom, need not be long established, or strictly uniform; it is sufficient if it be reasonably certain, and so notorious and generally acquiesced in that it may be presumed to have formed an ingredient of the contract (*Ghose* v. *Manickchund,* 7 Moo. Ind. App. 263, 282; *Plaice* v. *Allcock,* 4 F. & F. 1074; *Devonald* v. *Rosser,* 1906, 2 K.B. 728, 741-3). So, an agricultural custom need not have existed from time immemorial, though it must for a reasonable length of time (*Tucker* v. *Linger,* 8 App. Cas. 508; *Dashwood* v. *Magniac, sup.*). Such usages may be proved either (1) by the direct evidence of witnesses (which must be positive and not amount to mere opinion, *Lewis* v. *Marshall,* 7 M. & G. p. 744; *Tucker* v. *Linger,* 21 Ch. D. pp. 34, 38), in which case particular instances of its occurrence or non-occurrence will be admissible in corroboration or rebuttal (*id.; Bourne* v. *Gatliff,* 11 C. & F. 45); or (2) by a series of particular instances in which it has been acted upon (Steph., art. 6; *Johnstone* v. *Spencer, ante,* 67; *Tucker* v. *Linger, sup.,* where Jessel, M.R., remarked that an agricultural custom must be proved not by what the tenants thinks it is, but by what was publicly done throughout the district; indeed, a single instance has been held sufficient to prove a manorial custom, *Re Chenoweth,* 1902, 2 Ch. 488, 496). Numerous instances, however, adopted for individual convenience, but protested against, are not sufficient to prove a custom at a shipping port (*Strathlorne Co.* v. *Baird,* 1916, S. C. 134, H.L. (Sc.)); or (3) by proof of similar customs in the same or analogous trades in other localities (*post,* 161, 169); or (4) when ancient, by, *e.g.* the declarations of deceased persons of competent knowledge, or other forms of reputation (*post,* chap. xxv.). When, however, usages have been frequently, or at all events more than once, proved in the superior courts,

which may be shown by reported cases, they will be judicially noticed without evidence (*ante,* 21).

The party against whom the evidence is tendered may, in reply, show that the usage does not exist; or has not been acted on in particular instances; or was a mere practice; or was unreasonable (*Olympia Co.* v. *Produce Co.,* 1917, 1 K. B. 320, C.A.); or illegal; or that he was ignorant of it (though see *supra*); or that it was inconsistent with the terms of the contract (merely that it varies the apparent contract, *Brown* v. *Byrne,* 3 E. & B. 703, or regulates the mode of its performance without changing its intrinsic character, *Robinson* v. *Mollett,* L.R. 7 H.L. 802, 836, is not sufficient); or was expressly excluded by the parties, either in the written contract itself (*Brenda Co.* v. *Green,* 16 T.L.R. 226, C.A.), or by extrinsic oral agreement (*post,* chap. xlv.); or was impliedly excluded by their course of dealing (*Bourne* v. *Gatliff,* 11 C. & F. pp. 70-71); or was superseded by a later usage (*Moult* v. *Halliday,* 1898, 1 Q.B. 125; *Ropner* v. *Stoate,* 92 L.T. 328, 332, where Channell, J., remarked that "contracting out may become so general as to destroy the custom. When once the custom becomes the exception and not the rule there is no longer a custom").

Admissibility for other purposes, Evidence of usage is receivable not only as above (1) to annex incidents to contracts and wills (*cp. post,* 579); but (2) to explain the meaning of peculiar or technical terms (*post,* 629, 661); (3) to furnish standards of comparisons on questions of negligence, &c. (*infra*); (4) to fix a party with knowledge or notice of the subject-matter of the usage (*post,* 146); or (5) to rebut a criminal intent (*R.* v. *Spencer,* 20 Cox 692, cited *post,* 155, 174; *R.* v. *O'Connell, post,* 184; *R.* v. *Jakeman,* 10 Cr. App. R. 38, 43).

STANDARDS OF COMPARISON. (*e*) **Negligence, Intent, &c.** On questions involving negligence, reasonableness, and other qualities of conduct, when the criterion to be adopted is not clear, the acts or precautions proper to be taken under the circumstances, and even the general practice of the community, or in some cases of the particular individuals, are admissible as affording a measure by which the conduct in question may be gauged. Such evidence does not, of course, bind the jury as a fixed legal standard; it is merely one, amongst other circumstances, by which they may be guided. To do an act in a customary manner does not, then, necessarily render it justifiable, nor will abstention from a voluntary custom render a party liable for negligence, unless he has expressly or impliedly invited the injured person to rely on such custom (*Loader* v. *London Docks Co,* 65 L.T. 674; *Smith* v. *S. E. Ry.,* 1896, 1 Q.B. 178; *Pwllbach Co.* v. *Woodman,* 15 A.C. 634).

Previous Accidents, Subsequent Precautions, &c. In this connection, previous accidents, though admissible to show that a particular act or place was dangerous (*post,* 163, 171), are not, as will be seen, evidence of the defendant's negligence (*post,* 163, 171); and, conversely, long immunity from accident does not necessarily prove absence of carelessness (*Thomas* v. *G. W. Ry.* 10 T.L.R. 244, C.A., *per Lindley* L.J.), though such immunity, whatever its weight, is usually allowed to be proved in his favour (*Longmore* v. *G. W. Ry.,* 19 C.B.N.S. 183; *Crafter* v. *Metr. Ry.,* L.R. 1 C.P. 300; *Thomas* v. *G.W. Collieries,* 10, 244; *Hart* v. *L. & Y. Ry., post,* 126; *Handley* v. *Wolverhampton Co.,* 1903, Times, Jan. 16, *post,* 126). As to similar conditions at other times or places, see

post, 155-6; as to the admissibility of, and conformity to, rules and notices, see *post,* 108; and as to subsequent precautions as evidence of previous negligence, *Hart* v. *L. & Y. Ry., post,* 134 [Ball, L.C., on Torts, 224-227; Wigmore, T.L.R. Ev., s. 461]

Intent. As to custom as furnishing a standard by which to test intent, good faith, &c., see *R.* v. *Spencer, &c., sup,;* and *cp. Sheen* v. *Bumpstead, post,* 155, and *R.* v. *O'Connell, post,* 184.

Handwriting. When a party's handwriting is in question, whether in civil or criminal proceedings—"Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the Court and jury as evidence of the genuineness or otherwise of the writing in dispute" (28 & 29 Vict. c. 18, s. 8, extending 17 & 18 Vict. c. 125, s. 27, which is now repealed by the St. Law Rev. Act, 1892). [Tay., ss. 1869-79; Best, ss. 238-48; Ros. N.P. 241-3; Steph., art. 52. As to proof of handwriting generally, by experts, non-experts, &c., see *post,* 388, 397, 399, 402, 515.]. *History.* In civil cases, comparison of the seals of deeds, and afterwards of handwriting as well, was permitted as early as the thirteenth century; but in criminal cases, this mode of proof was not sanctioned until the end of the eighteenth. Later on and down to the statute of 1854, the practice was uniformly disallowed, except as regards ancient documents, or those already in evidence in the case. [Thayer, Cas. Ev., 2nd ed., 710 *n;* Wigmore, Ev., ss. 1991-4; 2 Poll. & Mait., Hist. Eng. Law, 222.]

Scope of Rule. Under the above Act, both the disputed and the genuine writings must be produced in Court, and the former, if lost, cannot be compared, either from memory or from a photographic copy, with the latter (*Arbon* v. *Fussell,* 3 F. & F. 152; *McCullough* v. *Munn,* 1908, 2 I.R. 194, C.A. cited, *post,* 125; *cp. Lucas* v. *Williams, ante,* 47) and the latter must also be duly proved therein (*Wilson* v. *Thornbury,* 17 Eq. 517; *Hughes* v. *Dinorbin,* 32 L.T.O.S. 271). The comparison may include the general character of the writing; the forms, or relative number of diversified forms, of the letters; the use of capitals, abbreviations, stops and paragraphs; the mode of affecting erasures, interlineations, and corrections; the orthography of words, grammatical construction of sentences, and style of composition; the use of peculiar expressions, and the fact of one or more of the documents being written in a feigned hand (Tay., s. 1872). The documents used for comparison need not be relevant nor admissible for *any other purpose* (*Birch* v. *Ridgway,* 1 F. & F. 270; *Cresswell* v. *Jackson,* 2 F. & F. 24; *Brookes* v. *Tichborne,* 5 Ex. 929, where to prove the authorship of an anonymous letter, documents not connected with the case were produced to show that the same peculiarities of spelling existed as in the disputed writing); nor have been written *ante litem motam.* And the comparison may be made either by witnesses acquainted with the writing, or by experts, or, without the help of either, by the jury (Tay., s. 1870; *Cobbett* v. *Kilminster,* 4 F. & F. 490; *R.* v. *Smith,* 3 Cr. App. R. 87; though in *R.* v. *Harvey,* cited *ante,* 8, Blackburn, J., in the absence of expert testimony to assist the jury, rejected the evidence; and see *R.* v. *Rickard,* 13 Cr. App. R. 140). It has been doubted whether *fictitious specimens* may, on cross-examination, be submitted to a witness in order to impeach his testimony; but Mr. Taylor's opinion sanctions this

course (8th ed., s. 1873), and it has been frequently employed in practice (see, *e.g.* Reminiscences of Lord Brampton, vol ii., pp. 16-17). *The party whose writing is in dispute* may also be required to write, for the purpose of comparison, in the judge's presence, and such writing will then itself be admissible (*Doe* v. *Wilson,* 10 Moo. P.C. 502, 530; *Cobbett* v. *Kilminster, sup.*); as also will specimens voluntarily written by the accused before trial, when detained by the police for enquiries, although not cautioned (*R.* v. *Voisin,* 13 Cr. App. R. 89), or written since the trial and tendered on appeal (*R.* v. *Smith,* 3 Cr. App. R. 87).

Ancient Documents. Though the genuineness of documents more than thirty years old is usually presumed (*post,* chap. xlii.), yet where the handwriting must be proved in order to establish identity, this may be done by comparison with other ancient writings shown to have come from *proper custody* and to have been uniformly *treated as genuine* (Ros. N. P. 142; Tay., s. 1874).

Food and Drugs. The Pharmacopoeia is admissible as a standard for the composition of drugs (*post,* 380); but it is not conclusive and does not exclude evidence of a commercial, but inferior, standard (*Boots* v. *Cowling,* 30 Cox 420). As to commercial standards in cases of food, *e.g.* lardine, see *Rudd* v. *Skelton Soc.,* 75 J.P. Rep. 326; 75 J.P. Jo. 362.

Market Value. As to standards of value in the case of property, see *post,* 163.

ACTING IN A CAPACITY, OR UNDER DOCUMENTS. (*f*) Acting in a *public or official,* but not generally, in a *private,* capacity or relationship is *primâ facie* evidence of title thereto, even in favour of the party so acting, or even between strangers. [Tay., ss. 171-175; Best, ss. 353-365; Ros. N. P. 43-44; Whart., Civ. Ev., ss. 1297-1309.]

Principle. The admission of such evidence rests partly on the principle that, the law presumes in favour of the regularity of acts and against misconduct and bad faith (*post,* chap. xlvii.); and partly on the consideration that the invalidity of an act or appointment is more liable to detection when of a public, than when of a private, nature (Best, ss. 353, 358). So, as applied to property, acts of ownership are receivable not as admissions, but as showing possession, and thus proving title (*Jones* v. *Williams,* 2 M. & W. 326, 327, *per* Parke, B.).

Public Capacity. Thus, the incorporation of a *public company* may be proved in its own favour by trading as such (*R.* v. *Langton,* 2 Q.B.D. 296; *cp. R.* v. *Boaler,* 67 L.T. 354), or issuing invoices and receipts in the company's name (*R* v. *Webb,* 37 Sol. Jo. 215, *per* Cave, J.); and the appointment of directors and managers by their acting as such (*R.* v. *Lawson,* 1905, 1 K.B. 541). So, user is evidence, even against strangers, of a license to use a *public building, e.g.* a church (*R.* v. *Cresswell,* 1 Q.B.D. 466; *cp.* 7 & 8 Vict. c. 45 s. 2), or theatre (*Rodwell* v. *Redge,* 1 C. & P. 320); though where notice of a license is required to be exhibited, the absence of such notice is evidence of the absence of a license (*Gregory* v. *Tuffs,* 6 C. & P. 271); and under the Lunacy Act, 1890, s. 329, non-production of the license of a building raises a presumption of its non-license. Similarly, where local authorities have made a rate under an Act, compliance with the statutory formalities will be presumed (*R.* v. *Reynolds,* 5 R. 423).

Acting in a public office is evidence for or against the party, or between third persons, of due appointment thereto, although the appointment is required to be by deed (*Doe* v *Brawn,* 5 B. & Ald. 243), or is directly in issue (*Dexter* v. *Hayes,* 11 Ir. C.L.R. 106), or the acting took place but once and the proceedings are criminal (*R.* v. *Roberts,* 14 Cox 101; *cp. R.* v. *Lawson, sup.*). The following official appointments have been held so provable:— Lords of the Treasury (*R.* v. *Jones,* 2 Camp. 131); Masters in Chancery (*Marshall* v. *Lamb,* 5 Q.B. 115); Deputy County Court Judges (*R.* v. *Roberts, sup.*); Commissioners for Oaths (*R.* v. *Newton,* 1 C. & K. 469, 480; *R.* v. *Howard,* 1 Moo. & Rob. 187); Surrogates (*R.* v. *Verelst,* 3 Camp, 432); Sheriffs (*Bunbury* v. *Matthews,* 1 C. & K. 380); Under-Sheriffs (*Doe* v. *Brawn, sup.; Robinson* v. *Collingwood,* 17 C.B.N.S. 777); Justices, Constables, and Watchmen (*Berryman* v. *Wise,* 4 T.R. 366; even where the latter are appointed under local Acts, *Butler* v. *Ford,* 1 C. & M. 662); Replevin clerks (*Faulkner* v. *Johnson,* 11 M. &. W. 581); Post Office officials (*R.* v. *Rees,* 6 C. & P. 606); Churchwardens and Overseers (*Doe* v. *Barnes,* 8 Q.B. 1037); Vestry-clerks (*M'Gahey* v. *Alston,* 2 M. & W. 206); Trustees under a Turnpike Act (*Pritchard* v. *Walker,* 3 C. & P. 212), or under a local Act to raise rates for building a church (*R.* v. *Murphy,* 8 C. & P. 310); bank-directors (*R.* v. *Boaler,* 67 L.T. 354); weigh-masters of market-towns (*McMahon* v. *Lennard,* 6 H.L.C. 970; *Dexter* v. *Hayes, sup*); and attested soldiers in the recruiting service (*Wolton* v. *Gavin,* 16 Q.B. 48). The same rule also applies to the due qualification of a solicitor (*Berryman* v. *Wise, sup.*; *Pearce* v. *Whale,* 5 B. & B. 38, though not to the relationship of solicitor and client, *inf.*); surgeon (*Gremaire* v. *Le Clerk,* 2 Camp. 144; *Cope* v. *Rowlands,* 2 M. & W. 160, though in an action for fees, registration must be proved, 21 & 22 Vict. c. 90, s. 32); or incumbent (*Bevan* v. *Williams,* 3 T.R. 635 *n; Berryman* v. *Wise, sup.; Pearce* v. *Whale, sup.,* though mere acting as such has been held not sufficient to admit declarations in the course of duty by a deceased rector, *Miller* v. *Wheatley,* 27 L.R.I. 144; *post,* 290-91); and the rule has also been extended by statute to officers of excise (53 & 54 Vict. c. 21, s. 24), and customs (39 & 40 Vict. c. 36, s. 261). Where a witness stated that he was an Inspector under the Food and Drugs Act, 1875, this was held sufficient proof without production of the sealed appointment (*Ross* v. *Helm,* 1913, 3 K.B. 462).

Private Capacity. Generally, however, private relationships cannot, except as against the parties acting, be so established, *e.g.* those of executor or administrator (Best, s. 357; Ros. N.P. 119); solicitor and client (*Bright* v. *Legerton,* 2 De G. F. & J. 606); tithe-owner and tithe-collector (*Short* v. *Lee,* 2 Jac. & W. 464, 468); or bankrupt and assignee (*Pasmore* v. *Bousfield,* 1 *Stark,* 296); though it is otherwise in the case of master and apprentice, landlord and tenant, and co-partners (*R.* v. *Fordingbridge, post,* 128); and cohabitation is some evidence of a valid marriage, its weight varying with circumstances (*Doe* v. *Fleming,* 4 Bing. 266; *Hamblin* v. *Shelton,* 3 F. & F. 133; *R.* v. *Wilson,* 3 F. & F. 122; and see presumptions, *post,* chap. xlviii.) As against the parties themselves, however, acting in a capacity is, in civil cases, generally, and even in criminal cases sometimes (*R.* v. *Beacall,* 1 C. & P. pp. 312, 457; *R.* v. *Simons,* 117 C.C.C. Sess. Pap. pp. 562-3; *contra, R.* v. *Taylor,* 10 Cox 544) sufficient proof; though, where the appointment is by written contract (*R.* v. *Clapton,* 3 Cox 126; *R.* v. *Dodson,* 62

J.P. 729), and not mere resolution (*R.* v. *Stacy,* 96 L.T. Jo. 214), and its *terms* are material, parol evidence will be inadmissible if the document itself can be produced (*cp. ante,* 89-90, *post,* 128, 570).

Acting under Documents. The existence, execution, and (as secondary evidence) contents of *lost documents* may sometimes be proved by the parties to them having acted thereunder. Thus, long possession of land is evidence of the existence of a lost grant (Ros. N. P. 39-41). And the same principle has been applied to a lost indenture of apprenticeship (*R.* v. *Fordingbridge, post,* 128), and assignment of a patent (*Dennison* v. *Ashdown, id.*). But where the acts, or course of dealing, of the parties are equally consistent with an affirmative or negative view, they will be inadmissible (*Smith* v. *S., post,* 128). So, the course of dealing between the parties may be proved to *supplement a written contract,* if incomplete, though not if complete [*Pontifex* v. *Hartley,* 62 L.J.Q.B. 196; *post,* 590], as also to affect the *construction of documents* (*post,* chap. xlvi., Rule v.); though not generally to *vary or contradict the written terms* [*Ford* v. *Yates,* 2 M. & G. 549; see as to this case, *post,* 591].

ACTS AND DOCUMENTS SHOWING OWNERSHIP. (*g*) Title to real and personal property may be inferred from *acts of ownership* done by the party *for* or *against* whom they are tendered, *e.g.* possession, receipt of rents and profits, or the discharge of the burdens (*e.g.* Taxes, *Kirby* v. *Cowderoy,* 1912, A.C. 599) and repairs of the property. Planting or felling timber is also evidence of a right to the soil (*Doe* v. *Arkwright,* 5 C. & P. 575; *St. Leonards* v. *Ashburner,* 21 L.T. 595). And a perambulation by the lord is evidence of the limits of the manor, even against persons ignorant of it; declarations at the time of the perambulation being also admissible as parts of the *res gesta* (*Woolway* v. *Rowe,* 1 A. & E. 114; *ante,* 71; *post,* 296). Similarly, user of an easement is evidence of title thereto, the character of the user determining the extent of the easement (*Cowling* v. *Higginson,* 4 M. & W. 245; *Gingell* v. *Stepney Council,* 1906, K.B. 468); though as to undefined user, see *Robinson* v. *Cowpen Board, etc. post,* 115. So, the existence of a right is generally *primâ facie* evidence of its concomitant rights and liabilities, *e.g.* a right to a several fishery is evidence of ownership of the bed of the river, and *vice versâ* (*A.-G.* v. *Emerson,* 1891, A.C. 649; *Beaufort* v. *Aird,* 20 T.L.R. 602; *Carlisle* v. *Graham,* L.R. 4 Ex. 361, 368). Acts of ownership are also receivable to determine the extent of an ambiguous grant (*A.-G.* v. *Vandeleur, post,* chap. xlvi., rule v.). For specific acts and documents admissible to show ownership of *Land, Commons, Ways, Fences, Fisheries, Tolls, Minerals, Bridges, Highways, Manors, and Advowsons,* see Examples, *post,* 129-33. As to Assessments to land-tax as evidence of seisin, see *post,* 361; as to acts of ownership done to places *other* than the *locus in quo,* but connected therewith, *post,* 167-8; and *cp.* Declarations by deceased persons as to public rights, *post,* chap. xxv., and against proprietary interest, *post,* chap. xxiii.; and as to evidence to rebut presumptions of ownership, see *post,* chap. xlviii. [Tay., ss. 123-142; Best, ss. 366-399; Ros. N. P., 18th ed., 34, 38-41, 748, 914, 1024; Steph. art. 5; Williams and Yeats on Ejectment, 227-52.]

Principle. Acts of ownership are receivable not as admissions, but as original evidence, for or against either party (*sup.* 109). And in rebuttal, proof is admissible of their non-existence; or that they were disputed, or done in

the absence of persons interested in disputing them; or, in some cases, of acts of ownership done by strangers not claiming through the alleged owner.

Scope of Rule. Actual possession, or receipt of rent from one who has such, is *primâ facie* evidence, even against strangers, of the highest title to the property in question, *i.e.* of seisin in fee of lands (*Jayne* v. *Price*, 5 Taunt. 326; *Daintry* v. *Brocklehurst*, 3 Ex. 207), or the absolute ownership of chattels; and undisturbed possession as tenants is presumptive evidence of due payment of rent (*R.* v. *Exeter*, L.R. 4 Q.B. 341, 345). But it must be remembered that when possession or dispossession has to be inferred from equivocal acts, the intention is all-important, and where they are equally consistent with some different object, the *animus possidendi* will not be inferred (*Littledale* v. *Liverpool Coll.* 16 T.L.R. 44; *Leigh* v. *Jack*, 5 Ex. D. 264; *Philpot* v. *Bath*, 1905, Times, June 30). When possession is proved, however, the presumption of title therefrom increases with length of time and absence of interruption, and in many cases becomes absolute after fixed periods, *e.g.* under the Prescription Act, 1832, and the Real Property Limitation Act, 1874.

ANCIENT DOCUMENTS AS EVIDENCE OF ANCIENT POSSESSION, (*h*) Ancient documents (*i.e.* over 30 years old, see *post*, 523-4) produced from proper custody and by which any right of property purports to have been exercised, are admissible, even in favour of the grantor or his successors, in proof of ancient possession [Tay., ss. 658—67; Ros. N.P., 18th ed. 53-4; Steph., art. 5].

Principle. Such documents are sometimes thought to be admissible by exception to the hearsay rule (Tay., s. 658); but this is incorrect. They are received not as proving the *truth* of the facts stated, but merely as presumptive evidence of possession. Thus, a demise by copy of ancient Court Roll is an assertion of a right of ownership, and enjoyment under it is evidence of ownership (*A.-G.* v. *Emerson*, 1891, A.C. p. 658, *per* Ld. Herschell).

The grounds of admission for this purpose are two-fold—*necessity*, ancient possession being incapable of direct proof by witnesses; and the fact that such documents are themselves *acts of ownership*, real transactions between man and man, only intelligible upon the footing of title, or at least of a *bonâ fide* belief in title, since in the ordinary course of things men do not execute such documents without acting upon them (*Malcolmson* v. *O'Dea*, 10 H.L.C. 593; *Bristow* v. *Cormican*, 3 App. Cas. 641, 668; *Blandy-Jenkins* v. *Dunraven*, 1899, 2 Ch. 121; *Johnson* v. *O'Neill*, 1911, A.C. 552, 569).

Qualifications. (1) The documents should purport to *constitute* the transactions which they effect; mere *prior directions* to do the acts, or *subsequent narratives* of them, being inadmissible (*id*). Thus, though expired leases, licenses, and grants may be tendered, even against strangers, to show ancient possession of the property demised, or reserved from the demise, *recitals* therein of other documents or facts will be rejected, except as admissions (*Bristow* v. *Cormican sup.*, at p. 662). Counterparts of leases are similarly admissible, although executed only by lessees not shown to have held under them, and though no excuse be given for the non-production of the original leases executed by the ancestor (*id.*; *Doe* v. *Pulman*, 3 Q.B. 662; *Magdalen Hosp.* v. *Knotts*, 8 Ch. D. 709; Tay., s. 427). So, accepted, though not unaccepted, proposals for leases (*Powell* v. *Heffernan*, 8 L.R.I. 130, 143), and claims and assertions of right made and submitted to, with the documents

establishing these, are receivable under the present head (*Malcolmson* v. *O'Dea*, 10 H.L.C. 593, 611-13; *Miller* v. *Wheatley*, 28 L.R.I. 144, 163-4; *Blandy-Jenkins* v. *Dunraven*, *sup.*; *post*, 299). Judgments, convictions and awards *inter alios* have also been admitted, even on questions of *private* right, as acts of ownership, to explain ancient grants (*Brew* v. *Haren*, I.R. 9 C.L. 29; 11 C.L. 198; *post*, chap. xlvi); such documents, however, are usually tendered as being in the nature of *reputation* and so as admissible only on questions of *public* interest (*post*, 298, 306; *Neill* v. *Devonshire*, 8 App. Cas. 135), though in the latter case, Ld. Selborne considered them as coming "within the category of *res gestæ*, and of declarations accompanying acts, as least as much as leases between private parties." (2) Deeds of this nature must, to ensure genuineness, be, like other ancient documents, produced from *proper custody* (*post* 524-5); and should, to be of any weight, be *corroborated* by proof, within living memory, of payments made, or enjoyment had, in pursuance of them. The absence of evidence of modern enjoyment, however, goes merely to weight and not to admissibility; indeed in one case the paper title of the owner though only slightly corroborated, was held to prevail over open, adverse or long continued user by the public (*Johnson* v. *O'Neill*, 1911, A.C. 552). (3) Ancient documents, admissible as *acts of ownership*, may be tendered on questions either of public or private right; and must be distinguished from ancient documents receivable as evidence of *reputation*, which latter may consist of bare assertions, or recitals, of the right, but are confined to questions of public and general interest (*sup.*; *Malcolmson* v. *O'Dea*, 10 H.L.C. 593, 624; *post*, 299).

Modern Possessions, being susceptible of proof by witnesses, cannot be established by modern grants and leases, &c., though supported by evidence of payments thereunder (*Bristow* v. *Cormican*, 3 App. Cas. p. 568; *Clarkson* v. *Woodhouse*, 3 Doug. 189). After proof *aliunde* of possession, however, such documents become evidence of the interests conferred thereby (*Doe* v. *Penfold*, 8 C. & P. 536; *Doe* v. *Oliver*, 1 C. & K. 543; *Taylor* v. *Parry*, 1 M. & Gr. 604).

GOOD OR BAD FAITH OF PARTY'S CLAIM OR DEFENCE. (*i*) Evidence of the *bonâ fides* of a party's claim or defence is sometimes admissible in support of his own case (*Gerish* v. *Chartier*, *R.* v. *Labouchere*, and *Walker* v. *W.*, *post*, 118-119), and evidence of its *mala fides* is admissible against him to impeach it (*Melhuish* v. *Collier*, 15 Q.B. 878; *Moriarty* v. *L.C. & D. Ry.*, L.R. 5 Q.B. 314; *post*, 119), although such good or bad faith is not directly in issue. For facts relevant to prove good or bad faith, when these are in issue, or relevant, see further, *post*, 149, 154; and *cp.* Admissions by Conduct, and Treatment, *post*, 116-7, 175, 181-2.

COMPLAINTS. In cases of rape, indecent assault, and similar offences upon females, the fact that the prosecutrix made a complaint shortly after the outrage, of the matters charged against the prisoner, together with the *particulars* of the complaint, are admissible as evidence in chief for the prosecution, not to prove the *truth* of the matters stated, but (1) to confirm her testimony and, (2) where consent is in issue, to disprove consent (*R.* v. *Osborne*, 1905, 1 K.B. 551; *R.* v. *Lillyman*, 1896, 2 Q.B. 167). It is the

duty of the judge to explain to the jury the limited purposes for which such evidence is receivable (*id.*); though if this has otherwise been made clear to them, the absence of such a caution will not invalidate a conviction (*R.* v. *Lee*, 7 Cr. App. R. 31).

History. The rule as to complaints is a survival of the ancient requirement that the woman should raise "hue and cry" as a preliminary to an appeal of rape, the appellee being allowed, in defence, to deny that it had been raised. Afterwards, on appeals becoming obsolete, rape was dealt with on indictment, the woman being an admissible witness, and her testimony being corroborated or not according as she made, or failed to make, fresh complaint and pursuit of the offender. This, in effect, was the hue and cry over again. At this period, when rules of evidence were in their infancy, it was generally allowable to corroborate *all* witnesses by proof of their prior similar statements (*Lutterell* v. *Reynell*, 1670,1 Mod., 282, 283); but later on the rule was reversed (*R.* v. *Parker*, 1783, 3 Doug, 242), and complaints then survived as an exception to the changed rule (*post*, 488). [*R.* v. *Osborne, sup.; Com.* v. *Cleary*, 172 Mass, 175; 12 Harv. L. Rev. 453; Thayer, 14 Am. L. Rev. 830-38.] Proof of the complaint, however, was allowed, not as a privilege, but as practically essential to the case for the prosecution in so far as it rested on the woman's testimony, on account of the ease with which such charges could be fabricated and the difficulty with which they could be met. Its admission was thus peculiar to cases of rape and kindred offences against women, as to which there were also other peculiarities, *e.g.* that of allowing proof of the unchaste character of the prosecutrix, as well as of her immoral relations both with the prisoner and other men (Thayer, 14 Am. L. Rev. 830-38).

Scope of Rule. It has been held that such evidence is admissible only in cases of rape and kindred offences against females (*R.* v. *Osborne*, 1905, 1 K. B. 551, 558-91; *Beatty* v. *Cullingworth*, Times, Jan, 14, 1897, C.A., cited *ante*, 66; *Jones* v. *S. E. Ry.*; 87 L.J.K.B. 775, C.A., cited *ante*, 84, *per* Swinfen-Eady, L.J. (the dictum of Bankes, L.J., that they are also admissible on all charges of violence, civil or criminal, is not sustainable; Thayer, *sup.*; *Haynes* v. *Com.*, 28 Gratt, 942; Whart. Cr. Ev. s. 273), and not, *e.g.* in sexual charges against males (*R.* v. *Hoodless*, 64 J.P. 282, *contra Chesney* v. *Newsholme*, 1908 P. 301, followed in *R.* v. *McNamara*, 1917, N.Z. L.R. 382, C. A.; in *R.* v. *Christie*, 1914, A.C. 545, 550, this point was raised, but not argued); nor in civil cases, though consent be in issue, as in an action for performing a surgical operation without the consent of a female patient (*Beatty* v. *Cullingworth, sup*). These cases overrule *R.* v. *Wink* and *R.* v. *Ridsdale*, cited Ros. Cr. Ev., 13th ed., 24, which allowed complaints in cases of robbery and shooting; also the opinion of Mr. Taylor, who considered them admissible in all crimes of violence (pamphlet on the *Bedingfield Case*, p. 16); also *R.* v. *Folley*, 60 J.P. 569, and Steph., art. 8, which extend them to *all* criminal cases without exception; and also, it is presumed, divorce cases like *Berry* v. *B.*, 78 L.T. 688, where the fact (though not the particulars) of a wife's complaint of her husband's cruelty was admitted; *cp. O'H.* v. *O'H.*, 33 T.L.R. 51, where Shearman, J., in a Nullity suit, stated that there was no rule of the Common law which would admit such questions, but allowed the bare enquiry: "Did you speak to Dr. ——, with regard to your wife's objections to intercourse?" In the Ecclesiastical Courts the wife's complaint, if made *recenti*

facto, used to be received as direct evidence of the husband's ill-usage, as otherwise, the parties being incompetent as witnesses, secret cruelty could not have been proved; if not so made, the complaint was received merely as confirmatory of the other evidence (*Lockwood* v. *L.,* 2 Curt. 281; *cp. Chesney* v. *Newsholme, sup.*).

Complaints are admissible although the girl is so young that disproof of her consent is unnecessary [*R.* v. *Osborne, sup.* (where the girl was under 13); *R.* v. *Merry,* 19 Cox 442 (where she was under 9); *R.* v. *Kiddle, id.,* p. 77 (where she was under 6 and her testimony was unsworn); *contra, R.* v. *Kingham.* 66 J.P. 393, and *R.* v. *Rowland,* 62 J.P.459, are not now law]. And they are receivable although made in the absence of the prisoner and at such an interval as not to form part of the *res gesta* (*R.* v. *Osborne, sup.; R.* v. *Lillyman, sup.*). They must, however, have been made on the first opportunity which reasonably afforded (*R.* v. *Osborne, sup,* at p. 561; *R.* v. *Lillyman, sup,* at p. 171); thus complaints made by letter three days later (*R.* v. *Ingrey,* 64 J.P. 106), or on the following day (*R.* v. *Rush,* 60 *id.* 777), or even several hours afterwards by letter, (44 Sol. Jo. 603, *per* Wright, J.; *contra, R.* v. *Merry,* and *R.* v. *Kiddle, sup.*), have been rejected; though it is obvious that no precise rule can be laid down, the matter depending on the circumstances of each particular case. Where the girl had complained forthwith to the prisoner's mother (who was not called), and an hour and a half afterwards repeated the complaint to another woman (who was called), and the girl stated on cross-examination that both complaints were to the same effect, they were admitted (*R.* v. *Lee,* 7 Cr. App. R. 31). On the other hand a complaint made the same afternoon to a companion as to similar acts done by the prisoner to her 3 weeks before, was rejected (*R* v. *Pataney,* 71 J.P. Rep. 101). In *R.* v. *Hedges,* 3 Cr. App. R. 262, a complaint made 8 days after the act was admitted, though there was earlier opportunity; *sed qu.* Moreover, the complaint must be *voluntary* and spontaneous, and not elicited by leading, inducing or intimidating questions. Thus, if the circumstances indicate that, but for the questioning, there probably would have been no voluntary complaint, the answers are inadmissible; while if the questions merely anticipate a statement which the complainant was about to make, the fact that the questioner spoke first is immaterial. "Did A. assault you? Did he say this and that to you?" would be improper; but "What is the matter? Why are you crying?" would not be (*R.* v. *Osborne,* pp. 556, 561, explaining *R.* v. *Merry, sup.*). But where the girl was crying and at first refused to speak, but on being pressed, did so, the complaint was received (*R.* v. *Norcott,* 1917, 1 K.B. 347, explaining *R.* v. *Osborne, sup.*); so where it was invited by complainant's sister and repeated to their mother (*R.* v. *Wilbourne,* 12 Cr. App. R. 279). A complaint, however, too deliberately made will be rejected (44 Sol. Jo. 603, *per* Wright, J.); as also what was said in answer to a complaint (*R.* v. *Lillyman, sup,* at p. 176). Complaints, with their particulars, may of course, be admissible independently of the present rule; *e.g.* if so nearly contemporaneous as to be part of the *res gestæ* (see *Manchester Brewery* v. *Coombs* and *Gresham Hotel* v. *Manning, ante,* 75); or as evidence of present mental or physical feelings, though not of their cause (*ante,* 83-4); or to show knowledge of the matters complained of (*Gladman* v. *Johnson, &c., ante,* 95); or as admissions, *e.g.,* if made in the presence of the accused and not denied by him (*post,* chap. xx.).

How Proved. The complaint should be proved by calling both the prosecutrix herself and the person to whom it was made (1 Hale P.C. 633; *R.* v. *Stroner,* 1 C. & K. 650). Indeed, where the prosecutrix was alive but not called, Parke, B., rejected both the fact and the particulars of the complaint (*R.* v. *Gutteridge,* 9 C. & P. 471). So, where the girl, being imbecile, was not called, her mother's testimony to her complaint was rejected (*R.* v. *Burke,* 47 Ir. L.T. Rep. 111). In two other cases, however, where the woman was dead, the Court allowed the fact, though not the particulars, to be proved (*R.* v. *Nicholas,* 2 C. & K. 246; *R.* v. *Megson,* 9 C. & P. 420, where Rolfe, B., remarked that there was a wide difference between receiving them merely as confirmatory of her testimony in the box, and receiving them as independent evidence to show who had committed the offence; adding that all that could safely be admitted was her complaint that an outrage had been perpetrated upon her). Where the prosecutrix could not be found, but the prisoner testified to her consent, the jury, disbelieving him, convicted (*R.* v. *Noble,* 60 J.P. 169; see further as to consent, *ante,* 46).

ADMISSIONS BY CONDUCT. (*j*) A party's admission by conduct as to any material fact, *e.g.* showing his disbelief in the truth of his own case, may generally be proved *against* him (*Moriarty* v. *L. C. & D. Ry.,* L.R. 5 Q.B. 314; *R.* v. *Watt,* 20 Cox 812); and evidence to explain or rebut such admissions is receivable in his favour (*Melhuish* v. *Collier,* 15 Q.B. 878).

Principle. Admissions by conduct are sometimes considered to be exceptions to the hearsay rule, *i.e.* equivalent to oral statements, and so inadmissible except as against a party (see *Wright* v. *Tatham, infra*). This ground, however, is unsatisfactory, since assertions or admissions by conduct are by no means convertible, as regards admissibility, with those made orally (*post,* chap. xvii). Admissions by conduct are properly original evidence receivable either as constituting, wholly or in part, a fact in issue, as where A. makes an offer to B. and B. assents to it by his conduct: or as relevant facts from which a fact in issue may be inferred, *e.g.* guilt from the fabrication or suppression of evidence by the accused. Generally, indeed, it is this logical connection which is chiefly important, the personal privity merely supplying an additional, though not always an essential, reason for reception (Wigmore, Ev. ss. 265, 267, 459). The admissions by conduct of deceased persons, against their interest, have been held receivable even against strangers (*Gery* v. *Redman,* 1 Q.B.D. 161, cited *post,* 134). As to the admissions by conduct of third persons not deceased, see *Watts* v. *Lyons, post,* 134. [Tay., ss. 804-16; Ros. N.P., 18th ed., 64-7. As to admissions by conduct to show commission of crime, see *post,* chap. ix; or made with respect to statements in a party's presence, *post,* chap. xx.]

TREATMENT. (*k*) It is sometimes said that acts of treatment by either parties or strangers, expressive merely of their opinion or belief as to the existence or non-existence of facts, are not receivable against a party except when operating as admissions by conduct [*Wright* v. *Tatham,* 7 A. & E. 313; *Backhouse* v. *Jones,* 6 Bing. N.C. 65; *post,* 135, 382.]

Principle. In the first of the above cases, at pp. 388-9, Parke, B, remarked, "A fact which is relevant only as implying a statement or opinion of a third person on the matter in issue, is inadmissible in all cases where such statement

or opinion, not on oath, would of itself be inadmissible"; Vaughan, J., in the same case, also considered treatment to be merely opinion expressed in conduct instead of words, and so, even though against interest, inadmissible against third parties as suffering from the general insufficiency and infirmity of hearsay (5 C. & F. pp. 738-9). This ground of exclusion, viz., that conduct and treatment are inadmissible as hearsay, is unsatisfactory and has not generally been followed (see 'Conduct as hearsay,' *post,* 219-20). The reception of such evidence, which is *per se* logically relevant, appears to be rather a question of degree and intrinsic cogency. Assuming, however, that there may be said to be a general rule against it, such rule is at all events subject to numerous exceptions.

Exceptions. Thus, facts of the above class are sometimes admissible not only against, but even in a party's own favour, *e.g.* to show title (*ante,* 110), or good faith (*Gerish* v. *Chartier, post,* 133); and sometimes also in actions between strangers, Thus, on questions of *Pedigree,* family conduct is admissible to prove relationship (*post,* 312); and, even in non-genealogical enquiries, falling outside the Pedigree exception to the hearsay rule, the treatment of friends and neighbours may be received as presumptive proof of *Marriage, post,* 384. So, treatment by strangers is in some cases receivable: *e.g.* recognition by the Sovereign, to prove the *legitimacy* of a peer (Hubb. 698); conveyance of property by strangers to a person only entitled to it if legitimate (*Slaney* v. *Wade,* 7 Sim, 595); or conduct and declarations by parents, though non-parties, on issues of *paternity or dependency* (*ante,* 77-8). Treatment is also evidence of *Age* (*R.* v. *Cox,* 1898, 1 Q.B. 179), or of the *Identity* of persons or property (*post,* 611, 620, 641). And, where title, even to a private office or relationship, is in question, proof that the party was treated by others as entitled thereto may be given, even in actions between strangers (*R.* v. *Fordingbridge,* 27 L.J.M.C. 290, cited, *post,* 128); so, in some cases, as to title to land (*ante,* 111). And to prove the genuineness of *Ancient Documents,* the fact that they have always been preserved and treated as genuine by the parties interested is admissible (*post,* 523-5). Moreover, where the opinions of witnesses are receivable, instances in which they have *acted upon their opinions* may always be proved in confirmation of their testimony (*post,* 397).

EXAMPLES.

(*a*) *Facts logically Relevant: General Instances.*

Admissible.	*Inadmissible.*
To Prove Payment. To prove that A. had paid a bill of exchange accepted by him and subsequently negotiated;—the fact that A. was in *possession* of the bill after maturity is relevant (*Bremridge* v. *Osborne.* 1 Stark. 374; *aliter* if no proof of its circulation after acceptance be given, *Pfiel* v. *Vanbatenberg,* 2 Camp. 439). So, a receipt for *later* rent (or other periodic payment) is evidence of payment of *earlier* rent, &c. [*Gilb. Ev.,* 1st and 2nd eds. 100; *Sanders* v. *S., ante* 108. Under the Conveyancing Act, 1881, s. 3, it is also evidence of due performance of covenants, *Re Highett,* 1903, 1 Ch. 237; *Re Taunton,*	*To prove Payment.* The question being whether A. had paid a debt due by him to B.;—the fact that A. was in possession of a cleared cheque for the amount of the debt made out in B.'s favour, but not indorsed by B., is no evidence of such payment [*Egg* v. *Barnett,* 3 Esp. 196; *aliter* if so indorsed]. A., an indorsee, sues B., the acceptor, of a bill of exchange;—the facts that, an unknown person had after its dishonour by B., paid the amount to a holder and taken it away, and that when produced by A. it bore a receipt for such payment,—held, no evidence of payment by B. [*Phillips* v. *Warren,* 14 M. & W. 379.

Admissible.

1912, 2 Ch. 381]. As to payment of *earlier* rent, see *R.* v. *Exeter*, *post* 120. And payment of a debt may be inferred from a subsequent settlement of account between the parties, though the debt is not mentioned therein (*Colsell* v. *Budd*, 1 Camp. 27). [See generally as to the presumption of payment, Ros. N.P., 18th ed., 36-38; Tay. s. 178; Best, s. 406].

To Prove Loans, Means &c. The question being whether A. lent money to B.;—evidence of the poverty of A. about the time of the alleged loan is admissible, as tending to disprove it (*Dowling* v. *Dowling*, 10 Ir. C.L. 236). So, the poverty of the indorsee is relevant to disprove the indorsement of a bill to him for value (*Jacobs* v. *Tarleton*, *ante*, 31; *cp. R.* v. *Grant*, *post*, 140, and *Lench* v. *L.*, 10 Ves. 508). And to prove the forgery of a mortgage deed by which money was raised, the poverty of the borrower at the time is relevant (*Roupell* v. *Haws*, *ante*, 69). So, on a charge of obtaining goods by false pretences, the accused having given a bill for the goods;—evidence of his banking account for the previous year showing a number of dishonoured cheques, is admissible both to rebut means, and show his knowledge of his position (*R.* v. *Fryer*, 7 Cr. App. R. 183). On the other hand, prior means are relevant to prove the possession of subsequent means within a reasonable time (*R.* v. *Jones*, 19 Cox. 678, cited *post*, 121.

To Prove the Utility of Patents. The question being as to the utility of a patent;—extensive public purchases are evidence of its value (*Cole* v. *Saqui*, 5 R.P.C. 489, 495); and non-user and abandonment evidence of its want of utility (*Hinks* v. *Safety Co.*, 4 Ch. D. 607, 616).

To Prove Survivorship.—The question being whether A. survived B. in a shipwreck;—it is relevant to show that, previously to the disaster, A. was stronger, in better health, and a more expert swimmer than B. [*Sillick* v. *Booth*, 11 L.J. Ch. 41; see fully as to the Presumption of Survivorship, *post*, chap. xlviii.].

To Prove Paternity, and Age. The question being whether A. is the child of B.;—evidence of the *resemblance*, or want of resemblance of A. to B. is admissible [*Bagot* v. *Bagot*, 1 L.R. Ir. 308; *Burnaby* v. *Baillie*, 42 Ch. D. 282, 290. Hubb. Ev. of Succ. 384; and see 102 L.T.Jo. 188; and the Tichborne Case. In *A.-G.* v. *Slingsby* 33 T.L.R. 120, H.L., it was held that though the judge's own opinion might undoubtedly carry weight, it was irregular to call a sculptor, as an expert, on the point, even though the parties assented; *post*, 385].

Inadmissible.

Aliter if the receipt were in the handwriting of B. or some one entitled to demand payment thereof, *Pfiel* v. *Vanbatenberg*, *opposite*].

To Prove the Surrender of a Lease. The question being whether a lessee had surrendered a lease *in writing* to a lessor; the mere possession of the lease by the latter with its seals cut off, held no evidence of such surrender (*Doe* v. *Thomas*, 9 B. & C. 288; though see as to surrender by operation of law, Tay. s. 138).

To Prove Loans, Means, &c. A. is charged with obtaining board and lodging by false pretences. To prove that A. was without means at the time, the fact that there was found in his possession a cheque for £50 on which A. had forged his mother's name, but which he had not attempted to utter, is irrelevant (*R.* v. *Morgan*, 5 Cr. App. R. 157).

To Prove the Anticipation of Patents. The question being whether an article patented by A. in 1849 had been sold by B. before that date;—public sales of the article by B. after 1849, and private sales by him before it, are irrelevant (*Hyde* v. *Palmer*, 32 L.J.Q.B. 126; *ante*, 75, 87).

To Prove Passing Off. The question being whether B. had passed off his own goods as those of A.;—the facts that A. had committed a fraud by advertising such goods as being patented, when in fact they were not so (*Lever* v. *Goodwin*, 1887, W. N. 107 C.A.); and that the manager and secretary of A. (in this case a company) were bankrupts (*National Folding Co.* v. *National, &c. Co.*, 13 R. 60), are irrelevant.

To Prove Treatment at Schools. The question being whether the pupils at a certain school were badly *fed* and *lodged*;—the fact that they were badly *educated* is irrelevant (*Boldron* v. *Widdows*, 1 C. & P. 65; *post*, 125).

Admissible.

So, *appearance* is evidence of *age* (*ante*, 8). And, in an Indian case, the joinder of the outer and inner cartileges to the shafts of the bones, as revealed by X-Ray plates, was received as evidence that the patient was over 17 years of age ['*Pioneer*,' Sept. 1915].

To Prove Ownership of a Dog. To prove that A. is the owner of a dog, the facts that it answers to A.'s call and exhibits affection for him, are admissible (*Powell* v. *Crowe*, 23 L.Jo. 33. In another case, the fact that the dog performed certain tricks at the instigation of A., was held to decide its ownership.)

To Prove a Promise to Pay Money. The question being whether A. *promised* money to B. to abstain from voting;—the fact that he *paid* money to B. is admissible as an act in furtherance of the alleged promise (*Magee* v. *Mark*, 11 Ir. C.L.R. 449. It is also admissible in *corroboration* of testimony as to the promise, *cp. post*, 487-488).

To Prove Adultery, Consummation, Rape. In divorce cases, to prove adultery evidence of opportunities therefor, and prior and subsequent familiarities, is admissible (as to prior and subsequent adultery, see *post*, 166); so, also, association with prostitutes (*Ciocci* v. *C.*, 29 L.J.P. & M. 60); or the contraction of venereal disease [*Gleen* v. *G.*, 17 T.L.R. 62, where this fact was shown by a military register; but in *Anthony* v. *A.* 35 T.L.R. 559, the medical sheets were held privileged. As to the onus and sufficiency of proof in such cases, see *Browning* v. *B.*, 1911, P. 161, and *Gliksten* v. *G.*, 33 T.L.R. 203]; and adultery, once proved, may be presumed to continue within reasonable limits (*Turton* v. *T.*, cited *post*, 121; see *post*, chap. xi). So, to disprove adultery, medical evidence that the wife or other female (*Rippingall* v. *R.*, 1876, Times, May 4; *Jolly* v. *J.*, 63 Sol. Jo. 777; *Tombs* v. *T.*, 1902, Times, July 12), is *virgo intacta* is receivable, but not conclusive.

So, non-consummation of marriage, after a reasonable length of cohabitation, is evidence of incapacity to consummate on the part of a husband or wife, even though medical inspection reveals no structural impediment (*B.* v. *B.*, 1900, W.N. 130; *F.* v. *P.*, 75 L.T. 192; *S.* v. *B.*, 21 T.L.R. 219; *W.* v. *S.* 1905, P. 231; *S.* v. *S.*, 24 T.L.R. 253). And to disprove access by a husband, the fact that he was paralysed at the time is relevant (*Legge* v. *Edmonds*, 25 L.J.Ch. 125); as also to disprove a rape, evidence that the prisoner had been afflicted with a rupture for many years which rendered sexual intercourse impossible (Hale P.C. 635-6; in this case the rupture was inspected by the jury in an adjoining room, *cp. ante*, 7-10).

Inadmissible.

To Prove a Promise of Marriage. The question being whether A. promised to marry B.;—letters by A. to B. expressing affection and admiration for her, but containing no reference to marriage, are no proof thereof, since a man may write such consistently with having no intention to marry (*Kempshall* v. *Holland*, 1895, Times, Nov. 14, C.A.; *May* v. *Kelly*, 31 Ir. L.T.Jo. 67. Nor are they any evidence in corroboration of the promise, *post*, 489).

To Prove that a Road was Public or Private. The question being whether a certain road was public or private,—a statement made by a deceased occupier of adjoining land, whilst planting a tree, that he did it "to show where the boundary had been when he was a boy,"—held inadmissible since the question being not as to the boundary, but the character of the road, the mere act of planting the tree was irrelevant [*R.* v. *Bliss*, 7 A. & E. 550; *ante* 58. As to facts relevant to prove incitement to public or private *crimes* respectively, see *R.* v. *Boulton*, *ante*, 100].

Admissible.

To Prove that a Business was genuine or the reverse. A. is charged with obtaining money by falsely pretending he was carrying on a genuine business. The fact that A. had none of the goods he professed to sell in his possession or control at the time, is relevant for the prosecution (*R.* v. *Jakeman*, 10 Cr. App. R. 38); and the production of *receipts* from customers to whom A. testified he had sold goods, and of his *Bank-book* showing payments to persons whom he testified were trade creditors is relevant for the defence [*R.* v. *Sagar* 1914, 3 K.B. 1112; *cp. R.* v. *Leach*. 2 Cr. App. R. 72; and *R.* v. *Smith*, *post*, 182. As to *particular instances* to prove a *general usage*, see *ante*, 106-7; or to prove *general character*, *post*, 186].

To Prove that a Deed was forged. To prove that a certain deed was forged;—it is admissible to prove that the titles recited in the deed as those of the then reigning Sovereign were not in fact then used by that Sovereign. [*Ivy's Case*, cited Steph. art., 9, illus. (*d*); but see Tay. s. 1785, n. 2, as to the reports of this case. As to the poverty of the party benefiting by the deed, and his forgery of other documents connected with the transaction, see *Roupell* v. *Haws*, *ante* 69]. Anachronisms in writing and spelling are also relevant; as well as proof that the watermark was subsequent to the date of the document, and in rebuttal the fact that manufacturers often ante-date or post-date their paper [Wills, Circ. Ev. 6th ed., 241; stamps, it seems, are never issued post-dated, *Howe* v. *Burchardt*, *id.* p. 242). So, to prove that a will (which was ill-written and ill-spelt) was forged;—evidence that the testator was well educated and spelt well is relevant (*Battyll* v. *Lyles*, 4 Jur. N.S. 718). And, to prove that an Indian will was forged;—evidence that the testator had made certain provisions during his lifetime for the worship of a family idol, which provisions were absent from the will, was received (*Dowlat Koer* v. *Ramphal Das*, 1897, Times, Dec. 11, P.C.; *cp. Smith* v. *S.*, *post*, 128).

Inadmissible.

To Prove that a Transaction was Genuine or the Reverse. A. is charged with obtaining money from B., in specific cases by falsely pretending he could negotiate marriages (there being no charge of pretending to carry on a genuine business);—Evidence (1) that the *general* nature of A.'s business was genuine (see Character *post*, 186), and (2) that in other *specific* cases he had negotiated marriages (see Similar Facts, *post*, 158: Held, inadmissible [*R.* v. *Mortimer*, 31 L. Jo. 180; Times, March 5, 1896; *per* Sir Ch. Hall, Recorder, who remarked that even if A. were negotiating marriages between various persons, that would be no defence if he obtained money from B. by false pretences. Any general evidence of the nature of their business was irrelevant]. As to the admissibility of *general* conduct as a standard by which to test specific conduct, see *post*, 125.

To Prove that a meeting was Seditious. The question being whether a certain meet was seditious;—the fact that the military used violence in dispersing the meeting is irrelevant as the intention and objects of the meeting must have existed previously to its dispersion (*R.* v. *Hunt*, 3 B. & Ald. 566).

(*b*) *Previous and Subsequent Existence of Facts. Continuance.*

To Prove Ownership. To prove that A. owned land in 1783, evidence that it was conveyed to him in 1763 is admissible, the presumption being that it continued to be his property (*Magdalen Hospital* v. *Knotts*, 8 Ch. D. 709).

To prove that A. paid rent as tenant of land to B. in 1830, the fact that he paid rent to B. in 1826, and had remained in undisturbed possession since, is admissible (*R.* v. *Exeter*, L.R. 4 Q.B. 341, 345. As to payment of *later* rent, see *Sanders* v. *S.*, *ante*, 105, 118).

So, a farm which had been leased in 1598 for 1000 years (with a covenant to

Admissible.	*Inadmissible.*
convey the fee to the lessee within five years if required), and assigned as leasehold in 1777, was presumed to remain leasehold in 1869, although it had three times been devised as freehold and was so described on the Court Rolls (*Pickett* v. *Packham*, 4 Ch. App. 190).	
To Prove Atheism. The question being whether A. believed in a Supreme Being when taking the oath on his election to Parliament;—evidence may be given that A. had no such belief four years before his election (*A.-G.* v. *Bradlaugh*, 1 Cab. & Ell. at 467-469; 14 Q.B.D. pp. 699, 711. Here the evidence was received against the defendant, but it would probably have been equally admissible in his own favour, *ante*, 64).	*To Prove Atheism.* The question being whether A. believed in a Supreme Being when taking the oath on his election to Parliament;—evidence that A. had, or had not, such a belief twenty or thirty years before, is inadmissible. (*A.-G.* v. *Bradlaugh*, 14 Q.B.D. pp. 699, 711.)
To Prove Acting without Qualification. A. is charged with unlawfully acting on a county council on June 27, 1913, when not of British nationality. Evidence that he was granted a certificate of re-admission to British nationality on Sept. 10, 1913, "as from that date, but not as to any previous transaction," is relevant to show that he was an alien on June 27th, though he might possibly have become an alien after June 27, but before Sept. 10 [*R.* v. *Cork*, JJ., 1914, 2 I.R. 249, 256-7. A. had originally been a British subject, but there was some evidence, though no formal proof, that he had afterwards become an American citizen].	*To Prove Acting without Qualification.* The question being whether A., on Jan. 20, unlawfully acted in a particular capacity without having taken the necessary oath; evidence that he had not taken such oath on Jan. 1 is inadmissible, the continuance of an unlawful condition not being presumed (*Price* v. *Worwood*, 4 H. & N. 512, 514, *per Pollock*, C.B.).
To Prove Adultery. A. and B. are proved to have committed adultery. The fact that they afterwards continued to live under the same roof is evidence of the continuance of the adultery (*Turton* v. *T.*, 3 Hagg. Ecc. 338; see *ante*, 119).	
To Prove Means. A. is charged with the manslaughter, by neglect, of B.'s child, in October, 1901; defence, want of means. Evidence that prior to October, 1900, B. paid her 4s. a week for the child's support, and on that date gave her a lump sum of £15 to keep the child for good and all, is admissible to show that she had means in October, 1901, since at the rate of 4s. a week the £15 would not have been exhausted until twenty-three weeks later (*R.* v. *Jones*, 19 Cox. 678; *ante*, 118).	
To Prove Partnership. To prove the existence of a partnership in 1838, evidence is admissible that it existed in 1816 (*Clark* v. *Alexander*, 8 Scott N.R. p. 161; and see *Brown* v. *Wren*, 1895, 1 Q.B. 390, cited *post*, 236).	
To Prove Acting as Driver. A. is charged with driving a motor-car at an excessive speed. The car was stopped four miles out of town, when A. was found driving it, having a chauffeur with him. Held, this was some evidence that A. had been driving the whole distance (*Beresford* v. *St. Albans*, 22 T.L.R. 1).	

(o) *Course of Business. Public Offices (Posting, &c.). Private Offices.*

Admissible.

Public Offices. To prove that a certain indorsement had been made on a (lost) license entered at the Custom House:—it is relevant to show that the course of the office was not to permit the entry without such indorsements (*Butler* v. *Allnutt*, 1 Stark. 222; *Van Omeron* v. *Dowick*, 2 Camp. 42; *Waddington* v. *Roberts*, L.R. 3 Q.B. 579).

Posting and Delivery of Letters. To prove the *posting* of a letter;—it is relevant to show that it was delivered to a clerk who, though he had no recollection of the particular letter, habitually took all letters delivered to him to the post (*Hetherington* v. *Kemp*, 4 Camp. 193; *Trotter* v. *Maclean*, 13 Ch. D. 574); or, that the letter was put in a given place, where all letters were regularly put for posting, whence they were always carried to the post by a servant [*Hetherington* v. *Kemp*, *supra*; *Skilbeck* v. *Garbett*, 7 Q.B. 846; *Percy Supper Club* v. *Whyte*, 106 L.T.Jo. 308. In the first-mentioned case it was held that the servant must be called, but in the others this was decided not to be necessary. In the last-mentioned case, Channell, J., remarked that fifty years ago such proof—*i.e.*, without calling the servant, would have been wholly insufficient.]

To prove the *delivery* of a letter on a given date; it is relevant to show that the letter was properly addressed, posted in due time, and not afterward returned (*Warren* v. *Warren*, 1 Cr. M. & R. 250; *British and Am. Teleg. Co.* v. *Colson*, L. R. 6 Ex. 108; *Dunlop* v. *Higgins*, 1 H.L. C. 381; *Household Fire Co.* v. *Grant*, 4 Ex. D. 216; *Watts* v. *Vickers*, 86 L. J. Ch. 177, C.A.; Best, s. 403; Tay. s. 179). The *postmarks* are also evidence of the dates and places mentioned (*R.* v. *Johnson*, 7 East, 65; *R.* v. *Plumer*, R. & R. 264). And possession by A. of a letter with the address torn off is *prima facie* evidence that it was addressed to him (*Curtis* v. *Rickards*, 1 M. & G, 47).

Private Offices. The question being whether A. paid B. his wages;—A. may show that his practice was to pay all his workmen regularly every Saturday night, that B. was seen with the rest waiting to be paid and had not afterwards been heard to complain [*Lucas* v. *Novosilieski*, 1 Esp. 296; and see *Sellen* v. *Norman*, 4 C. & P. 80; *Evans* v. *Birch*, 3 Camp. 10].

Inadmissible.

Public Offices. Where a statute provided that both a bill of sale and its accompanying affidavit should be filed;—a certificate stamped on the former that "a copy thereof was duly registered";—Held no evidence that the affidavit also had been filed, since the Act did not provide that one could not be filed without the other [*Mason* v. *Wood*, 1 C.P.D. 63, distinguishing *Waddington* v. *Roberts*, *opposite*, where under the Bankruptcy Act, 1861, which required that both a composition deed and its accompanying affidavit should be filed, a memo. on the former that it had been "duly registered *pursuant to the provisions of the Act*" was held evidence that the affidavit also had been filed].

Posting and Delivery of Letters. To prove the posting of a letter written by A. to B.;—evidence by one of A.'s clerks that he habitually copied all letters written by A., then returned them to A. to seal, and that afterwards, when A. gave them back, the witness or another clerk posted them;—held in the absence of evidence to show that A. had returned that particular letter to the clerk, this was no proof of posting (*Toosey* v. *Williams*, Moo. & M. 129). So, where A.'s clerk proved that the letter had with several others been given by him to a deceased clerk to post, and that the letter had left for the post with them;—held that mere possession for posting was insufficient (*Rowlands* v. *De Vecchi*, 1 C. & E. 10; it did not, however, appear that it was the practice for the deceased to post all letters given to him. See further as to this case, *post*, chap. xxiv.). So, handing the letter to a town postman, is no evidence of posting, as it is against his duty to receive it (*Re London & N. Bank, Exp. Jones*, 1900, 1 Ch. 220). And where notices must be served by *prepaid* letter, as under the Public Health Act, 1875, s. 267, evidence of addressing and posting, without proof of prepayment, has been held insufficient (*Walthamstow U.C.* v. *Hanwood*, 1897, 1 Ch. 41).

To prove that A. in London, had received a registered letter from B. in Paris:—Proof by B. that he gave the letter to his clerk in Paris to register and post to A.; that the clerk (not called) reported that he had registered and posted it and handed B. the post-office receipt (produced) for its registration;—Held very doubtful if such receipt, in the absence of the clerk, were sufficient (*Copin* v. *Adamson*, 31 L.T. 242, 255-6, *per* Kelly, C.B.).

To prove the delivery of a letter posted to B. at Bristol;—the fact that it was addressed to him at "Bristol" is insufficient (*Walter* v. *Haynes*, Ry. & M. 149); *aliter* if this was the only address given by B. (*Burmester* v. *Barron*, 17 Q.B. 828).

(d) Custom and Usage to Annex Terms to Contracts, Wills &c.

Admissible.

Oral Contracts. A., a veterinary, sues B. for medicine and attendance. The claim for medicine, which had been supplied under an oral contract, being admitted, evidence tendered by A. that there was a usage among veterinaries to charge for attendance as well as medicine;—held admissible (*Sewell* v. *Corp.* 1 C. & P. 392).

A. lets a farm to B. on an *oral* agreement;—a general usage on the estate that the landlord has the right to sport is admissible to prove reservation of such right (*Liversedge* v. *Whiteoak*, 28 L.Jo. 761; 57 J.P. 692; as to *written* agreements, see *infra*).

A. lets premises to B. by deed containing a covenant to repair and afterwards assigns his reversion to C.—On the expiry of the lease B. having held over, but failed to repair, is sued by C. Held that, the tenancy being a new parol one, from year to year, C. could not sue on the original covenant, but that evidence of a custom to keep the premises wind and weather tight was admissible, and he might sue on that (*Wedd* v. *Porter*, 113 L.T. 819; see further, *Blane* v. *Francis*, 1917, 1 K.B. 252, C.A.; and *Cole* v. *Kelly*, 140 L.T. Jo. 122, C.A.).

Written Contracts, &c.—The question being whether A., a broker, is personally liable on a written contract made by him for an undisclosed principal;—evidence may be given of a usage that brokers who do not disclose the names of their principals are personally liable (*Pike* v. *Ongley*, 18 Q.B.D. 708, C.A.).

A. employs B., a stockbroker, to sell certain securities on the Stock Exchange. B. does so, and by a rule of the Exchange becomes personally responsible for the genuineness of the documents. One of the documents, unknown to either, is forged, and B. has to make good the loss. A. is liable to indemnify B., as the rule, though unknown to A., is a reasonable one (*Smith* v. *Reynolds*, 66 L.T. 808; *Harker* v. *Edwards*, 57 LJ.Q.B. 147).

A. insures a ship through B., a broker, with C., an underwriter at Lloyd's, ex-

Inadmissible.

Oral Contracts. A., a veterinary, sues B. for medicine and attendance;—evidence of a usage among veterinaries to charge for attendance "where not much medicine is required" held inadmissible as too vague (*Sewell* v. *Corp. opposite*).

A., a horse-dealer, sells B. a horse by *oral* contract, the question being whether the horse, which had been certified sound by a veterinary, had also been warranted sound by A.;—evidence of a practice, not amounting to a recognized custom of the trade, for horse-dealers not to warrant horses so certified, is inadmissible (*Howard* v. *Sheward*, L.R. 2 C.P. 148).

Written Contracts, &c. The question being whether B., an undisclosed principal, is liable on a written contract made for him by A., a broker and contracting as such;—evidence of a custom that where brokers do not disclose the names of their principals, the broker is solely liable and the principal is discharged, is inadmissible as contradicting the contract (*semble*, *Pike* v. *Ongley*, *opposite*).

A. employs B., a broker, to buy and sell certain securities for him;—a usage, unknown to A., by which B. is authorised to sell as *principal to A.* (*Robinson* v. *Mollett*, L.R. 7 H.L. 802), or to buy from him as such (*Hamilton* v. *Young*, 7 L.R.I. 289; *MoDevitt* v. *Conolly*, 13 *id.* 207), is inadmissible.

A. employs B., a country broker, to sell certain shares. B., without disclosing the name of his principal, sells them through his London jobber who, according to a practice of brokers in cases of such non-disclosure, sets off against the price a debt due to him from B. on previous transactions. A. is not bound by the practice, as (1) it is not a general usage; (2) it is unreasonable; (3) A. did not know or assent to it (*Blackburn* v. *Mason*, 68 L.T. 510; *Anderson* v. *Sutherland*, 13 T.L.R. 163). So, with a general usage not to specify the numbers of bank shares in a contract for sale, which usage contravenes Leeman's Act, 1867, s. 1 (*Perry* v. *Barnett*, 15 Q.B.D. 388).

A., a ship-builder, employs B., an insurance broker, to insure a ship at Lloyd's,

Admissible.

pressly contracting in the policy (though not under seal) to pay C. the premiums. A custom of Lloyd's that B., the broker, and not A., should be held responsible for the premiums held admissible as being not inconsistent with the terms of the policy, but merely a customary mode of carrying out the promise to pay (*Universo Insurance Co.* v. *Merchants Co.*, 1897, 2 Q.B. 93, C.A.).

A., a manufacturer, contracts to supply certain iron plates to B.;—evidence is admissible of a custom that the plates are to be of his own make. [*Johnson* v. *Raylton*, 7 Q.B.D. 438; *cp.* Sale of Goods Act, 1893, ss. 14 (3), 55].

A. sues B. to recover *debentures* bought in good faith by B. from C. (A.'s clerk), who had stolen them from A.;—B. may prove a usage among mercantile men and on the Stock Exchange that the debentures though not so expressed, are negotiable instruments transferable by delivery (*Bechuanaland Co.* v. *London Bank*, 1898, 2 Q.B. 658; this fact should now be judicially noticed, *Edelstein* v. *Schuler*, *ante*, 13). So also, as to *scrip* (*Rumball* v. *Metro. Bank*, 2 Q.B.D. 194) and *share-warrants* (*Webb* v. *Alexandria Co.*, 93 L.T. 339).

A. lets a farm to B., the lease specifying the terms of holding, but being silent as to those of quitting. A custom that on *quitting* B. should have the way-going crop is admissible, although inconsistent with the terms of the *holding* (*Holding* v. *Pigott*, 7 Bing. 465; *cp. Muncey* v. *Dennis*, 1 H. & N. 216). So, with a custom entitling tenants to hold over part of the land after the expiration of the notice to quit stipulated in the lease (*Re Paul*, 24 Q.B.D. 247). And a reservation of "minerals" in a lease is not inconsistent with and does not exclude a custom to take flints (*Tucker* v. *Linger*, 8 App. Cas. 508).

A testator devises land to B., with a proviso that she shall keep the house, grounds, gates, and fences in repair, and gives her a power "to fell timber necessary for such repair";—B. may prove a modern local usage whereby such a power enables her to cut and sell timber for her own benefit as well (*Dashwood* v. *Magniac*, 1891, 3 Ch. 306, C.A.).

A bill of lading provided for the delivery of goods "from the ship's tackles at the port of London";— a custom of the port

Inadmissible.

and afterwards on the ship being lost, to adjust and receive the policy-moneys from the underwriters. Underwriters, by a usage of Lloyd's, of which A. is ignorant, deduct from the amount a debt due to them from B. on previous insurances. A. is not bound by the usage (1) Lloyd's not being a market whose usages bind those who are ignorant of them; (2) the usage being an unreasonable one (*Sweeting* v. *Pearce*, 9 C.B.N.S. 534).

A., an undisclosed principal, sells goods to C., through B., a broker, the contract providing that all disputes between buyer and seller shall be referred to B., whose decision shall be final. The goods turning out inferior, C. sues B. and tenders evidence of custom that non-disclosure of the principal renders the broker liable. Held, that as the custom purported to make B. a principal, it was repugnant to the clause which made him an arbitrator and therefore inadmissible (*Barrow* v. *Dyster*, 13 Q.B.D. 635).

A., a glove manufacturer, agrees with B., a traveller, to pay a commission on all business introduced by B. and accepted by A. A. afterwards terminates the agreement without notice. Evidence of a custom in the glove trade for travellers to receive six months' notice to terminate their agencies, held inadmissible as inconsistent with agreement (*Joynson* v. *Hunt*, 93 L. T. 470, C.A.).

A. leases a farm to B., one of the terms being that the outgoing tenant's interest shall be valued according to the custom of the country;—evidence of a usage on the particular estate of which the farm forms part, cutting down the compensation allowed by the general custom, is inadmissible unless B. was aware of such restricted usage (*Womersley* v. *Dally*, 26 L.J. Ex. 219). So, a custom that the outgoing tenant should look only to the incoming tenant and not to the landlord, for payment for seeds, tillages, &c., is unreasonable, uncertain, and invalid (*Bradburn* v. *Foley*, 3 C.P.D. 129). And a custom to cut and burn undergrowth for the purpose of preserving and improving the pasture of the waste, has been rejected as too indefinite (*Devonshire* v. *Gwynne*, 1905 Times, July 22, C.A.). So, where by a lease rent was payable on the "customary rent days" *i.e.* Nov. 23 and May 13, and the tenancy was terminable by "six calendar months' notice"—a custom was rejected to validate a notice on Nov. 22 to quit on May 13 (*Travers* v. *Mason*, 45 W.R. 77). For a custom inadmissible as being inconsistent with a covenant to repair, see *Westacott* v. *Hahn*, 1918, 1 K.B. 495, C.A.

A., by a charter-party between himself and B., undertakes that a ship shall deliver her cargo "at the port of H. or as near

Admissible.	*Inadmissible.*
to discharge the goods on the quay and thence into lighters and not immediately into the latter, held admissible and not inconsistent with the document (*Marzetti* v. *Smith*, 49 L.T. 508). So, where a bill of lading states that the goods are to be delivered to a person appointed by the ship's agents, the delivery to be according to the custom of the port, a custom is admissible that they may be landed on the quay unless demanded within twenty-four hours of the ship's arrival (*Aste* v. *Stumore*, 13 Q.B.D. 326). And, where a bill of lading specifies a certain sum as payable for freight, evidence of a customary deduction is receivable (*Brown* v. *Byrne*, 3 E. & B. 703; *aliter* if an intention could be implied that the freight should be paid free from all deduction, *id.*; and *cp. Phillips* v. *Briard*, 1 H. & N. 21).	thereto as she can safely get." The ship is not able to get nearer than S., some miles from H. A custom of the port that consignees are not bound to take deliveries of cargoes elsewhere than at H. held inconsistent with the charter-party and inadmissible as evidence for B. (*Hayton* v. *Irwin*, 5 C.P.D. 130). So, where A. contracted with B. to "convey goods by sea from the port of loading to that of discharge":—evidence that war having occurred, the course of business was to convey them partly by sea and partly by rail, held inadmissible as contradicting the clear words of the document (*Sutro* v. *Heilbut*, 1917, 2 K.B. 348 C.A.). And, where a charter-party provides that cargo is to be "taken from alongside the ship at merchant's risk and expense," and "discharged according to the custom of the port," a custom of the port throwing on the shipowner the expense of taking it from the ship's rail and landing it on the quay is inadmissible, being repugnant to the first clause, and not within the second, which only refers to the time and mode, and not to the expense of the discharge (*The Nifa*, 1892, P. 411; *Lishman* v. *Christie*, 19 Q.B.D. 333).

(e) Standards of Comparison. Usage as Test of Cruelty, Negligence, Reasonableness, &c.

Treatment at Schools. The question being whether the pupils at a certain school were properly treated;—evidence is admissible of the *general* treatment of boys at schools of the same class as affording a criterion of what the treatment should have been at the school in question (*Boldron* v. *Widdows*, 1 C. & P. 65). So, in an apprentice's action against his master for failing to give proper instruction, proof is receivable of what is the usual course of instruction in such apprenticeships, otherwise no evidence can be given of departure from such course (*Cridlan* v. *Marler*, 9 T.L.R. 529).	*Treatment at Schools.* The question being whether the pupils at a certain school were properly treated;—evidence of the comparative treatment of boys at any other *particular* school, held inadmissible (*Boldron* v. *Widdows*, *opposite*).
Handwriting. To prove that a certain letter was in the handwriting of A.:—it is admissible to compare therewith cheques purporting to be signed by A. and produced by the manager of a bank, although he had never seen A. write, had no signature book, and the course of business was merely for A.'s wife to pay in money to A.'s account against which the manager wrote out cheques which he sent back to A. for signature, such cheques being afterwards honoured and preserved by the bank as being signed by A. (*R* v. *Tranter*, Times, Jan. 23, 1893, C.C.R.).	*Handwriting.* A. sues B. on a (lost) contract which B. denies having signed. A. cannot prove its execution by comparing from memory the signature of the *unproduced* contract with a *produced* letter admittedly signed by B. (*Arbon* v. *Fussell*, 3 F. & F. 152). A. sues B. for libel contained in a (lost) letter, and tenders a photographed copy of the letter taken before its loss. Held, though this copy is admissible as secondary evidence of the *contents* of the letter (including peculiarities in spelling, punctuation, and use of capitals, it was not a disputed document under the Act, and could not be used for comparison with genuine specimens (*McCullough* v. *Munn*, 1908, 2 F.R. 194, C.A.). To prove the handwriting of A. (deceased) to a letter:—a comparison cannot be made

Admissible.	*Inadmissible.*
	between the letter and a deed fifty years old purporting, but not proved, to be signed by A. (*Miller* v. *Wheatley*, 28 L.R.I. 144, 160. O'Brien, J., remarked that "proof to the satisfaction of the judge" implied a personal judgment by him, and not the mere presumption of genuineness arising from the age of the deed).
Cruelty to Animals. The question being whether A. cruelly ill-treated an animal by performing a certain operation upon it—evidence is admissible that such an operation was customary in that part of the country, and that A. believed, and that there was a general belief, that it produced beneficial results to the animal. [*Lewis* v. *Fermor*, 18 Q.B.D. 532 (spaying cows), in which case the defence prevailed. So, also, in *Bowyer* v. *Morgan*, 95 L.T. 27, where branding cattle was proved to be customary and reasonably necessary. On the other hand, evidence of custom, where the act resulted in no benefit save to the owner, was admitted, but held no defence, in *Ford* v. *Wiley*, 23 Q.B.D. 203 (dishorning cattle), *Murphy* v. *Manning*, 2 Ex. D. 307 (cutting cock's combs), and *Waters* v. *Braithwaite*, 30 T.L.R. 107 (cows overstocked with milk). As to the Irish rule, see *Callaghan* v. *Society*, &c., 16 L.R.I. 325; *R.* v. *M'Donagh*, 28 *id.* 204; and as to the Scotch rule, *Todrick* v. *Wilson*, 26 L.Jo. 191].	*Genuineness of Fortune-Telling, &c.* The question being whether A. intended to deceive B. by pretending to tell his fortune by the stars;—evidence that A. and others *bona fide* believed in his ability to tell fortunes thereby held inadmissible (*Penny* v. *Hanson*, 18 Q.B.D. 478; Denman, J., remarked, "We do not live in times when sane men can believe in such powers"). So, on a similar charge as to palmistry, evidence that palmistry is a well-recognized science whose professors enjoy a professional status was rejected (*R.* v. *Stephenson*, *post*, 155. *Contra*, *Davis* v. *Curry*, cited *post*, 155.
Negligence. The question being whether a railway company was negligent in not employing more than one man to manage a coal engine;—the fact that for twenty years it had been usual only to employ one man, and that no accident had happened, is admissible as tending to rebut negligence (*Hart* v. *Lancs. & York. Ry.*, 21 L.T. 261, and *post*, 134; *cp. Troke* v. *Felton*, 13 T.L.R. 252). So, in an action against a Railway Co. for injury to goods by defective packing;—evidence of the customary mode of packing is admissible (*Lewis* v. *G.W.Ry.*, 3 Q.B.D. 195, C.A.; *Tobin* v. *L. & N.W. Ry.*, 1895, 2 I.R. 22).	*Negligence.* A. is charged with manslaughter in causing B.'s death by a kick at football:—the rules of the game, and the fact that A. was, or was not, acting in accordance therewith at the time, held irrelevant (*R.* v. *Bradshaw*, 14 Cox, 83; *R.* v. *Moore*, 14 T. L R. 229: 42 Sol. J. 264; the rejection of the *rules* is noticed in the last-named report). As to *subsequent precautions* by the defendant as evidence of negligence, see *Hart* v. *L. & Y. Ry., &c., cited post*, 134.
A., a railway servant, sues the company for injury sustained when uncoupling cars. The fact that A. knowingly disobeyed a *By-law* of the company in so doing, is admissible and sufficient to disentitle A. to recover (*Canadian Pacific Ry.* v. *Frechette*, 1915, A.C. 871).	
A. sues a Tram Co. for injury caused by negligently re-starting a tram before he had alighted; defence, contributory negligence in A. alighting by the front instead of the back steps in contravention of a *Notice* posted in the car. Evidence by A. that it was the *practice* of passengers, in spite of the notice, to alight indifferently at either end of the cars.—Held, admissible to rebut this defence. [*Freel* v. *Bury Tram Co.*, 1901, Times, Jan. 26, C.A. Evidence that A. did not see or know of the notice was held immaterial in view of	A., a barge-owner, sues B., a brig-owner, for damages sustained through a collision. The damage was caused by the anchor of the brig being carried in a position contrary to a Thames *By-law*. Evidence by B. that it was the *custom*, locally, to neglect the *By-law*, held inadmissible (*Sills* v. *Brown*, 9 C. & P. 601, 603-4; *Marriott* v. *Stanley*, *id.* 604.).

Admissible.	*Inadmissible.*
the general practice to ignore it. *Cp.*, however, *Byrne* v. *Londonderry Tram Co.*, *ante*, 99] Knowledge that boys habitually trespass, and are reckless (*ante* 25), imposes a special duty to take precautions. [*McDowall* v. *G. W. Ry.*, 1902, 1 K.B. 618; *Robinson* v. *Smith*, 17 T.L.R. 235, 423; *cp. Sullwan* v. *Creed*, 1904, 2 I.R. 317. See, however, *Wheeler* v. *Morris*, 113 L.T. 644, C.A.].	
The question being whether the captain of a ferry-boat was negligent in starting in a fog:—the *practice* of other captains to cross the ferry in fogs is admissible, although the jury might find that the fog was so dense that it was improper, on that occasion, to start (*Ball* v. *Wallasey Board*, 1894, Times, Jan. 31, C.A.). So, where a horse was injured by barbed wire fencing, a general practice to use such was admitted (*Turner* v. *Stallibras*, 1897. Times. Aug. 13; *Milton* v. *Pronk*, 1902, Times, Dec. 12). And where a race-course had been roped instead of fenced, evidence that this was habitually done at other race-courses without accident was admitted (*Handley* v. *Wolverhampton Co.*, 1903, Times, Jan. 16).	
Reasonableness. The question being what was a reasonable time for the completion of a sale of shares by A. to B. in Liverpool:—a custom on the Liverpool Stock Exchange as to such time is admissible, though neither A. nor B. was a member of the Exchange (*Stewart* v. *Cauty*, 8 M. & W. 160).	*Reasonableness.* A., a quarry owner, agrees to supply, and B., a smelter, agrees to take from A., all the limestone required for the production of hematite pig-iron at B.'s smelting-works. In an action by A., for breach of contract, to which B.'s defence is that the limestone supplied by A. was not of a quality reasonably fit for this purpose, evidence (1) of the standard of purity of limestone found or adopted elsewhere; and (2) that with limestone of a particular purity better results could be obtained than from A.'s limestone,—held irrelevant (*Strongitharm* v. *North Lonsdale Co.*, Times, Aug. 9, 1904).
The question being whether an agreement between A., a horse-dealer, and B. (deceased) as to the sale of the latter's horse was reasonable; a similar course of dealing between (1) A. and B. on former occasions; and (2) between other horse-dealers and their customers, is admissible (*Re Leigh*, 6 Ch. D. 256, C.A.).	
As to the admissibility of usage as a test of intention in rebuttal of crime, see *R.* v. *Spencer*, *post*, 155, and *R.* v. *O'Connell*, *post*, 184.	

(*f*) *Acting in a Public or Private Capacity, or under Documents.*

As Receiver. To prove that A. (deceased) was receiver of port dues for a Corporation;—evidence tendered by the latter that A. used to furnish accounts of such dues to the Corporation, which accounts were produced from the Corporation records;—held sufficient, the office being a *public* one (*Exeter Corp.* v. *Warren*, 5 Q.B. 801). So, to prove that A., deceased, was manor steward to B.'s ancestors, seventy years before the trial, evidence tendered by B. that A. furnished estate accounts to the then lord, who *adopted* such by signing them, held sufficient, though the office was a *private one* [*Doe* v. *Michael*, 17 Q.B. 276; the accounts were not signed by A., but by "A., junr.,	*As Receiver.*—To prove that A. (deceased) was tithe-collector to B.'s ancestors, seventy years before the trial;—evidence tendered by B. that A. acted as such by furnishing tithe accounts to them. held no evidence, the office being a *private* one, although the accounts were ancient and produced from proper custody (*Short* v. *Lee*, 2 Jac. & W. 464; *aliter* where it was the duty of a Corporation under its charter to appoint a tithe-collector). *As Traveller and Collector.* A. is charged with embezzling the moneys of B., his employer. Evidence by C., B.'s cashier, that A. acted as traveller and collector for B. and was regularly paid his commission by C., who produced the books showing

Admissible

on A.'s behalf," there being no other proof of who "A. junior" was, or of his authority to sign for A.].

A. is charged with embezzling the moneys of a company. A. had been appointed by a resolution, entered in the minute-book, but not signed by A. Held, parol evidence of the appointment might be given, as this was not a contract, but only a record of the transaction. *Aliter* if A. had signed the minute [*R.* v. *Stacey*, 96 L.T.Jo. 214, C.C.R.; *cp. Rennie* v. *Clarke, &c.*, *ante*, 69, *post*, 570; and *Cotterill* v. *Hobby*, *post*, 571].

As Director. A. is criminally charged with libelling the directors of a bank;—evidence by the prosecution that they acted as such is sufficient proof against A. that they were directors (*R.* v. *Boaler*, 67 L.T. 354).

As Judge. So, where A. was charged with perjury before a deputy county court judge;—evidence that the latter acted as judge is sufficient proof of his appointment (*R.* v. *Roberts*, 14 Cox, 101, C.C.R. The minute of proceedings before him would also be evidence thereof).

As Apprentice: *see R.* v. *Fordingbridge*, *infra.*

As Husband and Wife: *Cohabitation.* A., as heir-at-law of B., sues C. to recover land. To prove that A. was legitimate, evidence that his parents lived together as husband and wife, held admissible and sufficient, although his parents were alive and strict proof was obtainable (*Doe* v. *Fleming*, 4 Bing. 266).

A. is charged with intermarrying with C. in 1858, while her former husband, B., whom she married in 1848, was alive. Defence that B., in 1848, had a lawful wife D., alive. Evidence (1) that in 1843, B. had cohabited with D., in Canada, where D. was introduced, treated, and received as his wife, and where she afterwards gave birth to a child while so living with B.; and (2) that in 1851, D. was still alive;—Held admissible and sufficient [*R.* v. *Wilson*, 3 F. & F. 119, and see p. 122*n. cp Hamblin* v. *Shelton*, *id.* 133; such evidence would not, however, have been sufficient to prove A.'s marriage either with B. in 1848, or with C. in 1858; *cp. R.* v. *Naguib*, 1917, 1 K.B. 359; *post*, chap xxxv, Reputation].

Acting under Documents. To show that A., a pauper, had acquired a settlement by being apprenticed by indenture to B. (they being dead, and the deed not forthcoming);—the facts that A. had served B. as apprentice, and been treated by B. as such and not merely as a journeyman or shopboy, held presumptive proof not only of the apprenticeship, but of the existence of an indenture regulating it, that being the usual method (*R* v. *Fordingbridge*, 27 L.J.M.C. 290; *R.* v. *St. Marylebone*, 4 Dow. & Ry. 475).

Inadmissible.

this, but that C. was not present when the engagement was made and only heard its terms afterwards;—held insufficient without calling B. (*R.* v. *Taylor*, 10 Cox, 544, *per* Russell Gurney, Q.C.; *cp. contra*, *R.* v. *Beacall*, 1 C. & P. pp. 296, 312, 457; and *R.* v. *Joyce*, 119 C.C.C. Sess. Pap. 562, *per* the Com. Sergt.). Where A.'s engagement was admittedly contained in letters, and A. contended these entitled him to retain the moneys, but the letters were not produced by B., parol evidence of their contents was rejected, and the jury directed to acquit (*R.* v. *Dodson*, 62 J.P. 729; *R.* v. *Clapton*, 3 Cox, 126; *post*, 570: but see *ante*, 109-11).

Acting under Documents. The question being whether a certain limitation was contained in a lost deed, and a memorial of the deed being produced in which such limitation did not appear;—the subsequent conduct of the parties to the deed was held not admissible, as it was equally consistent with that and several other limitations [*Smith* v. *Smith*, 1 L.R.I. 206. But usual limitations may be presumed, *Re Ward*, 43 Ir. L.T.R. 113; *post* 541].

Admissible.	*Inadmissible.*
To prove an assignment (lost) by A. to B. of a patent, evidence of a long course of dealing between them, chiefly consistent with the existence of such assignment, is admissible (*Dennison* v. *Ashdown*, 13 T.L.R. 226).	
A. sues B for tithes. A. having put in the Statute Book (37 Hen. 8, c. 12), a copy of the decree printed therewith, and proved search among Chancery Records, but no enrolment found, tenders evidence by incumbents and tithe owners in *other parishes* to show that the Statute and Decree had always been acted on by them. Held that though a custom as to payment of tithes in one parish was *per se* no evidence of the right in another, yet the facts of the decree being acted on by the parishes affected by it was the best secondary evidence of its enrolment [*Macdougal* v. *Young*, Ry. & Moo. 392; so, as to a copy of a lost recovery].	

(*g*) (*h*) *Acts and Documents showing Ownership, or Ancient Possession.*

Of Land. A. sues B. for trespass to land alleged by A. to be his private freehold, but over which B. claims a right of common. Evidence is admissible for A. (1) that his ancestors had granted leases of the land, though only counterparts signed by the lessees are produced [*Doe* v. *Pulman*, 3 Q.B. 622, 623-6; *Magdalen Hosp.* v. *Knotts*, *post*, 130; in *Haigh* v. *West*, 1893, 2 Q.B. 19, 30, C.A., entries in old parish books that "The following property belonging to the parish was this day let." &c., were admitted to prove the lettings specified]; also, (2) that they had erected stones, marked with their initials, to show the boundaries of the lands; evidence being admissible for B. that B.'s ancestors had destroyed the stones and protested in the Court Leet against their erection [*Blandy-Jenkins* v. *Dunraven*, 66 J. P. 661, *per* Byrne. J.; in *Philpot* v. *Bath*, 1905, Times, June 30, B. proved that the stones had been erected, not *animo possidentis*, but as precautions against the sea]. So, (3) A. having tendered a document dated 1659, found in his muniment room and signed by D. (tenant of a predecessor in title of B.), witnessing that C. (a predecessor in title of A.) had been persuaded to stay an action for trespass against D., upon D. binding himself by the document to pay C. 16s. costs and to refrain from further trespass: —held admissible, *per* Lindley, L.J.. not strictly as an act of ownership, but as a vindication of possession which was inferential evidence of one: *per* Jeune, P. and Romer, L.J., as a declaration by a deceased person against pecuniary interest testifying to an act of ownership by C. (*Blandy-Jenkins* v. *Dunraven*, 1899, 2 Ch. 121, C.A.).	In *Blandy-Jenkins* v. *Dunraven*, *opposite*, D.'s acknowledgment *per se* would not have been receivable against B. either as an admission by a predecessor in title (*post*, chap. xix.), or as a statement by a deceased person against *proprietary* interest (*post* chap. xxv.), since a tenant cannot prejudice the title of his landlord.

Admissible.

A. sues B. for trespass to lands held under an ancient Royal Patent. To show that the *locus* of the trespass was parcel of the lands granted, A. tenders convictions and awards obtained by his ancestors against strangers in title to B. for trespass upon the lands. Held admissible, not as adjudications of right, or evidence of reputation, but as acts of ownership explanatory of an ancient document which was ambiguous (*Brew* v. *Haren*, I.R. 9 C.L. 29; 11 *id.* 198; *post*, chap. xlvi. The awards would not have been admissible as reputation, *post*, chap. xxv).

A. sues B. for trespass upon land between A.'s farm and the high road, which B. claims as part of the highway. Evidence is admissible (1) for A. that he and his tenants had habitually cut grass and willows on the land, grazed their cattle thereon, protecting them by hurdles placed round the swampy parts, and turned off the cattle of strangers; and (2) for B., that strangers had sometimes cut grass and grazed cattle there (although this was not shown to have come to the knowledge of A. or his tenants), and that B.'s servants had frequently deposited road-scrapings and stones for the repair of the highway on the land (*Belmore* v. *Kent Council*, 1901, 1 Ch. 873; *Harvey* v. *Truro Council*, 1903, 2 Ch. 638. In the latter case B.'s surveyor had paid A. a nominal rent for the user, but this had been disallowed by B. in the surveyor's accounts).

A. (a Corporation) sues C. to recover land held by him under a lease granted by A. to B. in 1783, but now alleged by A. to be void. A. puts in the counterpart of the lease signed by B. but without showing that A. was in possession of the land in 1783, or that B. entered under the lease, or that C. claimed through B.:—held, that granting the lease was an act of ownership showing A.'s title to the fee in 1783; and that C., being in possession of the land included in the lease, the presumption was that he claimed through B. until the contrary was proved (*Magdalen Hosp.* v. *Knotts*, 8 Ch. D. 709; *ep. Metters* v. *Brown*, 32 L.J.Ex. 138. The land had been conveyed to A. in 1763, and Fry, J., held that a presumption therefore arose that it continued in A.'s possession till 1783).

Of Right of Way. Dedication. A. sues B. for trespass, B.'s defence being a public right of way. Evidence is admissible (1) for B. of long user of the way by the public, and also that many years before repairs were done to the road by the township surveyor; and (2) for A. that A.'s tenants and predecessors in title had from time to time obstructed the road and turned back persons using it (Steph. art. 5 *n*); also, in explanation of the repairs, that an

Inadmissible.

A. (a parish) sues B. to recover certain lands. To show that B. was in possession thereof as tenant, it is proved that he and his ancestors paid A. for the lands £6 a year, which the parish books described as "rent." In rebuttal, B. proves that his ancestors, when selling adjoining lands, covenanted in the various conveyances to indemnify the purchasers against £6 payable by them to the parish as "*rent-charge*" in respect of the lands in question. Held, B.'s title-deeds were no evidence against A. of the *truth* of the facts asserted, viz., that the £6 was rent-charge and not rent, though they were evidence of the *intention* with which the covenantors paid it to A. (*A.G.* v. *Stephens*, 6 De G. M. & G. 111, 139-140; so, if B. had written to his banker telling him of the rent-charge and directing him to pay the £6 yearly to A.).

Of Right of Way. Dedication. A. sues B. for trespass, B.'s defence being a public right of way. Evidence of a promiscuous user by the public, of the *locus in quo*, not confined to any definite path, will not support B.'s claim [*Robinson* v. *Cowpen Board*, 63 L.J.Q.B. 235, C.A.; *Giants Causeway Co.* v. *A.G.*, 1905, 5 New Irish Jurist, 301; Carson's Real Property Statutes, "Dedication"; *contra*, *A.-G.* v. *Esher*, 66 J.P. 71, *sed qu.*].

Admissible.

agreement was made at the time by the steward of A.'s ancestor, or even by strangers, with the surveyor, providing that the expense of the repairs was not to be borne by the township (*Ferrand* v. *Milligan*, 7 Q.B. 730). A.'s title-deeds (showing that during, and prior to, the period covered by the alleged user, the land was held by tenants for life in strict settlement, so that there was no one who could either dedicate the road to the public or acquiesce in its user), are also admissible [*Roberts* v. *James*, 89 L.T. 282; *op. Webb* v. *Baldwin*, 75 J.P. Rep. 564, where the law on this topic is stated by Parker, J. Though, however, dedication cannot be made by a termor, or for a term, but only in perpetuity (*Corsellis* v. *L.C.C.* 96 L.T. 614), yet dedication anterior to the lease may sometimes be presumed from user during it (*Winterbottom* v. *Derby*, L.R. 2 Ex. 316; *Paris* v. *Lymington Council*, 75 J.P. Jo. 88; *Webb* v. *Baldwin*, *sup.*: *Shearburn* v. *Chertsey Council*, 78 J.P. Rep. 289, where the property had been in tenancy since 1823, but was mortgaged and in strict settlement, evidence of stopping from time to time by the tenant was held admissible, but insufficient to rebut the inference of dedication prior to 1822. So, the land being in settlement is no bar, if the conduct of the remainderman (or of the tenant for life and remainderman together. *Farquhar* v. *Newbury Council*, 1909, 1 Ch. 12 C.A.), presumes dedication (*Webb* v. *Baldwin*, *sup.*; *Coats* v. *Herefordshire Council*, *opposite*)].

Of Fences and Ditches. A. sues B. for trespass in cutting down trees in a boundary fence between their two properties. Evidence that A.'s gamekeepers had for several years collected eggs in the fence; that the estate maps placed the fence on A.'s land; and that the ditch was on B.'s side of the fence (raising a presumption that both ditch and fence belonged to A., see 144 L.T.Jo. 2, 108), are admissible for A.; and evidence that B. or his tenants to the knowledge of A.'s tenants (though not shown to have been to that of A. or his agent), had for many years cut and laid the fence and cut and sold trees growing therein, one of which lay for two years on A.'s land,—is admissible for B. [*Craven* v. *Pridmore*, 18 T.L.R. 282. C.A.; *Henniker* v. *Howard*, 90 L.T. 157; in these cases the estate maps, and in particular the presumption against A. form the ditch being upon his side of the fence (as to which see 144 L.T.Jo. 2, 108), were held not rebutted by A.'s acts of ownership]. In *Stanley* v. *White*, *ante*, 72, the fact that A. had not claimed the fallen trees and that his tenants had stated in explanation that they belonged to B., was received, although the tenants' admission *per se* was not evidence against A.

Inadmissible

The question being whether certain land had been dedicated to the public, evidence that other land, though part of a continuous strip and of a similar description, had been fenced off from the highway with the consent of the highway authority, held not admissible [*Coats* v. *Herefordshire Council*, 1909, 2 Ch. 579, C.A.; *op. A.-G.* v. *Lindsay-Hogg*, 76 J.P. Rep. 450. In the former case, Eve, J., in the Court below, remarked: "In considering evidence adduced to rebut dedication, it is necessary to distinguish acts which are referable to *the ownership of the soil*, from those which show *an intention to exclude the public*. The conduct of the owners in asserting ownership of the soil, may but emphasise their acquiescence in the user of the surface by the public. When one finds an owner alive to the necessity of evidencing his continued possession, active to prevent encroachments upon his soil, and at the same time permitting, without protest, the unrestricted passage of the public over the surface of the very soil of which he is asserting his ownership there are cogent reasons for presuming dedication to the public."].

Admissible.

Of Fishery. A. sues B. for trespass to a fishery appurtenant to A.'s manor. Entries in the Court Rolls of ancient licenses to fish granted by A.'s ancestors, without proof that the rents received had been paid; and modern leases, with such proof;—are admissible for A. (*Rogers* v. *Allen*, 1 Camp. 309; *Musgrave* v. *Incl. Coms.*, L.R. 9 Q.B. 162, 178; *Malcolmson* v. *O'Dea*, 10 H.L.C. 593). So, old Bills and Answers in a Chancery suit brought by A.'s ancestors are receivable, not as evidence of the facts stated, but as showing a pending suit and as assertions of ownership submitted to, though by strangers in title to B. (*Malcolmson* v. *O'Dea, sup.*). So, also, decrees in old possessory suits brought by them against trespassers (*Neill* v. *Devonshire*, 8 App. Cas. 135; in these two cases the right involved was a public one, viz., to a several fishery).

Of Tolls. The question being whether a Corporation is entitled to claim tolls;—an ancient table of such tolls produced from their muniments and which had been kept by the town clerk of the Corporation, by whom it was delivered to the lessees and by the latter to the collector, by which the tolls had always been collected,—is admissible in favour of the Corporation (*Brett* v. *Beales*, M. & M. 419; *R.* v. *Carpenter*, 2 Show. 48). So, also, old accounts, kept by the town treasurer, showing collection of the tolls, and signed by the auditors as "allowed" (*Lancum* v. *Lovell*, 6 C. & P. 437, 443).

Of Minerals. A. sues B. for taking minerals under certain land, not in a mining district;—the fact that A. is in possession of the surface of the land is *prima facie* evidence that he owns the minerals; and in rebuttal evidence is admissible that strangers not claiming under A. have from time to time taken the minerals (see *Rowe* v. *Grenfel*, Ry. & M. 396; *Rowe* v. *Brenton*, 8 B. & C. 737).

Of Highways, Bridges, &c. On an indictment against a township for non-repair of a highway, the record of an indictment against an adjoining township for non-repair of a different part of the same road,

Inadmissible.

Of Fishery. To prove that A. was entitled to a fishery;—(1) a proposal made by a stranger to one of A.'s ancestors to rent the fishery, which proposal was not shown to have been accepted or acted on (*Powell* v. *Heffernan*, 8 L.R.I. 130, 143); (2) an ancient license to fish granted by one of A.'s ancestors, but not shown on its face or proved by extrinsic evidence, to apply to the *locus in quo* (*id.*); (3) ancient entries in Corporation books purporting not to constitute licenses to fish, but merely directions to prepare such licenses, or narratives of them (*Malcolmson* v. *O'Dea, opposite*); and (4) to prove the boundaries and extent of A.'s fishery—an unauthenticated report, made 140 years earlier, of an action for trespass to the fishery, then tried, together with the judge's charge therein (*Bridges* v. *Highton*, 11 L.T. 653)—are respectively inadmissible.

Of Tolls. The question being whether a Corporation is entitled to claim tolls:—ancient entries in the books of the Corporation, ordering powers of attorney to be made out to its bailiffs authorizing them to receive the tolls; and copies of ancient tables of tolls in the hands of lessees thereof, but not shown to have been delivered to them by the Corporation;—are not admissible for the Corporation (*Brett* v. *Beales, opposite*). Nor are old entries, signed by a former bailiff, stating that certain ships had been seized for non-payment of the tolls and that their captains had afterwards admitted the offence and paid 4s. as a fine, for these are merely of a private and not public character, and therefore being self-serving, are inadmissible (*Marriage* v. *Lawrence*, 3 B. & Ald. 142; see *post*, 372-3); nor old accounts of the tolls collected, kept by the town treasurer and signed by the auditors as "examined" but not as "allowed" (*Lancum* v. *Lovell, opposite*).

An information *quo warranto* by the A.-G. of Elizabeth against the Corporation in respect of the tolls claimed by them, but which was not shown to have been prosecuted, held not admissible against the Corporation (*Lancum* v. *Lovell*, at pp. 439-40).

Of Minerals. A. sues B. for taking minerals under certain land, situated in a mining district;—the fact that A. owns the surface of the land is no evidence that he owns the minerals, as in such districts these are commonly several inheritances (*Rowe* v. *Grenfel, opposite; Rich* v. *Johnson*, Str. 1142; *Hodgkinson* v. *Fletcher*, 3 Doug. 31).

Of Highways, Bridges, &c. On an indictment against a parish for non-repair of a highway, to which "not guilty" only has been pleaded, but no defence that the adjoining owners are liable to repair

Admissible.

which indictment had been submitted to, is admissible (*R.* v. *Brightside Bierlow*, 13 Q.B. 933). On an indictment against a parish for non-repair of a bridge, the question being whether the bridge is a public or a private one;—evidence of repairs by adjoining owners of a character adapted either for the public benefit, or their private convenience, is admissible in support of the above contentions respectively (*R.* v. *Northampton*, 2 M. & S. 262).

Of Manors. The question being whether A. owned a certain manor—the facts that perambulations thereof were made by A., together with declarations explanatory of them (*ante*, 111); and that Courts were held therein (*Doe* v. *Heakin*, 6 A. & E. 495); with copies of Court Rolls purporting to be surrenders of land by persons proved to be then in possession, with admittances accordingly (*Standen* v. *Christmas*, 10 Q.B. 135);—are evidence of the existence of the manor and of such lands being within it. So, entries in the books of the Clerk of the Peace of deputations, granted by A.'s ancestors, to game-keepers to shoot over the manor, are evidence both of the existence of the manor, and that such rights were publicly exercised, so that others purporting to grant similar licenses must have known their want of title (*Hunt* v. *Andrews*, 3 B. & Ald. 341; *Weber* v. *Stanley*, 16 C.B. N.S. 698, 717).

Of Advowsons. The question being whether A. owned an advowson. An original collation to the living by the bishop, in favour of one of A.'s ancestors, is evidence of A.'s title (*Irish Soc.* v. *Derry*, 12 C. & F. 641).

Inadmissible.

ratione tenuræ;—evidence of repairs by the latter is inadmissible, as such repairs might have been done merely for their own convenience (*R.* v. *Lordesmere*, 16 Cox, 65. C.C.R.).

A. sues B. *ratione tenuræ*, for non-repair of a stile in a public footpath through B.'s field. A. proves that B. had done slight repairs to the stile, but gives no proof that B. had been called upon to repair it by the highway authorities. Held, no evidence of the liability alleged (*Rundle* v. *Hearle*, 1898, 2 Q.B. 83).

Of Manors. The question being whether A. owned a certain manor:—the mere production of deputations to gamekeepers, granted by A.'s ancestors, held inadmissible without proof that such deputations were duly registered or enrolled pursuant to the statutes in force at the time (*Rushworth* v. *Craven*, McClel. & Y. 417, 422).

The question being whether manor A. was formerly part of manor B. The fact that the lord of the former had for long paid rent to the lord of the latter is no evidence of this fact (*Anglesey* v. *Hatherton*, 10 M. & W. 218).

Of Tithes. On a claim for tithes; an old resolution in the books of a Corporation, who were lay impropriators, that the tithes should, on default of the accustomed payment in lieu of tithe, be taken in kind, is not admissible for the Corporation against a claim of modus, without proof that tithe in kind had in fact been taken pursuant to such resolution (*A.-G.* v. *Cleeve*, cited Ros. N.P., 18th ed., 54).

(i) *Good or Bad Faith of Party's Claim or Defence.*

The question being whether A. (the owner) or B. (the contractor) is liable for work done to a house by C., on B.'s order; evidence that A. paid B. for the work done is admissible in A.'s favour as showing the *bona fides* of his defence, and that it was not a mere attempt to avoid payment (*Gerish* v. *Chartier*, 1 C.B. 13; and see *Milne* v. *Leisler*, *ante* 74; and *Barden* v. *Kyverberg*, *post*, 155).

A. indicts B. for libel in describing him as a swindler;—a report to the same effect made by the French police, upon which B. founded his statement, held admissible to show the *bona fides* of B.'s defence, though not to justify the libel or prove its truth [*R.* v. *Labouchere*, 14 Cox, 419; *cp. post*, 262, *Examples*. Generally, however, such evidence is inadmissible in libel cases, even in mitigation of damages; Odgers on Libel. 359; *Tucker* v. *Lawson*, 2 T.L.R. 593; *Scott* v. *Sampson*, 8 Q.B.D. 491; and see *R.* v. *Newman*, *post*, 134, 262].

The exors. of A. (a deceased stockbroker) sue B. for money lent her by A. Defence, that the advance was a gift, not a loan. Entries in A.'s books, treating it as a loan and debiting B. with interest thereon: Held inadmissible to show that A. had *bona fide* treated it as such. [*Schwabacher* v. *Heimer* No. 29. 1907, C.A., *per* Ld. Alverstone C.J., and Buckley and Kennedy, L.JJ., reversing Ridley, J., *Ex rel.* G. F. Emery, counsel for plaintiffs. The entries, being in his own interest, were also rejected as statements by a deceased person, *post*, 283].

As to evidence of *bona fide* belief in Palmistry, Astrology, &c., to rebut an intent to deceive thereby, see *ante*, 126, *post* 155.

Admissible.	*Inadmissible.*
A. petitions for divorce from B., his wife, on the ground of her adultery with C. Reports made by detectives to the husband were received in the latter's favour, not to prove the facts stated, but as evidence of his *bona fides* in afterwards making the same charges against his wife [*Walker* v. *W.*, 77 L.T. 715; and see *Farulli* v. *F.*, *post*, 156).	

(j) Admissions by Conduct.

A. (a parishioner) pays a sum of money as tithes to B. (a rector). This is an admission by conduct against A. that B. is entitled to the tithes (*James* v. *Biou*, 2 Sim. & St. 606; *Chapman* v. *Beard*, 3 Anstr. 942).	A. (a parishioner) pays a sum of money as tithes to B. (a rector). This is not an admission by conduct against B. that A. owes him the tithes (*James* v. *Biou*, *opposite*).
A. sues B. for injuries caused by B.;—the fact that A. had ascribed her injuries to a fall and not to B. is relevant as impeaching her case; and evidence that she had had no such fall is admissible for A. in rebuttal (*Melhuish* v. *Collier*, 15 Q.B. 878). So, the fact that A.'s husband and her solicitor's clerk had conspired to suborn false witnesses at the trial is relevant as an admission by conduct that A.'s claim is bad. [*Moriarty* v. *L.C. & D. Ry.*, L. R. 5 Q. B. 314; *R.* v. *Watt*, 20 Cox, 852; *cp. Queen's Case*, *ante*, 98].	A. sues a railway company for injury by an accident. The fact that the company adopted additional precautions after the accident is not an admission by conduct of their previous negligence [*Hart* v. *L. & Y. Ry.*, 21 L. T. 261, where Bramwell, B., remarked: "People do not furnish evidence against themselves simply by adopting a new plan to prevent the recurrence of an accident. . . Because the world gets wiser as it gets older, it was not therefore foolish before"; *Beever* v. *Hanson*, 25 L.Jo. Notes of Cases, 182; Beven, Negligence, 3rd ed. 976-7. In Canada, questions on this point have been held immaterial and irrelevant (*Cole* v. *Ry. Co.*, 19 Ont. Pr. Reps. 104); but in another case it was said that such facts, though no evidence of negligence *per se*, could not be excluded, since they might afford a foundation for other relevant matter (*Toll* v. *C. P. Ry.*, 1 Alberta L.R. 318). The English rule obtains generally in America. *Columbia Ry.* v. *Hawthorne*, 144 U.S. 202; Wigmore Ev. s. 283].
A. sues B. to recover a strip of waste adjoining a highway. B. pleads adverse possession and shows that his ancestors enclosed the strip in 1818, when it belonged to C. deceased (A.'s ancestor) in fee, by virtue of the presumption that such waste belongs to the adjoining owners. To rebut this presumption A. shows that C. accepted an allotment of the strip in question under an Inclosure Act dated 1836, on the footing of his having commonable rights only and not the fee of the waste. Held, an admission against C.'s interest which was evidence for A., against all persons, that B.'s adverse possession dated from 1836 and not 1818 [*Gery* v. *Redman*, 1 Q.B.D. 161; cited *post*, 285. The facts that the Inclosure Comrs., after inquiry, treated the waste as part of the manor, and that various adjoining owners treated it as their own by enclosing it, were also admitted; see *inf.* Treatment].	A., a contributor, sues B., the registered proprietor of a newspaper, for the price of certain articles therein. Defence that C., another person connected with the paper, and not B., is liable. Evidence for B. that C. had verbally admitted that he, C., was the proprietor, is inadmissible [*Watts* v. *Lyons*, 7 Scott, N.R. 1000. *Aliter*, perhaps, if acts of ownership had been done by C. with reference to the paper].
	A. is charged with libelling B. The fact that B. had abstained from taking procedings against C. for a similar libel is not an admission by conduct by B. that the statements in C.'s libel were true; nor is C.'s libel admissible against B. on this ground [*R.* v. *Newman* 1 E. & B. 268, cited *post*, 262. *Cp.*, however, *Irving* v. *Bodie*, 1909, Times, Nov. 5].

(k) Treatment.

To prove Sanity. The question being whether A., a testatrix, was sane at the time of making her will, the will having	*To prove Sanity.* The question being whether A., a testator, was sane at the time of making his will;—Letters from

Admissible.

been made in an asylum during an alleged lucid interval;—a medical inspector, who had attested the will, was allowed to state whether he saw A. under any restraint, though not whether she was treated as sane (*Martin* v. *Johnston*, 1 F. & F. 122, 123),

The question being whether A. was insane at the time of her marriage in October, 1882;—evidence that prior to this date she was always received and treated as sane by her friends and acquaintances, that she formed close intimacies and friendships with several distinguished and intelligent people, and that in August she became engaged to her future husband after ample opportunity on his part for observing her demeanour and state of mind,—was received. [*Durham* v. *D.*, 10 P.D 80; as to the opinions of non-medical witnesses on insanity, *see post*, 400, 401].

Marriage. The question being whether A. and B. were lawfully married;—the fact that they were always visited and received as man and wife by the respectable families in the neighbourhood, is admissible (Tay s 578. See Reputation, *post*, 384).

Ownership of Land. As to treatment by third persons to show Ownership of Land, see *Gery* v. *Redman*, *sup.*

Quality of Goods. To prove that B. (a brewer) supplied A. (a publican) with bad beer;—the fact that A.'s customers after tasting the beer threw it away complaining of its quality, held admissible (*Manchester Brewery* v. *Coombs*, *ante*, 75).

Inadmissible.

his friends addressed to A. and found opened and in his possession after his decease, in which letters A. was treated as intelligent and sane, but which were not connected in evidence by any act done by A. in relation thereto;—Held inadmissible although the writers were deceased and they had vouched for the genuineness of their opinions by sending the letters to A. [*Wright* v. *Tatham* (1838), 5 C. & F. 670. In cases other than Sanity, the mere opening and possession of the letters would have sufficed to render their contents admissible; *id.* pp. 736-7; *cp. ante*, 84; and *post*, 262]. So, the fact that boys in the street jeered at him as insane (*Martin* v. *Johnston*, *opposite*). And, the will of A.'s father having been tendered to show that the latter, by leaving A. property, had intimated his opinion of A.'s capacity to manage his affairs, was also held inadmissible (*Sutton* v. *Sadler*, 3 C.B. N.S. 99-100, *per* Cockburn, C.J.).

Condition of Ship. The question being as to the sea-worthiness of a ship;—the facts that the captain after a thorough examination of the ship, embarked in her with his family, and that the underwriters, after her loss, paid the policy-moneys on the footing of her seaworthiness, are inadmissible (*Wright* v. *Tatham*, 7 A. & E. pp. 385-8; *semble per* Parke, B.).

Condition of Premises. A. sues B. for obstructing the light to A.'s hotel. The fact that A.'s customers refused to take the rooms alleging their darkness as the reason of the refusal;—held inadmissible (*Gresham Hotel* v. *Manning*, cited more fully *ante*, 75).

Validity of Transfer. A., the assignee of B., a bankrupt, under a fiat in March, 1837, sues C., one of B.'s creditors, to recover goods delivered by B. to C. in January, 1837, after certain alleged acts of bankruptcy had been committed by B. To prove such acts and also that the delivery to C. was itself an act of bankruptcy, or an invalid preference, A. tenders evidence that before January other goods had been delivered to other creditors who, after the March fiat, had returned them to A. Held, that the only way the conduct of these other creditors bore on the case was to show their conviction that under the circumstances they were not entitled to retain them; and as their opinions, after the fiat, were inadmissible, so also were their acts, adduced in order to raise an inference as to the previous intentions either of themselves or of the bankrupt [*Backhouse* v. *Jones*, 6 Bing N.C. 65. The evidence was also tendered as part of the *res gestæ*, *i.e.* of the delivery to C.; see *ante*, p. 76, and *post*, 165].

CHAPTER IX.

FACTS RELEVANT TO SHOW IDENTITY, OR CONNECT THE PARTIES WITH THE TRANSACTION.

PERSONAL CHARACTERISTICS, ETC. When a party's identity with an ascertained person is in issue, it may be proved or disproved not only by direct testimony (*ante,* 65), or opinion evidence (*post,* 398, 402), but presumptively by similarity or dissimilarity of personal characteristics (*e.g.,* age, height, size, hair, complexion, voice, handwriting, manner, dress, distinctive marks, faculties, or peculiarities), as well as of residence, occupation, family relationship, education, travel, religion, knowledge of particular people, places, or facts, and other details of personal history (*R.* v. *Orton, passim*). In this connection, too, identity of *mental* qualities, habits and disposition may become relevant, though it would be excluded in more specific inquiries (*inf.*). [Taylor, Med. Jurisp., 5th ed., 101-7; Hubback, Ev. of Success, 438-68; Wigmore, Ev., ss. 410-16.]

Where, however, a party's identity is only material as showing that he did some particular act, the range of acts is much narrower. In civil cases a party's identity most frequently comes in question as having executed a particular document; and here identity of name, handwriting, residence and occupation, or even of name and handwriting alone, will generally suffice (*post,* 523). As to the identity of attesting witnesses, see *id.;* of persons or property referred to in wills, contracts, libels, &c., *post,* chap. xlvi.; of persons named in public registers, certificates, or licenses, *post,* 343-4, and *Simpson* v. *Dismore,* 9 M. & W. 47; of motor cars and drivers, *Marshall* v. *Ford,* 72 J.P. Rep. 480, *Martin* v. *White,* 74 *id.* 106, and see 74 J.P. Jo. 158, and 127 L. T. Jo. 12, 107; of persons as having taken prior legal proceedings, *Russell* v. *Smyth,* 9 M. & W. 810, or acted in a particular official capacity, *Smith* v. *Henderson, id.* 798, and *Collier* v. *Nokes,* 2 C. & K. 1012; of deceased victims in murder trials (*post,* 139); of deceased declarants, *post,* 276, 281, 288, 295; of disputed documents, *post,* 523; of stolen property, see *R.* v. *Pearson,* 72 J.P. Rep. 449, *R.* v. *Hill,* 7 Cr. App, R. 250, *R.* v. *Price,* 9 *id.* 15, *R.* v. *Smith,* 11 *id.* 19, *R.* v. *Baker, id.* 191; of weapons with which a crime was committed, *ante,* 70; of trade-marks, engravings, and musical compositions, *ante,* 9, 47, and *post,* 573; of the issues on a plea of *res judicata, post,* 415-6, 419-22; and as to conversations admitted to identify a date, see *post,* 218. As to *Confrontation* for purposes of identification, see *post,* 465-6.

PREVIOUS AND SUBSEQUENT CONDUCT. When an act has been proved, and the question is whether it was done by a given party, the undermentioned facts, which have chiefly to be invoked in criminal cases, are relevant, although not forming parts of the same transaction. In most cases, indeed, evidence of the *corpus delicti* is separable from that identifying the criminal; but in

some, it is equally applicable to both (Wills, Circ. Ev., 6th ed., 323-5, 373-411; Wigmore, Ev., s. 2072; 18 Crim. Law Mag., (Am.) 289). [For presumptions in criminal cases, which deal mainly with the present topic, see Best, ss. 91-2, 452-67; Russ. Cr., 7th ed., 2057-62; Ros. Cr. Ev., 13th ed., 14-22; Steph., art. 7; Whart., Cr. Ev., ss. 306, 756-7; Wills' Circ. Ev. 6th ed. *passim*].

Previous Conduct and Capacity, Attempts, Threats, Enmity. The presence or absence of motive (*R.* v. *Ball,* 1911, A.C. 47, 68; *R.* v. *Ellwood,* 1 Cr. App. R. 181; *R.* v. *Abramovitch,* 7 *id.* 145, 147; Wills, 6th ed., 57- 68, 260-4; Best, s. 453; as to adequacy of motive, see *post,* 140), of means, opportunity, preparation or previous attempts (as to the difference between preparation and attempt, see *R.* v. *Robinson,* 1915, 2 K.B. 342), on the part of the accused to do the act; his knowledge of circumstances enabling it to be done; his declarations of intention (*ante,* 63-4, *post,* 140), or threats to do it; or his enmity towards the injured party (*R.* v. *Ball, sup.,* at pp. 68-9; such evidence, like motive, is relevant not only to show the *mens rea,* but also the commission of the act by the accused), are admissible to prove identity. So, where the doing of the act reveals any special knowledge, skill, or capacity, his possession or non-possession thereof is also relevant (*post,* 142, 143). Motive, preparation, opportunity, &c., like most mental or composite facts, are usually provable not by direct testimony, but by detailing the specific incidents relied on as constituting or amounting thereto (*ante,* 56, 65), as well as, of course, by the party's own admissions. Moreover, as in the case of facts forming part of the main transaction (*id.*), or showing guilty knowledge, &c. (*post,* chap. xii), evidence relevant under the present head cannot, in general, be excluded because it involves the proof of other crimes, since otherwise the greater the criminal the greater might often be his immunity (*R.* v. *Clewes,* 4 C. & P. 221; *R* v. *Briggs,* 2 M. & R. 199; *cp. Roupell* v. *Haws, ante,* 69). So, on a trial for murder, to show the prisoner's possession of the weapon used, the fact that he stole such a weapon some time previously may be proved (*R.* v. *Ball,* 6 Cr. App. R.H.L. 31, 33-4); as, also, to show opportunity for robbing premises, the fact that he obtained access by burglary to others from which they could be watched; and generally all preliminary acts, whether criminal or not, rendering the crime more easy, safe, certain and effective, are receivable as in the nature of preparations [*Com.* v. *Robinson,* 146 Mass, 571; *Walker's Case,* 1 Leigh, 576; *People* v. *Zucker,* 20 App. Div. 363, affd. 153 N.Y. 770; Wigmore, Ev., s. 216; Chamberlayne, Ev. ss. 3256-60; *post,* 158]. On the other hand, *Similar facts* merely showing habits or disposition (*post,* 158, 167), and *Character* (*post,* chap. xiii.) are generally inadmissible to identify the doer of an act.

Alibi. Finger-prints. Foot-marks. The fact that the accused was in the neighbourhood or elsewhere about the time of the act (Wills, Circ. Ev., 6th ed., 279-286), or that finger-prints or foot-marks corresponding to his own (*id.* 161-6, 191-205; the Court may act on the former without corroboration, *R.* v. *Castleton,* 3 Cr. App. R. 74), or articles belonging to him, were found near the spot, are relevant; and to rebut *alibi,* proof that he was engaged in other crimes, whether similar or not, about the same time and place, has been admitted (*R.* v. *Briggs, ante,* 40). An *alibi* will not generally be entertained on appeal, however, unless supported by the defendant's oath (*R.* v. *Kirkham,* 73 J.P. Rep. 406; though for an exceptional case, see *R.* v. *Malvisi,* 73 J.P. Jo. 312).

Subsequent Conduct. The presence or absence of facts showing his consciousness of having done the act may also be proved—*e.g.* (in criminal cases) precautions taken to avert suspicion; change of demeanour or mode of life; flight; the fabrication or suppression of evidence; or the giving of false names, addresses, and explanations.

Possession of Property or Documents. So, the possession of property connected with the transaction is often a highly incriminatory fact. Thus, *recent* possession of stolen property, if not reasonably explained, raises a presumption of fact, though not of law, that the possessor is either the thief or the receiver, according to circumstances [*ante,* 35; as to possession by agents, see *ante,* 89, 93]. What amounts to such possession depends on whether the property is of a nature readily to pass from hand to hand—*e.g.* possession, two months after the theft, of property not likely so to pass was held to throw on the prisoner the burden of accounting therefor (*R.* v. *Partridge,* 7 C. & P. 551); while, had it been readily transferable, the inference would have been very slight (*id.*), and in one case, three months was held to raise no such presumption at all (*R.* v. *Adams,* 3 C. & P. 600). So, the exclusiveness of the possession or access is material—e.g. where there are other inmates of the prisoner's house, the mere finding of the property there is not, of itself, sufficient to prove possession by *him;* there must be control, exclusive or joint, as well (*R.* v. *Berger,* 84 L.J.K.B. 541; *R.* v. *Watson,* W.N., 1916, p. 339). The inference of complicity from possession of articles connected with a crime, applies also to other criminal charges—*e.g.* indecent photographs in certain sexual charges, house-breaking implements in burglary, drugs and instruments in cases of abortion, &c. (*R.* v. *Thompson,* 1918, A.C. 221; *R.* v. *Twiss,* 1918, 2 K.B. 853), [Tay., 8th ed., ss. 140-142; 10th ed., 127A- 127C; Best, ss. 210-214; Ros. Cr. Ev., 13th ed., 18-20; Russ. Cr., 7th ed., 2099-2101; Archb. Cr. Pl., 23rd ed., 340-341; Wills, Cir. Ev., 82-97.]

As to the seizure and production of articles by the police, see *ante,* 9; and documents and property found at his abode even *after* his arrest, are evidence against a prisoner, if their previous existence may be inferred from the circumstances (2 Rus. Cr., 7th ed., 2099-2101; *ante,* 93). So, letters written by him, or invited by and addressed to him, but which have been *intercepted* at the post office, are receivable, the postmaster being the agent of the recipient (*R.* v. *Cooper,* 1 Q.B.D. 19; *ante,* 9, 102). Conversely, the fact that documents or property belonging to the prisoner have been found at the scene of the crime is also evidence against him; and in rebuttal he may disprove their identity, or show that they had been stolen from him, and so probably placed there by others (*R.* v. *Frantz,* 2 F. & F. 580). Though, however, the contents of letters in his possession may be used to show the accused's knowledge, identity, or interest, those portions which merely show his general bad character will be rejected (*R.* v. *Hull,* 1902, Queensl. St. R. 1).

Conduct and Declarations by Other Persons. In criminal cases the previous conduct and declarations of the injured or other parties, and their relations with the accused, are often material in fixing the latter's identity (*R.* v. *Ball,* 1911, A.C. 47, 68; *R.* v. *Clewes, post,* 140; *R.* v. *Buckley,* 143; *R.* v. *Wainwright, ante,* 79; *Joy* v. *Phillips,* 1916, 1 K.B. 849, 854 (cited *post,* 169), in which case Phillimore, L.J., remarked, "Wherever an enquiry has to be made into the cause of death of a person and, there being no direct evidence, recourse must be had to circumstantial evidence, any evidence as to

the habits and ordinary doings of the deceased which may . . . throw light upon the probable cause of death, is admissible even in the case of a prosecution for murder"; and where the identity of the *injured person* is also in dispute, all facts which tend to establish it are also relevant (*id.; R.* v. *Crippen,* 1910, Times, Oct. 19-20; *R.* v. *Pateman, post,* 141; Wills, Circ. Ev., 6th ed., 339-52).

On the other hand, it is competent for the accused to show that the act was more likely to have been done by the injured party himself (*R.* v. *Cowper, post,* 143), or by others (*R.* v. *Dytche,* 17 Cox, 39; *R.* v. *Brownhill; R.* v. *Treloar* and *R.* v. *Beck, post,* 144; Wigmore, Ev., ss. 139-44); and although the prosecution may rebut such evidence (*R.* v. *Dytche, sup.; R.* v. *Winslow, post,* 180; *R.* v. *Rowland,* 1910, 1 K. B. 458, where a prisoner, called for his co-defendant, was cross-examined not only to discredit his testimony, but to criminate himself) yet the accused, it has been said, is allowed the greater latitude, since to exculpate himself he may implicate others by evidence of acts which the Crown could not tender against them (*R* v. *Beck,* and *R.* v. *Stevens, post,* 144; *cp.* however, *R.* v. *Thomson, ante,* 80). So, in affiliation proceedings, evidence may be given by the defendant that other men had intercourse with the complainant, provided it was at a time which could affect the paternity (*Garbutt* v. *Simpson,* 32 L.J.M.C. 186), otherwise the question is only admissible in cross-examination, and her denials cannot be contradicted (*id.; R.* v. *Gibbons,* 31 L.J.M.C. 98; as to rape, *post,* 190). For cases where several defendants are charged with a crime, but only one commits it, see *ante* 93. Neither the convictions, nor acquittals (*post,* 425, 428), nor confessions (*post,* 269) of third persons are, however, evidence for or against the accused for the present purpose.

Miscellaneous. As to identification by the *Opinion* of witnesses, see *post,* 398; by *Handwriting, post,* 523; and by *Photographs, post,* 398-9, 540-1.

EXAMPLES

Admissible.

Motive. A. is charged with the murder of B., a police constable;— the fact that B., shortly before the murder, had given evidence against A. on a charge of theft, together with the depositions taken under 11 & 12 Vict. c. 43, and containing B.'s evidence, are admissible against A. as constituting a motive for the murder (*R.* v. *Buckley,* 13 Cox, 293). Proceedings in Chancery have been received for the same purpose. (*R.* v. *Creau,* 8 Cox, 509, 510). So, where A. was charged with the theft of mess-moneys, a conversation between A. and his superior officer, in which A. asked him for a loan, as he was out in his squadron accounts, was received to show motive (*R.* v. *Westacott,* 25 T.L.R. 192).

A. is charged with the murder of B., an infant and the illegitimate child of A.'s wife by another man:—evidence that a fortnight before B.'s death, A. had said, "The child is no good; it is eating the other children's food," held admissible to

Inadmissible.

Motive. A. is charged with the murder of B., a police constable;—depositions containing the testimony given by B. against A. thirty years before the murder, on a charge of assault, held not admissible to show A.'s motive, the depositions being taken prior to 11 & 12 Vict. c. 43. [*R.* v. *Shippey,* 12 Cox, 161. This ground is not very clear, since such depositions appear to have been admissible under the old law also; the evidence, however, was not pressed.] So, where the alleged motive was hostility resulting from a notice to quit served on A. by his landlord—and the process-server having sworn that he left such notice with the servant at A.'s house —held that a copy of the notice was not admissible as it did not appear the notice had ever come to A.'s hand [*R.* v. *Creau, opposite.* In this case O'Brien, J., remarked: "In a civil proceeding the original notice need not be called for to let in a copy; but it was not clear that the same principle applied in a criminal case. How-

Admissible.

show motive, although it was not proved that A., when making the statement, had shown any intention of carrying it out, or used any violence towards B. [*R.* v. *Hagan*, 12 Cox, 257. In *R.* v. *Palmer*, 1856, Shorthand Rep. 308, Ld. Campbell remarked that "if there be any motive that can be assigned, I am bound to tell you that the *adequacy of that motive is of little importance*. We know from experience that atrocious crimes have been committed from very slight motives." Rare instances, however, hardly justify general propositions, and it seems obvious that a strong motive is more likely to induce action than a weak one; *cp. R.* v. *Godhino*, 7 Cr. App. R. 12, 13-14. Motive may also be considered in awarding sentence (*R.* v. *Bright*, 1916, 2 K.B. 441), and its absence may even afford evidence of insanity (*R.* v. *Abramovitch*, 7 Cr. App. R. 145, 147].

A. is charged in 1830 with the murder of B., a carpenter, in 1806. Evidence (1) that in 1806, great hostility existed between C., the rector of their parish, and the parishioners; that A. had expressed enmity against C. and said he would give £50 to have him shot; and that C. was shot by B., who was detected in the fact;—held admissible as showing that A. had a motive, in the fear of discovery, for murdering B.; and (2) that in 1829 bones were found in a barn which had in 1806 been occupied by A., which bones, from their size, might have been those of B.; and that a carpenter's rule, a pair of boots similar to B.'s, and a skull with teeth marked like his, were found in the same spot, held also relevant as showing the *identity of B.* (*R.* v. *Clewes*, 4 C. & P. 221).

The question being whether A. forged a deed whereby he obtained a large sum of money;—evidence that he was in very embarrassed circumstances and owed large sums to his creditors before and at the time of the alleged forgery, is admissible to show A.'s motive (*Roupell* v. *Haws*. 3 F. & F. 784; *cp. Dowling* v. *Dowling*, *ante*, 118; and *R.* v. *Heesom*, *post*, 180); and, in rebuttal, the fact that he was in easy circumstances at the time (*R.* v. *Grant*, 4 F. & F. 322).

Preparation, previous attempts, threats, &c. A. is charged with the murder of B. The following facts are relevant to show that A. committed the crime — (1) that a few days before the murder A. had bought a knife which might have caused the fatal wound. (2) That A. knew of habits of B. which would enable him readily and secretly to commit the murder (Steph. art. 9, illus. c). (3) That A. had been heard to declare he would be revenged on B. (*R.* v. *Ball*, 1911, A.C. 47, 68, *per* Ld. Atkinson: previous acts and words of the accused showing motive and enmity towards the deceased, are evidence

Inadmissible.

ever, the ground on which I reject the document is that it was tendered to supply a motive, and yet it never appeared that the notice came into the hands of the prisoner. In ejectment in a civil court, service on the servants would unquestionably be valid, but here the Court ought not to speculate upon the probability of it having reached the prisoner's hand, in order that the jury might presume a hostile motive in the prisoner's mind." See, also, *R.* v. *Pearce*, Peake, N.P. 75; *cp. post*, 543-4].

The question being whether A. murdered B., his wife;—evidence of violence done by A. to B. ten days before the murder, but not accompanied by declarations connecting it with the subsequent murder, was considered inadmissible to show A.'s motive, intention, or malice at the time thereof [*R.* v. *Mobbs*, 6 Cox, 223. *Sed qu.;* and connective circumstances, even without express declarations, have been received. Thus where A. was charged with shooting B. and admitted he had broken up her furniture some time before, the fact that he had then purchased the pistol with which the crime was afterwards committed, was received. [*R.* v. *Chomaten Yabu* (1903), West Australian L.R. 35; and in Russ. Cr., 7th ed., 2114, it is stated that in murder cases evidence of previous violence is frequently given without objection to prove ill-will; *cp. R.* v. *Ball*, *infra*; *R.* v. *Edwards*, *ante*, 80; and see *post*, 151].

Previous attempts. A. is charged with bribing B., a city official. The fact that A. had previously attempted to bribe C. another official;—Held, inadmissible to show A.'s motive, or identity (*People* v. *Sharp*, 107 N.Y. 427, 457-61; see *post*, chaps. xi.-xii.).

Physiognomy. Character. Avarice. Suspicion, &c. A. is charged with the murder of B. The following facts are irrelevant:—the fact (1) that A. was of sinister appearance; (2) that he bore a bad character (*post*, chap xiii); (3) that on a former occasion he narrowly escaped being convicted for the murder of another

Admissible.

not only of malice aforethought, but also that the accused killed the deceased). (4) That A. had made previous attempts on B.'s life. [*R.* v. *Donnall*, 2 C. & K. 308-9*n*, where a prior attempt was admitted to show that A. "did in fact administer the arsenic" to B., *per* Abbott, J. In *R.* v. *Towell*, 2 C. & K. 309*n*, approved by Willes, J., in *R.* v. *Harris*, 4 F. & F. 342, the fact that the deceased had been taken ill several months before, after taking porter with the prisoner, was admitted by Parke, B., not as direct proof of an attempt to poison, but as "tending to show antipathy against the deceased"; see *R.* v. *Neill Cream*, *post*, 180. In *R.* v. *Egerton*, R. & R. 375, and 6 B. & C. p. 148, a subsequent attempt was also admitted to confirm the prosecutor's testimony as to the robbery charged (see Corroboration, *post*, 492). Mr. Best remarks that "*previous attempts* are closely allied to *preparations* and only differ in being carried one step nearer the criminal act" (ss. 455-6); but such evidence is more usually tendered to rebut accident, &c., *post*, chap. xii.]. (5) That a few nights before the murder and while B. was absent, shots were fired at B.'s house which were represented by A. to have been fired at himself, but were more probably fired by him to induce a suspicion that assassins were about (*R.* v. *Patch*, Best, s. 455; Wills, Circ. Ev., 6th ed. 443, 446; *cp. People* v. *Zucker*, 20 App. Div. 363, affd. 154 N.Y. 770); (6) that both before and after the crime A. was observed near the spot (in explanation A. may prove that he had an independent reason for being there, *R.* v. *Barnard*, 19 St. Tr. 815, 833-4; *Prindle* v. *Glover*, 4 Conn. 266); (7) that *footprints* corresponding with the impression made by A.'s boots were traceable near the body of B. (*R.* v. *Beards*, Wills, Circ. Ev., 6th ed. 218; *R.* v. *Richardson*, *id.* 385); (2) that *bloodstains* were found on A.'s clothing which were those of a human being who suffered from anæmia, and that B. had been attended for anæmia (*R.* v. *Pateman*, 75 J.P.Jo. 317); in *R.* v. *White*, 2 Cox, 192, a witness for A. was allowed to prove that the day before the crime he met A. and saw bloodstains on his coat, which A. told him had been caused by a dead hare he carried over his shoulder, though this statement was inconsistent with A.'s explanation before the magistrate; (9) that after the crime A. absented himself from home; and (10) that he gave inconsistent accounts of his whereabouts on the day of the murder [see Best, s. 92].

A., a soldier, is charged with the murder of B., his officer. The fact that just before the murder A. had applied for an unusually long leave, stating that he was about to be married and being a Roman Catholic a special license would take some time to obtain:—Held, relevant, as it would

Inadmissible.

person; (4) that B. was found to have been robbed, and that A. was well known to be avaricious; and (5) that A. had been heard in his sleep to use language implying that he was the murderer. [See Best, ss. 91-2; and as to acts and declarations by *third* persons, *infra*, 143-4].

A. is charged with the murder of B. The fact that boots belonging to A. corresponded with *footprints* traced near B.'s body, such boots having been put into the footprints *after* but not *before* the comparison was made, is inadmissible [*R.* v. *Shaw*, 1 Lew. C.C. 116, *per* Parke, B.; *R.* v. *Heaton*, *id. per* Alderson, B.—The boots, indeed, should not be put into the marks at all, but impressions thereof made by the side, Wills. Circ. Ev., 6th ed., 220].

Admissible

allow him time to get well away before any enquiry about him would be made. The fact that, in his attestation paper, he had described himself as a Wesleyan, is also relevant, as showing that his reason for wanting long leave was untrue [*R.* v. *O'Donnell*, 12 Cr. App. R. 219. The latter fact, which was elicited from A. on cross-examination, was held admissible under the Cr. Ev. Act. 1898, s. 1, because it did not merely affect A.'s credit (*cp. post*, 478), but was relevant to the issue as well].

Special skill, capacity or knowledge. A. is charged with the murder of B. under circumstances which show that the crime must have been committed by a left-handed man, a skilful mechanic or a person with surgical knowledge;—evidence that B. possessed similar attributes is admissible (*R.* v. *Patch.* Wills. Circ. Ev., 6th ed. 190, 442-6; *R.* v. *Gibbons*, *id.* 352; *R.* v. *Richardson*, *id.* 190, 436-42; *R.* v. *Crippen*, 1910, Times, Oct. 19-20; so as to physical incapacity, to disprove a rape, *ante*, 119).

A. is charged with the murder of B. by poison. Evidence that A. possessed a treatise on poisons, the only pages cut being those relating to the poison in question, is admissible (*R.* v. *Donnellan.* Stephen, General View of the Criminal Law, 222, 253; *R.* v. *Hall*, 5 N.Z.L.R. 93, 95, C.A.).

Possession of Property and Documents. The question being whether A. was guilty of treason:—documents of an incriminating nature found in a locked portmanteau, though this had been out of A.'s possession for several days after his arrest;—Held inadmissible (*R.* v. *O'Brien*, 7 St. Tr. N.S. 1).

The question being whether A. murdered B. by the explosion of grenades;—the fact that the grenades were ordered by C., and the contents of a letter from C. (indicating hostility to B.) found at A.'s lodgings after his arrest, and bearing a memorandum in A.'s handwriting, are admissible against A. (*R.* v. *Bernard*, 1 F. &. F. 240).

A. is charged with committing acts of indecency with boys on March 16; defence, mistaken identity and *alibi*. The boys having testified to these acts, stated further that A. had made an appointment to repeat them at the same place and hour on March 19, where and when A. was in fact arrested while talking to the boys. On him were found powder puffs; and later, at his rooms, indecent photographs of naked boys. Held, that not only the puffs, but also the photographs were admissible against A. as evidence of identity:—(1) by the trial judge and the Ld. Ch. as showing abnormal propensities of the same kind as those exhibited by the man of the 16th, and so as corroborating the truth of the boys' testimony as to that date; (2) by the C.C.A. as implements of the crime found

Inadmissible.

Possession of Property and Documents. The question being whether A. and B. had stolen certain shawls;—the fact that an inventory of the shawls, not in A.'s handwriting, but contained in an envelope on which he had written "A.—private," was found in a bag which A. said belonged to B., in a room in which they both lodged;—Held inadmissible, on the ground that the indorsement on the envelope might have been written prior to the enclosure (*R.* v. *Hare*, 3 Cox, 247; *sed. qu.*, and see *note* to this case, Russ. Cr. 7th ed. 2100*n*).

A. is charged with receiving stolen property. The facts that the property was found in a house occupied by A. & B., in a box belonging to B., which contained property of A. and B., and of which A. had the key:—Held no evidence of possession aginst A. unless it were proved that A. knew the property was there (*R.* v. *Higginbottom*, 8 Cr. App. R. 79).

A. is charged with fraud in connection with the flotation of a company. A typewritten document relating to the affairs of the company found in A.'s office, but not signed by him, held inadmissible, as it might have been written by an employee or stranger, without A.'s knowledge or authority (*R.* v. *Hooley*, 1904, Times, Dec. 7, and *ex rel.*).

The question being whether A. (residing in London) had fitted out a vessel to be employed in the slave trade abroad;—slave-trading papers found on board at one (not the first) of the foreign ports at

Admissible.

in his possession, in the same way as jemmies, coining discs, or surgical instruments on charges of burglary, coiuing or abortion; (3) by Ld. Atkinson as showing the *intent* of the meeting on the 19th and so as evidence of identity; (4) by Lds. Sumner, Parker & Parmoor, because the acts of the 16th, *plus* the appointment to repeat them on the 19th, showed the same continuous abnormal propensities in both men and thus were specific indicia of identity; though *aliter* if there had been no appointment to repeat, since then the articles would only have shown a general evil disposition, and not a continuous abnormal propensity [*Thompson* v. *R.*, 1918, A.C., 221; 13 Cr. App. R. 61 (where the arguments are reported more fully); followed in *R.* v. *Twiss*, 1918, 2 K.B. 853].

A., a letter-carrier, is charged with secreting a letter containing a bill of exchange. The letter, which stated that the bill was enclosed, was allowed to be read to the jury as being in A.'s possession; but was held to be no proof that the bill was enclosed (*R.* v. *Plumer, ante*, 83; *cp. Bruce* v. *Hurley, ante*, 74; and *R.* v. *Cooper, post*, 181).

Flight. A. is charged with obtaining money from B. by fraud. In a previous civil action by B. against A. for damages for the same fraud, A. after the first day of the trial, had gone abroad and not appeared again thereat. This fact is admissible against A. on the criminal trial as conduct tending to show his guilt (*R.* v. *Ellis*, 1910, 2 K.B. 746, 755-6).

Acts and Declarations by the injured party and others. A. is charged with the murder of B. Evidence that, shortly before her death, B. was in a very melancholy and depressed state of mind and had threatened to commit suicide held admissible for A. [See *R.* v. *Cowper*. *R.* v. *Jessop*, and *R.* v. *Thomson, ante*, 80].

A. is charged with the murder of B. (his wife),—the fact that a week before the murder B. went to the house of a neighbour, and handing the latter an axe and a knife, said, "Please put these up, and when I want them I will fetch them, for my husband always threatens me with them, and when they are out of the way I feel safer."—held admissible [*R.* v. *Edwards*, 12 Cox, 230. But see as to this case *ante*, 80].

A. is charged with the murder of B., a constable. A verbal report made by B., in the course of duty, to his inspector, that he (B.) was about to go to a certain place to watch A., held admissible. [*R.* v. *Buckley, ante*, 79, where the grounds of admission are discussed]. So, a statement in the presence of A., made by B., when dying, to his doctor, who had asked whether B. suspected anyone, that "A, has mentioned W.," and injurious charges then

Inadmissible.

which the vessel touched, but which papers were not otherwise traced to A.'s knowledge:—Held inadmissible to connect him with the transaction, as the papers might have been introduced at some intermediate post without A.'s knowledge (*R.* v. *Zulueta*, 1 C. & K. 215).

A. is charged with stealing B.'s property, which is found in A.'s possession. A.'s daughter testifies that A. bought the property from C. for 3s. The prosecution may, *in rebuttal*, call C. to deny the sale or the price, but not to state that he "saw A. steal the property and assisted him in so doing," for this, being merely confirmatory, should have been given *in chief*. (*R.* v. *Stimpson*, 2 C. & P. 415. In 2 Phill. Ev. 410, it is said, "This is carrying the rule very far, as the fact of the prisoner's stealing the goods would be strong evidence that he did not buy them"; see *ante*, 40).

A. is charged with the murder of B. A letter (lost) which had been read while in B.'s possession, asking B. to return the letter and envelope to A., the sender;—Held, not admissible, no proof of A.'s handwriting being given (*R.* v. *Neill Cream*, 116 Sess. Pap. C.C.C. p. 1424).

Flight. A. is charged with robbing B. ou Oct. 15th, 1915. The fact that he evaded arrest when another similar charge was made against him on Oct. 26th, is not admissible (*R.* v. *Hampson*, 11 Cr. App. R. 75, 77).

Acts and Declarations by the injured party and others. A. is charged with the murder of B. The following acts and declarations of *third persons* are inadmissible;—(1) the fact that A. belonged to a people notoriously reckless of human life; (2) that much jealousy and ill-feeling existed between A.'s nation and B.'s nation; (3) that on the same spot, a year before, one of the former murdered one of the latter in the same manner (*post*, chap. xi.); (4) that all A.'s neighbours believed him guilty (*post*, chap. xxxv); (5) that both Houses of Parliament had voted Addresses to the Crown in which A. was assumed to be guilty (*post*, chap. xxix) [Best, ss. 91-2]; and (6) that C., on his death-bed had confessed that it was he, and not A., who had murdered B. (*R.* v. *Gray*, Ir. Cir. Rep. 79; Steph. art. 26; *post*, 275).

A. is charged with obtaining money by false pretences, in 1895. An expert having given his opinion that the handwriting of the letters containing the false pretence was, though disguised, the same as that of a list written by A. and found in his luggage when he was arrested;—the defence proposed to ask in cross-examination whether the handwriting of the letters was

Admissible.

made by A. against W., are receivable. In this case W. and others were called to prove the falsity of such charges, and also an *alibi* in respect of W. [*R.* v. *Patch*, Published Report, 117-120; *cp.* Statements in Presence, *post*, chap. xx. For statements by the injured person and others admissible as part of the *res gesta*, see *ante*, 79-81.]

A. and B. are charged with fraud. To show that A. was the dupe of B., A. may ask witnesses for the prosecution whether B. had not committed certain other frauds before A. came upon the scene, although this evidence might not have been admissible against B. if tendered by the prosecution [*R.* v. *Stevens*, 131 C.C.C. Sess. Pap. 183. *per* Darling, J., who commented upon the greater latitude allowed to the defence than to the prosecution; see, however, *R.* v. *Thomson*, *opposite*].

A. is charged with wounding a constable;—it is competent for A. to give in evidence facts showing that B., C. and D. were more likely to have committed the crime than he; and B., C. and D. may testify on oath that they were absent at the time [*R.* v. *Dytche*, 17 Cox, 39; in this case B., C. and D. had been convicted and were suffering imprisonment for the crime; *cp. R.* v. *Brannagan*, Wills, Circ. Ev., 6th ed., 114].

A. is charged with publishing defamatory libels in anonymous letters concerning B. Evidence that after A.'s arrest, further letters of the same kind and in a similar handwriting continued to be sent to B. is relevant as tending to show that persons other than A. were the authors of the original letters, and not A. (*R.* v. *Brownhill*, 8 Cr. App. R. 258; *R.* v. *Treloar*, 9 *id.* 1.).

Inadmissible.

not the same as that of certain other documents which the prosecution had previously submitted to the witness for examination, being exhibits in the trial of B. for a similar offence in 1877; the defence being also prepared to show that while B. was undergoing his sentence for such offence A. was at large and in America. Held, inadmissible, as raising a collateral issue likely to mislead the jury, viz., whether A. was or was not, the man convicted in 1877 under the name of B. (*R.* v. *Beck*, 31 L.Jo. 197; 123 C.C.C. Sess. Pap. p. 485, *per* Forest Fulton, C.S. [*Note.* — This case led to a public inquiry and the complete exoneration of Mr. Beck. The names, handwriting and methods employed in the two crimes being remarkably similar, A.'s defence was that they must have been committed by the same man. If therefore, A. proved that he could not have committed the 1877 crime, it went far to show that he had not, but that B. had, committed the 1895 crime. The rejected evidence was considered by Collins, M.R., Grantham, J., and Sir J. Edge, K.C., clearly relevant and admissible *for* A. (See Beck Report, pp. xii., 216); although proof that A. or B. had committed the first crime would not have been admissible *against* either to show that he had committed the second (*post*, chap. xi). *In R.* v. *Thomson* 1912, 3 K.B. 19, however, the general statement of Collins, M.R., in the Beck report, that defendants in criminal cases are not confined to strictly legal evidence, was disapproved (see 47 L.Jo. 379; 133 L.T.Jo. 156). Mr. Blake Odgers remarks that the fallacy in the Beck case was that he did not try to prove an *alibi*, *ie.* that he was not the man in prison at the time alleged,—but desired to prove that he was not the man alleged, *i.e.* that he was neither the man previously convicted, nor the committer of the second offence (Transactions of Medico-Legal Soc. Vol. 2. p. 83, 1905).]

A. is charged with the murder of B. Evidence that, after the murder and during a quarrel between C. and C.'s wife (deceased), the latter taking two bullets out of a cupboard, said to C., "The third one killed B."—being tendered to show grounds for suspecting C. rather than A.;—Held inadmissible, the presence of the bullets in the cupboard, or their being taken out by C.'s wife, being irrelevant, and, even if remotely relevant, needing no explanation and not being in fact explained in any material sense by her statement [*Com.* v. *Chance*, 174 Mass. 245; *ante*, 80].

CHAPTER X.

FACTS RELEVANT TO PROVE STATES OF MIND.

When the state of mind of a party with reference to a transaction is material, all acts and declarations from which it may be inferred, whether previous or subsequent to the transaction are, in general, *primâ facie* evidence, either for or against him.

Declarations tendered for this purpose are, however, original evidence and not hearsay admitted by exception, *i.e.* they are presumptive evidence of the *existence* of the alleged state of mind, but are not receivable to prove the *truth* of the matters asserted (*ante,* 103; *post,* 218).

KNOWLEDGE AND NOTICE. (a). As to a party's own declarations in proof of his knowledge, see *ante,* 65, 86-7. Actual knowledge, however, may also be inferred circumstantially, from the fact that a party had reasonable *means of knowledge* (*Bates* v. *Hewitt,* 15 L.T. 366)—*e.g.* **Possession of, or Access to, Documents** containing the information, especially if he has answered, or otherwise acted upon, them [*cp. Wright* v. *Tatham, ante,* 84; as to passengers' tickets, see *infra*; and as to admissions of the *truth* of the document from the possessor's conduct regarding it, *post* chap xx.]; or sometimes, *e.g.* in the case of Notices, from the mere fact that such documents, properly addressed, have been delivered at, or posted to, his residence (as to documents found after the arrest of a prisoner, or intercepted in the post, see *ante,* 93, 138, 142). So, **Execution** of a will (*Guardhouse* v. *Blackburn,* L.R. 1 P. & D. 109; *Beamish* v. *B.,* 1894, 1 I.R.7), or deed (*Re Cooper,* 20 Ch. D. 611; *Paul* v. *O'Reilly,* 49 Ir. L.T.R. 89), or contracting that the latter shall contain certain clauses (*The Draupner,* 1910, A.C. 450) will imply knowledge of its contents; though mere **Attestation** will not (*Harding* v. *Crethorn,* 1 Esp. p. 58); nor will notice of the existence and preparation of a draft deed be notice of the execution of the deed (*Williams* v. *W.,* 17 Ch. D. 443). The previous **Course of Dealing** between a party and his opponent or others is, also, admissible to show his knowledge (*Lewis* v. *G. W. Ry., post,* 152; *G. W. Ry.* v. *Sutton,* L.R. 4 H.L. 226; *Sweetman* v. *S.,* 2 Ir. L.T. Jo. 136). **Access** to documents may also, sometimes, raise a presumption of knowledge—*e.g.* in the case of the rules of a club; books kept between partners (though the inference here is not invariable, *post,* 258); master and servant; trader and shopman; banker and customer (Tay., s. 812); or vestryman and vestry clerk (*Cooper* v. *Law,* 28 L.J.C.P. 283). This presumption, however, does not apply in the case of directors (*Hallmark's Case,* 9 Ch. D. 329; *Re Denham,* 25 Ch. D. 752; *Re Printing Co., Exp. Cammell,* 1894, 1 Ch. D. 528; *Dovey*

v. *Cory,* 1901, A.C. 492-3), or shareholders (Lindley, Company Law, 312) as to the share register and other books of a company. But knowledge will be imputed where it is a party's **Duty to know.** (*Hallmark's Case, sup.*) though not from a mere *right to inspect* (*Hill* v. *Manchester Co.,* 5 B. & Ad. 866; *Waterford Corp.* v. *Price,* 9 Ir. L.R. 310). Thus, underwriters are presumed to know matters of common notoriety or knowledge, and matters which an insurer in the ordinary course of his business ought to know (Marine Ins. Act, 1906, s. 18), *e.g.* the contents of Lloyd's Shipping List (*Mackintosh* v. *Marshall,* 11 M. & W. 116); and directors what is done in the management of the company's affairs (*Re Esparto Trading Co.,* 12 Ch. D. 191); while not only directors (*Lane's Case,* 1 De G.J. & S. 504, 506), but all persons dealing with the company (*Mahony* v. *East Halford Co.,* L.R. 7 H.L. 869, 893), will be deemed to know its registered regulations, *i.e.* deed of settlement, or Memorandum and Articles of Association. So, the **Notoriety** of a fact may support an inference of knowledge (*Bates* v. *Hewitt, post,* 152), *e.g.,* of a custom in a party's trade (*ante,* 107), or even in that of persons merely trading with him (*Exp. Powell, Re Matthews,* 1 Ch. D. 501; *Re Peel, Exp. Crossley,* 1894, 1 I.R. 235); though mere *Rumour,* or *Reputation* as to a fact is not admissible for this purpose (*Greenslade* v. *Dare,* 20 Beav. 284; *R.* v. *Gunnell,* 16 *Cox* 154). And **Publication in a Gazette** or *newspaper* is receivable to fix a party with notice; though (unless the case is governed by statute) it is always advisable, and sometimes necessary, to furnish evidence that the party to be affected has probably read the paper—*e.g* that he takes it in, or attends a reading-room where it is taken, or has shown knowledge of other matters contained in the same number, or that it is a publication with which it is his duty to be familiar; but the mere fact that the paper circulates in his neighbourhood is no **proof** (Tay. ss. 1665-1666; Whart., Civ. Ev. ss. 671-675; *post,* 338; in rebuttal, evidence might be given that the party was unable to read). As to proof of knowledge by *subsequent* knowledge, see *ante,* 87; *by Similar Facts, post,* 174-5; and by *Recitals in Statutes, post,* 336.

In this connection, however, the distinction between *admissibility* and *sufficiency* must always be borne in mind. Thus, in cases of **bigamy,** the prisoner's actual knowledge that his former wife was alive must be proved, mere means of knowledge being insufficient (*R* v. *Faulkes,* 15 T.L.R. 250; *R.* v. *Tolson,* 23 Q.B.D. 168, 183; *R.* v. *Curgenwen,* L.R. I.C.C.R. 1). See also, as to an underwriter's knowledge of a ship's character, *Bates* v. *Hewitt, post,* 152; and as to *scienter* in the case of stolen goods, *R.* v. *Davis, post,* 174-5. As to knowledge of, and notice to, *Agents, Partners, Co-Trustees, Co-Executors, Directors, &c.,* in civil and criminal cases, see *ante,* 89-92.

Constructive Notice has been defined as a presumption of knowledge which will not be allowed to be rebutted; and arises, in equity, where a party or his agent has had the means of knowledge, and might have obtained it, but for his gross negligence, or wilful abstention (Ashburner, Equity, 84-97; Kerr, Fraud, 3rd ed., 230-64). Thus, claiming under an instrument is constructive notice of its contents; and notice of a deed or a trust will be notice of its terms provided the noticee had a reasonable opportunity of inspecting the document (*Patman* v. *Harland,* 17 Ch. D. 353; *Reeve* v. *Berridge,* 57 L.J.Q.B. 265; *Re Nisbet,* 1905, 1 Ch. 391; see Conveyancing Act, 1882, s. 3, sub-s.), and that the terms were not unusual ones (*Molyneux* v.

Hawtrey, 1903, 2. K.B. 487). But notice to a purchaser of land that it is occupied by a tenant is not notice of the title or rights of the lessor of the tenant (*Hunt* v. *Luck*, 1902, 1 Ch. 428); though it is of the tenant's rights (*id.*; but see *Caballero* v. *Henty*, 9 Ch. 447; and Kerr, Fraud, 3rd ed., 239-43); and the conduct of the party giving the notice may restrict its effect (*English Co.* v. *Brunton*, 1892, 2 Q.B. 700; *Re Valletort Co.*, 1903, 2 Ch. 654).

The above doctrine, however, is a purely equitable one, familiar enough in dealing with land and estates where title is everything, and can be deliberately investigated, but not extending to mercantile transactions, where possession is everything, and there is no time to investigate title (*Manchester Trust* v. *Furness*, 1895, 2 Q.B. 539; *The Draupner*, 1909, P. 219). At common law, accordingly, notice of a document is not necessarily notice of its contents. Thus, a bill of lading which states that goods are to be delivered on "payment of freight, and other conditions as *per* charter-party," only incorporates conditions of the latter referring to freight and delivery, and not *all* its contents, as in equity (*Manchester Trust* v. *Furness, sup.*; *Diedrichsen* v. *Farquharson*, 77 L.T. 514; *The Draupner, sup.*; *The Portsmouth*, 1912, A. C. 1); nor will it incorporate terms inconsistent with the bill of lading (*Turner* v. *Haji*, 1904, A.C. 826, 836; *Temperley* v. *Smyth*, 21 T.L.R. 739), and where such inconsistency exists the bill of lading will prevail (*Crossfield* v. *Kyle Shipping Co.*, 1916, 2 K.B. 855, C.A.; *Hogarth Co.* v. *Blythe Co.*, 1917, 2 K.B. 534, C.A.); see further as to Incorporation of documents, *post*, 525-8, 612. Moreover, the doctrine does not apply to negotiable instruments or debentures (*Manchester Trust* v. *Furness, sup.*; *London Joint-Stock Bank* v. *Simmons*, 1892, A.C. 201; *Thompson* v. *Clydesdale Bk.*, 1893, A.C. 282; *cp. Re Valletort Co., sup.*); unless, indeed, the party knew facts or heard statements implying something adverse, and wilfully abstained from further inquiry, when, even at common law, knowledge will be inferred (*English Co.* v. *Brunton, sup.*; *Jones* v. *Gordon*, 2 App. Cas. 616; *Eyre* v. *McFarlane*, 1898, Times, July 18). In the case of **Passengers' Tickets**, if the issuer has done all that was reasonably necessary to give the ticket holder notice of the conditions thereon, the latter will be bound by them, although it is not proved that he was in fact aware of them (*Hood* v. *Anchor Line*, 1918, A.C. 837). Thus, knowledge of their conditions will be imputed (1) if the party knows or believes that there are conditions on the ticket although he has not read them (*Harris* v. *G. W. Ry.*, 1 Q.B.D. 515; *Parker* v. *S. E. Ry.*, 2 C.P.D. 416), or (2) if, being an intelligent person, he knows, though without reading it, that there is writing or printing thereon, for in this case, he must be taken to know that such writing embodies conditions (*Acton* v. *Castle Mail Co.*, 73 L.T. 158; *Burke* v. *S. E. Ry.*, 5 C.P.D. 1). While (3), if he does not know there is writing or printing thereon (*Henderson* v. *Stevenson*, L.R. 2 H.L. Sc. 470), or, though knowing it, does not know (*e.g.* from being an ignorant person, or from the conditions being minute or obscured) that it contains conditions, knowledge will not be imputed (*Richardson* v. *Rowentree*, 1894, A.C. 217; *Stephen* v. *Intern. Co.*, 19 T.L.R. 621; *Roberts* v. *Gen. Steam Co.*, 1906, Times, Jan. 24; *Skrine* v. *Gould*, 29 T.L.R. 19, C.A.; *Roe* v. *Naylor*, 1917, 1 K.B. 712; though see *Hooper* v. *Furness Ry.*, 23 T.L.R. 451; *Marriott* v. *Yeoward*, 1909, 2 K.B. 987; *Cooke* v. *Wilson*, 85 L.J.K.B. 888, C.A.; *Grand Trunk Ry.* v. *Robinson*, 1915, A.C. 740). The inference of knowledge, how-

ever, will vary with the nature of the document, *e.g.* the rules as to passengers' tickets do not apply to ordinary contracts (*Roe* v. *Naylor, sup.*); and though the acceptance of a toll-gate ticket might not imply knowledge of the conditions thereon, that of a bill of lading (*Parker* v. *S. E. Ry., sup.*). or sold note (*Roe* v. *Naylor, sup.*), would. So, a party has been held bound, not only by an auctioneer's receipt, but by conditions elsewhere exhibited, to which the receipt referred and was subject (*Watkins* v. *Rymill,* 10 Q.B.D. 178). As to incorporation of documents by reference, generally, see *post,* 525-8.

INTENTION, when in Issue, or Relevant. (*b*) Formerly it was supposed, perhaps in view of the then incompetency of parties as witnesses, that intention was a matter incapable of proof; but now it is recognised that the state of a man's mind is as much the subject of evidence as the state of his digestion. It may be harder to prove than more external facts, but whenever material, one may prove it if he can (Pollock, Law of Fraud, 61). Thus, it may be proved, even in a party's own favour, not only by his direct testimony, or declarations out of Court (either as part of the *res gesta,* or in some cases even unconnected with an act, *ante,* 63-4), but also circumstantially by acts and events previous or subsequent to the transaction (*Re Grove,* 40 Ch. D. 216, 242); as well as, against himself, by his own admissions. As to proof of intention by similar facts, see *post,* 175; by motive, *R.* v. *Heesom,* 180; by the acts, &c., of third persons, *R.* v. *O'Connell,* 184.

Intention, though not in issue, may itself sometimes be relevant to prove other elements of a transaction, *e.g.* (1) that an act intended was in fact done (*ante,* 64); or (2) after the act has been proved *aliunde,* to show the identity of the doer (*ante,* 137). How far (3) a party's intent at one time, proved either by his own declarations or otherwise, is relevant, on the presumption of continuance, to show his intent at another, *i.e.* in doing some future or even past act, seems doubtful, though the tendency is perhaps to admit the evidence (*ante,* 64, 103-5). The question of *subsequent* intent, to prove *prior* intent, has caused special difficulty. Thus, in *R.* v. *Cooper, post,* 181, Bramwell, B., asked how what happened *after* the act, could be evidence of the defendants' intent in doing it; though this objection is not now tenable (*R.* v. *Mason,* 10 Cr. App. R. 169; *R.* v. *Smith,* 11 *id.* 229). While in *O'Brien* v. *Sheil,* and *Williams* v. *W., post,* 138, declarations of intent after an act were rejected, because the question was said to be "what was the intention at the time, and not what it was subsequently," the Court treating the admissibility of the subsequent intent not as a question of logical relevancy, but as one raising an independent issue; *cp. Re Churchill,* 86 L.J. Ch. 209, 212.

Generally speaking, a man is presumed to *intend the natural consequences of his acts;* and where this presumption is conclusive, no evidence *contra* will be allowed, though it is otherwise where it is disputable (Tay., ss. 80-3). Thus, where A. is alleged to have passed off his goods as those of B., and a comparison of the goods, explained by surrounding circumstances, shows that A.'s goods *are* calculated to deceive, the presumption will be conclusive, and evidence of A.'s intention to deceive or the reverse will be inadmissible; while, if such comparison and explanation leave the matter doubtful his actual intent may be shown (*Saxlehner* v. *Appollinaris Co.,* 1897, 1 Ch. 893, 900-1). In the case of a sober man, indeed, the presumption may be rebutted in many ways; while in that of a drunken man, evidence may be given that he was in such a state

as to be incapable of forming the specific intent alleged (*R.* v. *Beard,* 1920, A.C. 479). As to this presumption in cases of defamation, see *post,* chap. xlvi., rule 1, and Odgers on Libel, 14.

In the case of formal Documents, the intention must be gathered from the writing itself, explained by such surrounding circumstances as are receivable for that purpose, direct declarations of intent being in general excluded in aid of construction (*post,* chaps. xxviii., xlvi.).

When Irrelevant. Where intention is by law immaterial, evidence thereof will be excluded on that ground (*ante,* 27). Thus, where a person has a right to do an act, the intention or motive with which it was done cannot in general be inquired into (*Bradford Corp,* v. *Pickles,* 1895, A.C. 587; *Allen* v. *Flood,* 1898, A.C. 1; *Quinn* v. *Leathem,* 1901, A.C. 492, 508-9; Best, s. 96). Nor can that of a negligent act (Beven, Negligence, 2nd ed., 17); nor of an infringement (*Oxford* v. *Gill,* 1899, Times, June 14); nor of an act prohibited irrespective of a *mens rea, e.g.* cruelty to animals (*Duncan* v. *Pope,* 80 L.T. 120), or obtaining credit without disclosure of bankruptcy (*R.* v. *Dyson,* 1894, 2 Q.B. 176).

MOTIVE. As to the distinction between *intention* and *motive,* which has been called its subjective antecedent, see 24 Law Mag., 1899, 321; Wills, Circ. Ev., 6th ed., 54, 57-68; Austin, Lectures, 12, 18, 19; 18 Harv. Law Rev. 411; Wigmore, Ev., s. 119. And as to Motive to Show Identity, *ante,* 137, 139.

GOOD AND BAD FAITH. (*c*) A party's good faith in doing an act may generally be inferred from any facts which would justify its doing (Whart. Civ. Ev., s. 35). In such cases the state of his knowledge (*London J.-S. Bank* v. *Simmons,* 1892, A.C. 201, 221); or the advice, however erroneous, that he received (*Ravenga* v. *Mackintosh,* 2 B. & C. 693; *post,* 157); or the information, whether true or false, on which he acted (*Shrewsbury* v. *Blount, post,* 155; *Thomas* v. *Russell,* 9 Ex. 764; *Taylor* v. *Willans,* 2 B. & Ald. 845; *Dovey* v. *Cory,* 1901, A.C. 477; Tay., s. 576) may often be relevant. So, to show the *bonâ fides* of a party's belief as to any matter, it is admissible to show the state of his knowledge, and that he had reasonable grounds for such belief (*Derry* v. *Peek,* 14 App. Cas, 337); or that it was shared by the community, or even by individuals similarly situated to himself (*Sheen* v. *Bumpstead* 2 H. & C. 193; *post,* 155); while the absence of reasonable grounds of belief in the existence of a fact (*e.g.* means of knowing the opposite) is evidence of want of honest belief (*Derry* v. *Peek, sup.;* see, however, *Watson* v. *Smith, post,* 151). Under the Marine Ins. Act, 1906, s. 20, a representation as to a matter of expectation or belief is true if it be made in good faith.

The relative positions and circumstances of the parties are often material in determining their good or bad faith in a transaction; a higher standard of probity being demanded from either when the other is, *e.g.* of weak intellect, intoxicated, illiterate, or acting under duress or fear; or occupies the position of child, ward, client, or patient to the other (Kerr on Fraud, 129-181; *ante,* 33).

As to when good or bad faith, although not in issue, is relevant to support or impeach a party's case, see *ante,* 113, 133.

FRAUD. (*c*) When fraud is in issue, the particulars of it have generally to be pleaded, and the question of their sufficiency often becomes one of law. Fraud imports moral obliquity, a dishonest or wicked mind; but facts may, of course, be evidence of fraud without being in law sufficient to constitute or establish it (*Derry* v. *Peek, sup.,* at p. 369; *Le Lievre* v. *Gould,* 1893, 1 Q.B. 461, 500; Kerr on Fraud, 1-16). Thus, on a charge of obtaining goods by false pretences, the fact that the accused obtained them by a false statement, though strong evidence of a fraudulent intent, is not conclusive, for he may show that he had well grounded hopes of paying (*R.* v. *Hunt,* 13 Cr. App. R. 155). So, the fact that an act was customary is admissible in rebuttal (*R.* v *Spencer,* 20 Cox 692; *cp. R.* v. *O'Connell, post,* 184).

Concealment of Material Facts (*e.g.* those affecting title or risk) by either party to a contract is evidence of fraud. A vendor, however, is not bound to disclose every defect in the property sold; nor *à fortiori* is a purchaser bound to disclose facts which would increase its value; and where there is no obligation to divulge, the *passive acquiescence* of either in the other's mistake is not evidence of fraud (*Smith* v. *Hughes,* L.R. 6 Q.B. 597; *cp. Ward* v. *Hobbs,* 4 App. Cas. 13).

Misrepresentation of Material Facts may itself be perfectly innocent; or, even though made without reasonable grounds of belief, merely negligent; but it becomes fraudulent if made (1) *knowingly,* or (2) *without belief in its truth,* or (3) *recklessly* without care whether it be true or false [*Derry* v. *Peek, sup.;* and "without care" does not mean without taking care, but being wilfully indifferent to the truth of some statement which it is known will be acted on, *Angus* v. *Clifford,* 1891, 2 Ch. 499, *per* Bowen, L.J.; *Le Lievre* v. *Gould, sup.; Low* v. *Bouverie,* 1891, 3 Ch. 82]. In this connection, however, actions for rescission of contract must be distinguished from those for damages for deceit; a misrepresentation of material facts, though honestly made, being sufficient to sustain the former, while fraud in one of the three forms, *sup.,* must be proved in the latter (*Derry* v. *Peek, sup.*). Moreover, a fraudulent statement is not neutralised by a proviso that the complainant is to make his own inquiries (*Pearson* v. *Dublin Corp.,* 41 Ir. L.T.R. 221, H.L.), nor even by proof that the complainant knew of its untruth (*Wells* v. *Smith,* 1914, 3 K.B. 722). [Kerr, Fraud, 17-128, Ros. N. P., 18th ed., 656-8, 729-835.] As to misrepresentation in prospectuses of companies, see Company (Cons.) Act, 1908, s. 84; and the uncorroborated statements of promoters and vendors do not afford reasonable grounds for directors believing them to be true (*Adams* v. *Thrift,* 1915, 2 Ch. 21). As to Similar Facts to show fraud, see *post,* 175, 182.

Inadequacy of Price or Value. Gross, though not slight, *inadequacy of price* may imply fraud, *e.g.* in the sale of reversions (Tay., s. 153), negotiable instruments (*Jones* v. *Gordon,* 2 App. Cas. 616), stolen property (Ros. Cr. Ev., 12th ed., 708; *R.* v. *Powell,* 3 Cr. App. R. 1), or the goods of a bankrupt (*Re McCue,* 12 Ir. L.T.R. 37; as to such sales being merely under-value, however, and not under-cost, see *R.* v. *Crane,* 6 Cr. App. R. 185). So, on a charge of false pretences, evidence of value may be material as showing that the prosecutor was induced to act to his injury (*R.* v. *Newton,* 109 L.T. 747); while the trifling value of the property may be relevant for the accused (*R.* v. *Millington,* 11 Cr. App. R. 86).

MALICE. (*d*) The nature of malice varies in law with the proceedings in which it is in question. Thus, it means one thing in relation to murder, another in relation to the Malicious Damage Act, 1861, and a third in relation to libel (*R.* v. *Tolson*, 23 Q.B.D. 168, 187; see fully 106 L.T. Jo. 9; 24 Law Mag., 1899, 341; 18 Harv. L. Rev. 411). It has generally, however, to be inferred from the previous and subsequent conduct of the parties, or the terms upon which they have lived—*e.g.* previous enmity, threats, quarrels, and violence; while in rebuttal previous expressions of good-will and acts of kindness may be shown (Russ. Cr., 7th ed., 2114; *post*, 156-7).

In cases of libel, malice may be inferred not only from the transaction itself (*i.e.* the nature of the libel, with its mode and extent of publication), but from previous ill-feeling or disputes between the parties, the repetition of the libel, the publication of similar ones on other occasions (*post*, 175), and in fact from the defendant's whole conduct down to, or even at, the trial (*Praed* v. *Graham*, 24 Q.B.D. 53, C.A.; *Simpson* v. *Robinson*, 12 Q.B. 511). [Tay., ss. 340-344; Ros. N. P., 836-865; Odgers, Libel, 306-335]. So, the knowledge and belief of the defendant as to the truth of the statements made by him is often material in determining his state of mind towards the plaintiff (*Clark* v. *Molyneaux*, 3 Q.B.D. 237; *Fountain* v. *Boodle*, 3 Q.B. 5).

In actions for malicious prosecution, the defendant's negligence in not making proper inquiries, or his want of reasonable and probable cause for the proceedings, is evidence of malice, though it does not necessarily import it. So, his recklessness as to whether the charge be true or false, or a corrupt motive in instituting the charge, although coupled with an honest belief in its truth, will constitute malice (*Brown* v. *Hawkes*, 1891, 2 Q.B. 718; *Moore* v. *Trulock*, 33 Ir. L.T.R. 62; *Coulter* v *Dublin Ry.*, 9 Ir. L.T.R. 209); while the mere fact that the honest belief was not based on reasonable grounds, is no evidence of malice (*Watson* v. *Smith*, 15 T.L.R. 473; see, however, *Derry* v. *Peek*, *ante*, 150). As to the different burdens of proof in actions for malicious prosecution and those for false imprisonment, see *ante*, 31.

EXAMPLES.

(*a*) *Knowledge.*

Admissible.	*Inadmissible.*
Directors. The question being whether A., a director of a company, had notice of an illegal transfer passed at a board meeting in his absence;—the fact that A. was present at the next board meeting when the minutes of the former one were read and confirmed, affects him with such notice, although he did not arrive till after they had been read, and denied all knowledge of them, for he had the opportunity of reading them though he came late (*Ashhurst* v. *Mason*, 20 Eq. 225; *Joint-Stock Co.* v. *Brown*, 8 Eq. 381; *Re Llanharry Co.*, 4 DeG. J. & S. 426; but mere presence at such confirmatory meeting is no concurrence in the illegality, *Re Lands Allotment Co.*, 1 Manson, Bpy. Rep. 107). As to mining directors' knowledge of books kept at the mine, see *Shrewsbury* v. *Blount*, *post*, 155.	*Directors.* The question being whether A., a director, had notice of an illegal transfer passed at a board meeting in his absence;—the fact that A., though not present at the next board meeting when the minutes of the first meeting were confirmed, was present at a third meeting, when a formal minute approving of the transfer was passed, held not sufficient to affect A. with notice (*Ashhurst* v. *Mason*, *opposite*). The question being whether A., a director of a company, knew that his name was inscribed on the share register;—the mere facts that A. attended meetings of the company and acted as director are no proof of such knowledge (*Hallmark's Case*, 9 Ch. D. 329).

Admissible.	*Inadmissible.*
Debtors. The question being whether A., a debtor, knew that he had committed an act of bankruptcy;—the fact that he had notice of a bankruptcy petition having been filed against him, which was founded on such act, is admissible. (*Re Sedgwick, Exp. Hobbs*, 9 *Morell*, 217; for other facts relevant for the same purpose, see *Exp. Snowball, Re Douglas*, L.R. 7 Ch. 534; and as to debtor's own statements to show his knowledge, *ante*, 86-7).	
Consignors. The question being whether A., in sending goods by rail "at owner's risk," knew the meaning attached by the company to the phrase;—the fact that he had previously sent goods by the same company, sometimes at the owner's risk and sometimes at the company's, paying different rates for each, is relevant (*Lewis* v. *G. W. Ry.*, 3 Q.B.D. 195; *cp. Peek* v. *N. Staff. Ry.*, *post*, chap. x]vi). So to show that cargo owners knew that a charter-party contained a negligence clause, evidence (1) that they knew they had *contracted* for such a charter-party, and (2) that such a charter-party had in fact been made,—is admissible (*The Draupner*, 1910, A.C. 450).	
Knowledge of Character of Ship. A., a ship-owner, sues B., an underwriter, for loss of A.'s ship X. by capture. Defence, that A. concealed from B. that X. was a notorious Confederate cruiser, which enhanced B.'s risk. Evidence that the exploits of X. had been discussed in Parliament, the Press, and mercantile circles, admitted to show that though B. swore he did not know of the identity of the ship, yet that by ordinary care and inquiry he might have known [*Bates* v. *Hewitt*, 15 L.T. 366. A. failed, however, to recover, as *actual* knowledge by B. was not proved].	
Knowledge of Insanity. The question being whether A., at the time of making a contract with B., knew the latter was insane;—evidence of B.'s conduct, both before and after the transaction, is admissible as showing that his lunacy was of such a character as must have been apparent to A. (*Beavan* v. *McDonnell*, 10 Ex. 184; *Lovatt* v. *Tribe*, 3 F. & F. 9; *Hassard* v. *Smith*, I.R. 6 Eq. 429).	*Knowledge of Insanity.* The question being whether A. knew at a certain time that B. was insane;—the fact that B. was generally reputed to be insane in the neighbourhood in which A. and B. lived at the time in question, is inadmissible (*Greenslade* v. *Dare*, 20 Beav. 284; *Hassard* v. *Smith*, *opposite*, and see *R.* v. *Gunnell*, *ante*, 86).
Knowledge of Propensities of Animals. The question being whether A., the owner of a dog, knew of its mischievous propensities;—evidence that he generally kept it tied up, and had promised to pay compensation to a person whom it was alleged, though not proved, to have bitten (*Beck* v. *Dyson*, 4 Camp. 198); or that he had offered to pay compensation for its biting cattle, "if it was proved to have done so" (*Thomas* v. *Morgan*, 2 Cr. M. & R. 496); or had warned another person to beware of it (*Judge* v. *Cox*, 1 Stark, 285);—is admissible; so, where the dog was *reported* to have been bitten by another dog which	*Knowledge of Propensities of Animals.* The question being whether A., the owner of a dog, knew of its mischievous propensities;—mere proof (1) that the dog was in fact of a savage disposition, or (2) that *after* biting the plaintiff's cattle, it had bitten other people's cattle,—is no evidence of A.'s *scienter* at the time the plaintiff's cattle were bitten (*Thomas* v. *Morgan*, *opposite*).

Admissible.	*Inadmissible.*
was mad, this fact, especially as the defendant had tied it up, was held evidence of *scienter* (*Jones* v. *Perry*, 1 Esp. 482; see, however, *Greenslade* v. *Dare*, *sup.*). As to complaints of the dog made to A.'s agents see *ante*, 95. Where A.'s sow had killed B.'s cow, the fact that A. had previously seen his sow kill C.'s cocks and hens, was admitted to prove A.'s *scienter* of its mischievous propensities (*Quin* v. *Q.* 39 Ir. L.T.R. 163; *cp. post*, 162). *Knowledge of Poisons.* See *R.* v. *Donnellan*, *ante*, 142.	*Knowledge of Contents of Newspaper.* To prove that an article in a certain newspaper had come to A.'s knowledge;—evidence that a copy of such newspaper had been printed and deposited at the Stamp Office, held not admissible to show that other copies of the same issue had been printed and published to the world, so as to come to A.'s knowledge (*Watts* v. *Fraser*, *post*, 167)

(*b*) *Intention.*

Insurance. A. having insured his life, but neither the proposal nor agent's receipt for premium stating for whose benefit it was to be, and the policy being only completed after A. died;—declarations made by him to the agent, that it was for his wife's benefit, held admissible, the contract being partly written and partly oral. Similar declarations by A. to his wife and friends both *before* the proposal that he intended to insure for her, and *after* it, that he had done so, were also received, apparently in corroboration. [*Newmon* v. *Belston*, 76 L.T.Jo. 228; affd. 28 Sol. Jo. 301 C.A.: *cp. contra*, *R.* v. *Thomson*, *infra*, 154].

In an action against an insurance office, on a policy on the life of A. (deceased), brought by his representatives, to which the defence was that A. had insured not for his own benefit, but for that of his son, B.;—(1) Evidence tendered by plaintiffs of conversations some time before the insurance between A. and a witness for the plaintiffs, showing that A. intended to insure for his own benefit; and (2) Evidence tendered by defendants of conversations between B. (deceased) and a witness for the defendants, that B. intended to insure A.'s life as a provision for himself in case of A.'s death—held admissible as conduct relevant to the issue [*Shilling* v. *Accidental Death Co.*, 1 F. & F. 116. In a shorter report of this case in 4 Jur. N.S. 244, it is stated that, on a witness being asked whether the intestate had *consulted* him about insuring his life, and the question being objected to as hearsay, Erle, C.J., remarked that there were cases where a man's words are his acts, and that this question came within the category and was not inadmissible as hearsay; *cp. post*, 219-21]. For testamentary cases in which intent at one time (proved by the testator's own declarations) have been received to show intent at another, see *post*, chaps. xxviii., xlvi.

Merger of Lease in Fee. On Jan. 27, 1914, A. & B., sisters, purchased certain

Bankruptcy. The question being whether A., an insolvent, in executing a trust deed for his creditors on Jan. 1, did so with intent to petition;—statements in a schedule of his affairs delivered in connection with a petition filed in May, held inadmissible to show such intent [*Peacock* v. *Harris*, 5 A. & E. 449. Denman, C.J., remarked: "Here the evidence is of something done under the statute *alio intuitu*. And even if it were not so, an act cannot be qualified by insulated declarations made at a later time"].

Advancement. A. lodges certain securities at a bank in the joint names of himself and B., his daughter. After A.'s death, a memorandum, dated fifteen months subsequently to the deposit, is found in which he directs the securities to be applied to other purposes. Held the memorandum was not admissible to rebut the presumption that the money was a gift to B. [*O'Brien* v. *Sheil*, I.R. 7 Eq. 255; *Williams* v. *W.*, 32 Beav. 370; *post*, chap. xlvii. *Aliter* if the memorandum had been contemporaneous with the deposit, since the question was what was the intention *at the time* of the transaction and not what it was *subsequently*. See as to these cases *ante*, 148.]

Admissible.	*Inadmissible.*
freehold land subject to an existing lease of part thereof, which lease was on Dec. 3, 1914, assigned to them as tenants in common. By a subsequent deed on Oct. 7, 1915. A. and B. mortgaged the leasehold premises and freehold land as separate properties, to C. Held, that the last named deed was admissible as evidence not only that A. and B. believed there had been no merger on Dec. 3, 1914, but that such was their intention at that date. [*Re Fletcher*, 1917, 1 Ch. 339, C.A.; *ante*, 85; *Lea* v. *Thursby*, 1914, 2 Ch. 57.]	
Murder. A. is charged with the murder of B. The facts that A. had a motive for killing B., had made preparations for it, and had previously attempted B.'s life, are relevant to show, not only that A. did the act (*ante*, 125), but also that it was intentional and not accidental (*post*, 156); and to rebut such intent A. may prove previous expressions of goodwill and acts of kindness by himself towards B. (Tay. ss. 347; Russ. Cr. 7th ed. 2114; *cp. R.* v. *Hardy*, 24 How. St. Tr. 1082, 1091, 1094); or that he (A.) was so drunk as to be incapable of the intent (*R.* v. *Beard*, 1920, A.C. 479, qualifying *R.* v. *Mead*, 1909, 1 K.B. 895). As to the effect of provocation when the accused was drunk, see *R.* v. *Letenosk*, 12 Cr. App. R. 221.	*Murder.* A. is charged with the murder of B. Evidence that A. and two others had been lurking near the spot previous to the killing of B. having been given, it was proposed by the prosecution to show that they were lurking there clandestinely with a bundle of cloth; the object being to raise a presumption that they were there with an evil intent, and *ergo*, must have had malice against all persons likely to interrupt them, and so against B.;—held inadmissible (*R.* v. *Wilson*, 1 Lew. C.C. 112). A. is charged with the murder of B. as the result of an abortion. Declarations by B., deceased, before the act, that she intended to operate on herself, and after it, that she had done so;—Held inadmissible for A. (*R.* v. *Thomson*, 1912, 3 K.B. 19; see fully, *ante*, 80).
Treason, Sedition, &c. A. is charged with treasonable conspiracy. Evidence having been adduced that under the cloak of parliamentary reform he meditated the establishment of a treasonable convention;—books published, and public speeches made, by him many years before, and entirely disconnected with the alleged conspiracy, held admissible, in rebuttal, to show what were his fixed political opinions on the subject (*R.* v. *Hardy*, &c., *ante*, 85-6).	*Treason, Sedition, &c.* A., a priest, is charged with blasphemously burning certain Bibles;—sermons preached by him several days before and on occasions unconnected with the burning—held not admissible in A.'s favour to show that he meant immoral books merely and not Bibles to be burnt on the occasion in question (*R.* v. *Petcherini*, 7 Cox, 79; *ante*, 59, 79). A. is charged with sedition. Evidence that he had on previous occasions expressed principles of an opposite kind, held not admissible in his own favour (*R.* v. *Cantwell*, 120 C.C.C. Sess. Pap. 939, *per* Lawrance, J.; *ante*, 79).

(c) *Good and Bad Faith. Fraud.*

Representations by Vendors. The question being whether A., B. and C., directors of a mining company, acted in good faith in misrepresenting its value to D. to whom they sold the mine;—conversations between A. and B. (not in D.'s presence) in which A. introduced and recommended the mine to B. and representations made to A., B. and C. by E., who sold the mine to them; and the fact that although the shares for a time went to a premium, the directors did not part with any but bought more;—held admissible for A., B. and C.; and books kept at the mine by their agent, in the course of his duty, showing that	*Representations by Vendors.* The question being whether A., B. and C., the vendors of a mine, acted in good faith in misrepresenting its value to D.;—books showing the expenses and receipts kept by their mining agent, but not in the regular course of his duty, and which might have been made afterwards, held inadmissible against them (*Shrewsbury* v. *Blount*, *opposite*). So, shop books kept by a party at his private house and made up from slips, were held not evidence for such party (*Ellis* v. *Cowne*, 2 C. & K. 719, *aliter* if kept at his shop and open to the inspection of his clerks).

Admissible	*Inadmissible.*
they had the means of knowing the inferior character of the mine,—held admissible against them (*Shrewsbury* v. *Blount*, 2 M. & Gr. 475; as to directors' knowledge of the books of the company generally, see *ante*, 145-6, 151).	
A. and B. are charged with conspiring to defraud C. by a deed which falsely represented that A. owned certain property, B.'s defence being that he honestly believed the representation, but was duped by A.:—letters between A. and B. (not communicated to C.) *prior* to the completion of the transaction, and regarding it, in which A. made similar representations to B., held admissible in B.'s favour [*R.* v. *Whitehead*, 1 Dowl. & Ry. M.C. 367. It was objected that the evidence was only admissible *against* but not *for* A., but replied that as other letters had been put in to prove the conspiracy, the whole correspondence should be read; Abbott, C.J., thought that, under the anomalous circumstances the whole correspondence *prior* to the execution of the deed was admissible. So, on a new trial, Best, J., held that what the parties said at the time was evidence to show how they acted, see 1 C. & P. 67].	A. and B. are charged with conspiring to defraud C. by falsely representing that A. owned certain property, B.'s defence being that he honestly believed the representations, but was duped by A.;—letters between A. and B., written *subsequently* to the transaction, and regarding it, held inadmissible (*R.* v. *Whitehead*, 1 Dowl. & Ry. M.C. 367, 368).
A., a grocer, is charged under the Weights and Measures Act, 1878, s. 16, with fraudulently including a paper wrapper in tea weighed for a customer. Evidence of a custom among grocers to include the wrapper in the weight is admissible to negative fraud (*R.* v. *Spencer*, 20 Cox, 692).	***Malicious Prosecution.*** In an action for malicious prosecution, the question being whether A., in giving B. into custody for stealing oysters, acted *bona fide* and under the reasonable belief that B. had in his possession stolen oysters;—a former conviction against a stranger for stealing oysters from the same bed, but which A. was not aware of at the time he gave B. into custody, is inadmissible. *Aliter* if he had been aware of it [*Thomas* v. *Russell*, 9 Exch. 764. Pollock, C.B., remarked, that the only ground for admitting the record as evidence of *bona fides* was to show the impression which it might have made on A.'s mind, and not as proof of the fact of the conviction itself. For the former purpose it was perfectly competent to prove any communication made to A. on which he might have formed an opinion. But here, as he never knew of the conviction, it could not have produced any impression on his mind).
Representations as to Credit. The question being whether A. acted in good faith in representing W., a tradesman, to be solvent, whereby B. trusted W., and suffered damage;—the fact that W. had sold goods to A. under cost price is admissible, as negativing A.'s good faith; the fact that A.'s shopman, who was cognisant of the transactions between A. and W., believed W. to be solvent; and that other individual tradesmen in the same town who had dealt with W. also believed him to be solvent; and that there was a general reputation in the town that W. was solvent, are admissible in A.'s favour as showing his good faith (*Sheen* v. *Bumpstead*, 2 H. & C. 193. As to the general belief of the community on other questions, see *Lewis* v. *Fermor*, *ante*, 126; and *R.* v. *O'Connell*, *post*, 184).	***Representations as to Astrology, &c.*** The question being whether A. intended to deceive B. by pretending to tell his fortune by the stars; evidence that A. or others bona fide believed in his ability to tell such fortunes is inadmissible (*Penny* v. *Hanson*, 18 Q.B.D. 478; Denman, J., remarked, "We do not live in times when sane men can believe in such powers."). On a similar charge as to palmistry, evidence that this was a well-recognised science whose practitioners enjoyed a professional status, and that the defendant practised it in a genuine manner, was rejected, the Court remarking that whether there was such a thing as palmistry was not the question (*R.* v. *Stephenson*, 68 J.P. Rep. 524). In *Davis* v. *Curry*, 1918, 1 K.B. 109, however, Sankey and Darling, JJ. (*diss.* Avory, J.), held that in such cases, to rebut the intent to deceive, the defendant was entitled to testify to his own honest belief that by holding an object in his hand he could tell the thoughts of its owner [see *ante*, 126].
The question being whether A. gave credit to B., a married woman, *bona fide* believing her to be single;—the fact that B. had represented herself to other tradesmen as single, in such a way as to reach A.'s ears, is admissible in A.'s favour (*Barden* v. *Kyverberg*, 2 M. & W. 61).	
Divorce: Bona fides of Parties. A. petitions for divorce from B., on the ground of her adultery with C. B. does not answer or appear; but C. denies and pleads collu-	

Admissible.	*Inadmissible.*
sion, A witness for A. was allowed to state that B. had confessed her adultery with C. to the witness and that the latter had told A. of B.'s confession but no further details. The evidence was received not to prove the adultery, but to show the materials on which A. acted and his bona fides in acting thereon in rebuttal of the alleged collusion [*Farulli* v. *F.*, 61 Sol. Jo. 110; 51 L.Jo. 598, *per* Shearman, J. See *Walker* v. *W.*, *ante*, 134].	

(*d*) *Malice.*

Libel. The question being whether A., in publishing a libel against B., acted maliciously, the following facts are relevant as evidence of malice:—(1) the fact that the libel (which would have been privileged if sent by letter) was sent by wire or post-card (*Williamson* v. *Freer*, L.R. 9 C.P. 393; *Sadgrove* v. *Hole*, 1901, 2 K.B. 1, C.A.); (2) the fact that the libel was untrue to A.'s knowledge (*Fountain* v. *Boodle*, 3 Q.B. 5); (?) the fact that A., after pleading justification as a defence to an action by B., neither offered proof in support of such plea, nor abandoned, nor retracted it at the trial, although B. offered to accept nominal damages if it were retracted [*Simpson* v. *Robinson*, 12 Q.B. 511; and *cp. Anderson* v. *Calvert*, 24 T.L.R. 399; but see *Pape* v. *Driscoll*, 1909, Times, 28 May, *per* Moulton, L.J.]. As to the admissibility, in rebuttal, of reports made by detectives and others to A., to the same effect as the libel, see *R.* v. *Labouchere*, *ante*, 133.

A. sues B. for libel in publishing a handbill offering a reward for the recovery of certain bills of exchange "which B. believes to have been embezzled by his clerk, A."—Evidence that B. followed up the handbill by preferring a similar charge against A. before a magistrate is admissible to show B.'s *bona fides* in publishing the handbill (*Finden* v. *Westlake*, M. & M. 461; *cp. ante*, 133. It was objected that though the *fact* of the charge might be admissible, the *particulars* of it were not. But it was held that these were receivable to show how far they corresponded with the imputation in the handbill and supported the inference of good faith; *cp. post*, 220).

False Imprisonment. In an action for false imprisonment, the fact of putting on the record a special plea of felony, which was abandoned at the trial, was admitted in aggravation of damages (*Warwick* v. *Foulkes*, 12 M. & W. 507).

Libel. The question being whether A., in libelling B., acted maliciously, the following facts afford no evidence of malice; —(1) The fact that the libel was sent on a postcard, not bearing B.'s name, and there being nothing to show B.'s connection therewith, or that it came to the hands of any one who could understand it to refer to B. (*Sadgrove* v. *Hole*, *opposite*); (2) the fact that A., by mistake, sent the libel in a wrong envelope, so that it was opened by a stranger (*Tompson* v. *Dashwood*, 11 Q.B.D. 42; overruled on other grounds, *Hebditch* v. *Macilwaine*, 1894, 2 Q.B. 54); (3) the fact that the libel, though false, was without reasonable grounds honestly believed by A. to be true (*Clarke* v. *Molyneux*, 3 Q.B.D. 237); (4) the fact that A.'s informants as to the libellous matter were actuated by malice against B. (*Hennessy* v. *Wright*, 24 Q.B.D. 445*n*); (5) the fact that A. had previously published statements about B. which, though not defamatory on their face, were nevertheless untrue (*Caryll* v. *Daily Mail*, 90 L.T. 307); (6) the facts that A., after pleading justification as a defence to an action by B., abandoned the plea at the trial (*Wilson* v. *Robinson*, 7 Q.B. 68; so, in *Upton* v. *Hume*, 41 Am. St. Rep. 863, mere failure to prove such a plea was held no evidence of malice); or, without offering evidence thereon, had impeached B.'s credit in cross-examination (*Wilkinson* v. *Graves*, 1899, Times, Nov. 30, per Ld. Russell, L.C.J., who remarked that such conduct was irrelevant unless it threw light on A.'s state of mind at the time of writing the libel).

In an action for libel against A. for stating that B. had proved incompetent as a surveyor in a certain transaction;—the fact that B. was generally competent as a surveyor is not admissible to prove A.'s malice (*Brine* v. *Bazalgette*, 3 Ex. 692; see *post*, 158, 186).

A., the wife of B., sues C. for a libel whereby B.'s affections were alienated from A. After proof of the libel, A. tenders, as evidence of malice by C., a letter sent by B., but copied in C.'s handwriting, to A.'s solicitors, marked "*without prejudice*," in which B. accused A. of prac-

Admissible.	*Inadmissible.*
Malicious Prosecution. The question being whether A. acted maliciously in prosecuting B.;—(1) an affidavit filed by the clerk to A.'s solicitor, and used for the purpose of preventing persons becoming bail for B. when he was arrested, is admissible as showing A.'s malice. So, (2) a letter to B. from the clerk of a judge, stating that the latter saw no objection to bail being granted, is admissible to show that the magistrate in granting bail acted thereon, and that the alleged intercession of A. had no effect on the magistrate's mind (*Taylor* v. *Willans*, 2 B. & Ad. 845. In neither case was proof of the clerk's authority held necessary).	tising frauds upon, and intending to poison, him. Held inadmissible without further proof of authorship by C. (*Watt* v. *Watt*, 1905, A.C. 115, 117-8; the contents of the letter are given in the Times, Oct. 30, 1902).
In an action for malicious prosecution, the question being whether A. acted *bona fide* in giving B. into custody;—the fact that A. obtained an opinion of counsel justifying such a course, is admissible together with the contents of the opinion (*Ravenga* v. *Mackintosh*, 2 B. & C. 693. The Court remarked that if A. had obtained opinions both ways the question of *bona fides* might have been a nice one).	*Malicious Prosecution.* To prove that A. acted maliciously in prosecuting B.;—the fact that A.'s charge was dismissed by the Court for want of prosecution, is no evidence of malice on A.'s part (*Purcell* v. *Macnamara*, 9 East, 361).

CHAPTER XI.

SIMILAR FACTS.

When Admissible, or not, to Prove (1) the Main Fact; or (2) the Identity or Connection of the Parties.

Facts which are relevant merely from their *general similarity* to the main fact or transaction, and not from some *specific connection* therewith as shown below, are not admissible to show its existence or occurrence. Nor, to prove that an act was done by a given party, may evidence be given of similar acts done either by *himself*, with the object of showing a general disposition, habit, or propensity to commit, and a consequent probability of his having committed, the act in question, or by *others*, though similarly circumstanced to himself, to show that he would be likely to act as they. If, however, the similar acts are so related to the main act as to show the party's identity irrespective of any general propensity, they will be admissible notwithstanding that they may also tend to show such propensity.

[*Makin* v. *A.-G. of N.S.W.*, 1894, A.C. 57, 65; *R.* v. *Ball*, 1911, A.C. 47; *Thompson* v. *R.*, 1918, A.C. 211. In *Makin* v. *A.G. sup.*, Ld. Herschell stated: "It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that he is a person likely, from his criminal conduct or character, to have committed the offence for which he is being tried. On the other hand the mere fact that the evidence adduced tends to show the commission of other crimes, does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the act, alleged to constitute the crime charged in the indictment, were designed or accidental, or to rebut a defence which would otherwise be open to the accused," *e.g.*, a defence of mistaken identity or *alibi* (*Thompson* v. *R.*, *sup.*). See generally Steph. arts. 10-11; Tay., ss. 316-48; Best, ss. 506-510; Wills, Circ. Ev. 6th ed., 77*n*; Whart. (Civil Ev. s. 29; Barrows, 14 Am. L. Rev., 350; Wigmore Ev. ss. 300-383; Chamberlayne Ev. ss. 3150-3264.]

Similar facts under the present head, must be distinguished from those tendered as *Parts of the Transaction* in issue (*ante*, 56, 58), or as *Standards of Comparison* to gauge conduct (*ante*, 107); as also from the converse cases of *Course of Business* (*ante*, 105), and *Character* (*post*, 186), under which last two heads general results only, but not particular instances, are receivable; and from those in the next chapter, which are tendered not to prove

the act itself, or its authorship, but, after evidence *aliunde* on these points has been given, to show the *state of mind* of the party.

Similar facts under the present rule are inadmissible whether proved by the direct admissions of the party himself (*R.* v. *Cole, post,* 165), or by independent witnesses. So, *dissimilar* facts are inadmissible to *disprove* the main fact, *e.g.* skill on other occasions to disprove negligence (*R.* v. *Whitehead, post,* 165), honest acts to disprove fraudulent ones (*R.* v. *Rowton,* 34 L.C. M.C. 57, 67; *R.* v. *Mortimer, ante,* 120, *Holcombe* v. *Hewson, post,* 167), or specific acts of bravery to disprove specific acts of cowardice (*Edmondson* v. *Amery,* Times, Jan. 28, 1911); and, to rebut evidence of authority, the forgery of a prior authority is inadmissible (*Presscott* v. *Flinn, ante,* 97).

Principle of Exclusion. Such facts, though often of moral weight, *i.e.* logically relevant, are rejected as legal evidence on the grounds of policy and fairness, since they tend to waste time, embarrass the inquiry with collateral issues, prejudice the parties with the jury, and encourage attacks without notice (*R.* v. *Oddy,* 2 Den. C.C. 269; *A.-G.* v. *Nottingham Corp.,* 1904, 1 Ch. 673; *R.* v. *Bond,* 1906, 2 K.B. 397-400).

The present topic, which is sometimes regarded as one of the four great exclusive canons of the law of evidence, does not, like the other three, Character, Hearsay and Opinion, adapt itself satisfactorily to treatment by way of rule and exception, the conditions in this case being less susceptible of precise formulation. Logically, facts similar to the main fact have some tendency to prove its existence since here, "inference," as Mr. Gulson remarks, "is based on the supposed uniformity of nature . . on a belief in the probability of *complete* resemblance wherever we observe *partial* resemblance . . But as partial resemblance, though usually, or frequently, accompanied by complete resemblance is not invariably so, the inference is merely a probable one, and only probable in certain kinds of cases" (Philosophy of Proof, ss. 140-5). The law, therefore, for the practical reasons above stated, holds that mere general similarity is not, *per se,* a sufficient ground for admission. It demands some further and more specific nexus. The admissibility of similar facts as presumptive proof of the fact in issue is in truth mainly a question of *degree,* or of our knowledge and understanding of the causes of events, as to which, in many cases, the progress of science may change the law. In proportion as the element of personality, the interjection of the free will of the human being, diminishes, we become more certain of the effects of a causative force, and more ready to admit such evidence (14 Am. Law Rev. 350, 358). Even where the personal element is absent, however, the presumption from similarity must be sufficiently cogent to outweigh the practical inconveniences against which the rule is aimed (*Metropolitan Asylum* v. *Hill,* 57 L.T. 29; *A.-G* v. *Nottingham,* 1904, 1 Ch. 673; *Wilkinson* v. *Clark,* 1916, 2 K.B. 636).

The maxim, "*Res inter alios acta alteri nocere non debet,*" has frequently been supposed to express the principle of exclusion in such cases (Tay s. 317; Best, ss. 112, 506-10; Broom, Legal Maxims, 908; Gulson on Proof, ss. 523-31); but this is incorrect, for similar transactions *inter partes* would be equally inadmissible in this relation (*R.* v. *Fairie,* 8 E. & B. 486; *post,* 170). The principle of the maxim appears, indeed, to fail altogether as a test of relevancy, since an examination of the three preceding chapters will show that many of the transactions relevant under them are *res inter alios,* while others

that are irrelevant are *res inter partes;* see, also, *Manchester Brewery* v. *Coombs,* and *Holcombe* v. *Hewson* (*post,* 167) where, though the evidence in both cases was *res inter alios,* it was held admissible in one, but rejected in the other, and *R.* v. *Ball* and *R.* v. *Cole* (166), where, though *res inter partes* (*i.e.* between the Crown and the prisoner) it was received in the first but excluded in the second. In other words, admissibility here depends not on personal, but logical, privity. As to the operation of the maxim in other branches of evidence, see *post,* Judgments, and Testimony in Former Trials. Mr. Justice Stephen remarks: "The application of the maxim to the law of evidence is obscure, because it does not show how unconnected transactions may be supposed to be relevant to each other. In its literal sense it also fails, because it is not true that a man cannot be affected by transactions to which he is not a party; illustrations to the contrary are obvious and innumerable; bankruptcy, marriage, indeed every transaction of life would supply them" (Dig. *note* vii.). *History of the maxim.* The maxim, which was current long before the existence of formal rules of evidence, appears both in the Roman and Canon Law; and was invoked, at Common Law, not as an evidentiary principle, but as a plea in rejoinder, as early as the reign of Edward II. In Wingate's Maxims, published in 1608, some fifty examples are given; but these, also, are all in the law of real property. In 1689, *Eccleston* v. *Petty,* Carth. 79, the maxim first appears as one regulative of testimony as well as of the legal rights of parties, a deposition in another suit having been there objected to as *res inter alios,* but received as an admission; while about the same time Lord Hardwicke mentions the case of a verdict having been excluded on the same ground. The phrase does not, however, appear at all in Gilbert on Evidence, 1756; and only once in Buller's *Nisi Prius,* 1772, s. 239. Down to this time, then, its application was limited to judgments, and verdicts or testimony in former trials. It has since, however, been intermittently, but not very successfully, invoked sometimes as equivalent to hearsay, but more often, and chiefly in the present connection, as a sub-division of relevancy, in which sense it is used, though it is submitted, incorrectly, by Mr. Taylor (ss. 317-9). [Barrows, 14 Am. L. Rev. 350; Best, ss. 112, 506-10; Broom's Legal Maxims, 8th ed., 748; Chamberlayne, Ev., ss. 3207-3230].

The following are the principal cases in which a sufficient nexus exists to justify the admission of similar facts in proof of the main fact, or the identity of the parties:—

EXISTENCE OR OCCURRENCE OF THE MAIN FACT. Agency. To prove agency, repeated acts thereof done by the agent and adopted by the principal are admissible (*Blake* v. *Albion Co., post* 166; *R.* v. *Mean, ante,* 69; Steph. art. 13; *R.* v. *Boyle,* 1914, 3 K.B. 339, 348); though no multiplication of acts by a *special* agent will turn him into a *general* one (*Barrett* v. *Irvine, ante,* 96). And the fact that on other occasions when he purported to have authority, he had none, is not admissible in rebuttal (*Prescott* v. *Flinn, post,* 166).

Sexual Intercourse. Adultery. Incest. To prove the occurrence of sexual intercourse on a given occasion, prior or subsequent acts between the same parties are admissible (*R.* v. *Shellaker,* 1914, 1 K.B. 414; *R.* v. *Ball,* 1911, A.C. 47; *R.* v. *Stone,* 6 Cr. App. R. 89). So, in Divorce cases, although the specific acts on which the petitioner relies must be alleged in the petition,

yet similar acts both previous and subsequent thereto between the respondent and co-respondent (*Cantello* v. *C.*, Times, Feb. 1, 1896; *Wales* v. *W.*, 1900, F. 63), though not between the former and a *stranger* (*Pollard* v. *P.*, Times, Mar. 26, 1904; *cp. R.* v. *Cole, post,* 165, and *R.* v. *Rodney, post,* 185), may be proved, as presumptive evidence of the acts charged. As to questions to the parties themselves, see *post,* 216. Similar evidence is also receivable on charges of Incest [*R.* v. *Ball, sup.* (prior acts); *R.* v. *Stone, sup.* (subsequent acts)].

Insanity. On questions of insanity, the conditions of mental disease are sufficiently determined to justify the reception of similar facts and conduct by the same party, or his relations, in proof of the insanity alleged (Tay. s. 337; Pope, on Lunacy, 392). In criminal cases, this question usually arises to show the accused's mental state as to an act proved *aliunde;* but it may also arise on the question of his connection with the act itself (*R.* v. *Devereux, post,* 167).

Acts done as to parts of the same whole. Similar acts, done with respect to different parts of a common whole, are sometimes admissible to prove the act in question, although all the acts are not parts of the same transaction (*Holcombe* v. *Hewson,* 2 Camp. 391; *Spenceley* v. *De Willott,* 7 East 108; *Griffits* v. *Payne,* 11 A. & E. 131; *Re Foley,* 25 L.T. O.S. 311; *cp. inf.* Title).

Title: Acts at same or other places. On questions of title, not only are repeated acts of ownership with respect to the *same* property receivable (*Woodward* v. *Buchanan,* L.R. 5 Q.B. 285; *cp. ante,* 111-2); but sometimes even acts done with respect to *other places* connected with the *locus in quo* by "such a common character of locality as to give rise to the inference that the owner of one is likely to be the owner of the other" (*Jones* v. *Williams,* 2 M. & W. 326, *per* Parke, B.; *Ld. Advocate* v. *Blantyre,* 4 App. Cas. pp. 791-2). This principle has been applied to the case of common or waste lands in a manor (*Doe* v. *Kemp,* 2 Bing. N.C. 102; *Leake* v. *Portsmouth Corpn.,* 107 L.T. 260), where the acts of ownership were done upon the surface of the land (*Taylor* v. *Parry,* 1 M. & G. 604, where the acts were the working of a mine under the same waste; and see *Wild* v. *Holt,* 9 M. & W. 672); roads (*R.* v. *Brightside,* 13 Q.B. 933); rivers (*Neil* v. *Devonshire,* 6 App. Cas. 135; *Lord Advocate* v. *Blantyre,* 4 App. Cas. 770, 791); inland lakes (*Bristow* v. *Cormican,* 3 App. Cas. 641, 670; but *cp. Johnson* v. *O'Neill,* 1911, A.C. 552, 612); woods and continuous hedges (*Jones* v. *Williams, sup.; Stanley* v. *White,* 14 East, 332); and mountain ridges (*Brisco* v. *Lomax,* 8 Ad. & E. 198). On the other hand, it has been held not applicable to other properties on the banks of the same canal, unless such properties were shown to have belonged to the same person; since the proprietors of the canal may have bought the freehold in one place and not in another, and being unnecessary, there was no ground for presuming such purchases in any case (*Hollis* v. *Goldfinch,* 1 M. & C. 205; *Tyrwhitt* v. *Wynne,* 2 B. & Ald. 554). Nor are acts of ownership by either party outside a disputed boundary, evidence of title to the lands within it (*Clark* v. *Elphinstone,* 6 App. Cas. 164). [Tay, ss. 323-325; Ros. N.P. 85-86, 931-934.]

Customs of Manor, Trade, or Market, Although the customs of one manor are not, in general, proof of the customs of any other, even though both manors lie within the same parish or leet, and one was a subinfeudation of the other and pays chief rent to it, since, if separated before the time of

legal memory, each may have had immemorial customs peculiar to itself (*Anglesey* v. *Hatherton,* 10 M. & W. 218); yet, if it can be proved that one manor was derived from the other after the year 1189, or that the customs in each are identical (*id.*), or that the custom in question is merely a particular incident of some more general custom or tenure, common to both, as Borough-English, Gavelkind, or tenant-right (*Stanley* v. *White,* 14 East, 338; *R.* v. *Ellis,* 1 M. & S. p. 662), such customs will then become reciprocally admissible. On the same principle, rights in different honours of the same duchy (*Jewison* v. *Dyson,* 9 M. & W. 540), different estates in the same manor (*Doe* v. *Sisson,* 12 East, 62), or different farms in the same township (*Blundell* v. *Howard,* 1 M. & S. 292), have been held admissible. [Tay. ss. 320-322; Ros. N.P. 85-86].

Trade Customs. So, to prove the customs of a given trade or market customs of the *same* trade or market, in other localities (*Noble* v. *Kennoway,* 2 Doug. 510; *Plaice* v. *Allcock,* 4 F. & F. 1074), or even of *analogous* trades (*Fleet* v. *Murton,* L.R. 7 Q.B. 126), are receivable.

Animals: Conduct and Propensities. When the doings of animals are in question, it is admissible to prove, not only the general habits and propensities of the species, or of the particular animal (*Joy* v. *Phillips,* 85 L. J. K. B. 770), but the doings of the *same* animal on other occasions (*Osborne* v. *Chocqueel.* 1896, 2 Q.B. 109; *post,* 186, 192), or even those of *other* animals of the same species (*Brown* v. *E. & M. Ry.,* 22 Q.B.D. 391).

"The habit of an animal is in the nature of a continuous fact to be shown by proof of successive acts of a similar kind" (*Todd* v. *Rowley,* 90 Mass. 51, 58; *Broderick* v. *Higginson,* 169 Mass. 482). Though, however, a propensity to bite animals of one species is evidence of a propensity to bite those of another (*Quin* v. *Quin,* 39 Ir. L.T.R. 163), it is no evidence of its propensity to bite human beings, nor *vice versâ* (*Osborne* v. *Chocqueel, sup.; Hartley* v. *Harriman,* 1 B. & Ald. 620; *cp. Williams* v. *Richards,* 71 J.P. Rep. 222).

The owner of a wild animal, not shown to be harmless by nature or domestication (*Filburn* v. *People's Palace,* 25 Q.B.D. 258), or the owner of a dog in proceedings for injuries done by it to cattle, sheep, or swine (The Dogs Act, 1906, s. 1), is liable for its acts, without proof either of the animal's mischievous propensities, or the owner's knowledge thereof. In the case of domestic animals, including dogs in proceedings other than the above, proof of both these facts must be given, in order to render the owner liable (*Barnes* v. *Lucille,* 23 T.L.R. 389; *Sulc* v. *Garzena,* 1907, Times, April 11; *Heath's Garage* v. *Hodges,* 1916, 1 K.B. 206). As to evidence of *scienter,* see *ante,* 95, 152.

Physical Agencies. The action of physical and natural agencies may be inferred from their action, under similar conditions, at other times and places; while, if the similarity of conditions is not sufficiently established, the evidence will be rejected (*Folkes* v. *Chadd,* 3 Doug. 157; *Hawkes* v. *Charlemont,* 10 Mass. 110; *Metropolitan Asylums* v. *Hill,* 47 L.T. 29; *A.-G.* v. *Nottingham,* 1904, 1 Ch. 673).

Mechanical Agents and Instruments: Engines, &c. The action of locomotives and other mechanical agents may generally be inferred from their working at other times (*Aldridge* v. *G. W. Ry.,* 3 M. & G. 515). And the working accuracy of scientific instruments, *e.g.* watches (*Gorham* v. *Brice,* 18 T.L.R.

424; *Plancq* v. *Marks,* 94 L.T. 577), thermometers, aneroids, pedometers, and the like may be presumed (Tay. s. 183; as to speedometers and stop-watches see 127 L.T. Jo. 142, 176, 575); and under the Public Health Act, 1875, s. 20, and other statutes, the register of a gas, electric or water meter is *primâ facie* evidence of the quantity consumed (Tay. s. 183; *Cork Gas Co.* v. *Bible,* 31 Ir. L.T. Jo. 477).

Condition or Character of Places and Things. The condition or character of a place or thing may sometimes be proved by showing its condition or character at other times. Thus, in actions of negligence, to show that a particular spot was dangerous, previous accidents thereat, or even the condition of other similar places, may be proved (*post,* 171, 186). So, as to the condition of a ship (*Ajum* v. *Union Ins. Co.,* 1901, A.C. 362). *Cp. ante,* 103-5, 135.

Market Value. In proof of market value, *e.g.* on rating and compensation questions, evidence of the value of similar properties in the same neighbourhood is admissible in chief (*Cartwright* v. *Sculcoates,* 1900, A.C. 150). Usually, however, such evidence comes in on cross-examination to test the opinions of experts (*post,* 399).

IDENTITY OF THE PARTIES. Where personal identity is in issue, without necessary reference to an act done, it may, as we have seen, be proved by similarity of characteristics (*ante,* 136). But where identity is material merely to show that an act, of which *primâ facie* proof has been given *aliunde,* was done by a particular party, the present rule, which excludes evidence of similar acts showing that he would be likely, from his *general* conduct or character, to do the act in question, comes into operation (*Makin* v. *A.-G.,* 1894, A.C. 57; *R.* v. *Oddy,* 2 Den. CC. 265; Steph. Art. 11). Here, however, a distinction must be drawn between psychological tendency and physical aptitude or trained ability, facts showing his possession of the latter being sometimes receivable when those implying the former would be excluded (*ante,* 136, 142). And, generally, facts which are relevant to show identity, otherwise than through the inference from general propensity, are admissible notwithstanding that, incidentally, they may also tend to show such propensity (*Thompson* v. *R.,* 1918, A.C. 221). Thus, acts of *preparation* are admissible to show identity though they may also involve proof of other crimes, similar or not (*ante,* 137); and to rebut an *alibi,* evidence of other crimes is admissible if they show that the accused was in the neighbourhood at the time (*R.* v. *Briggs, ante,* 40). In such cases it is the preparation or presence of the accused, respectively, that is material, and not the similarity or criminality of the acts involved. So, to show that A. was the writer of a libellous letter, other letters written by A. to third persons are admissible as proof of *handwriting* and thus of authorship (*Jones* v. *Richards,* 15 Q.B.D. 439) and it would be immaterial for this purpose whether the other letters were libellous or not (*cp. R.* v. *Pearce* and *R.* v. *Barnard, post,* 491). Similar facts, also, are admissible to *corroborate* testimony as to identity, though they might not be receivable as substantive evidence thereof (*id.; R.* v. *Chitson, R.* v. *Burlison, Perkins* v. *Jeffery, post,* 491-4). In criminal cases, greater latitude in this connection is apparently allowable to the accused than to the prosecution; for on the trial of A. he may try to shift the guilt to B. by proving

similar crimes by the latter, though such evidence could not be tendered by the prosecution on B.'s trial (*R.* v. *Beck* and *R.* v. *Stevens, ante,* 144).

System to Show Identity. Whether similar crimes committed in pursuance of a common scheme, or purpose, are admissible to connect the accused with the doing of the act,—such evidence being tendered to prove not that the accused was a bad man and so likely to commit crime, but that all the crimes, being actuated by the same plan or motive, were likely to have been committed by the same person, is a question of some difficulty. It is one, however, which rarely occurs in practice, since in most cases such evidence is admitted either as part of the main transaction (*ante,* chap. vi.), or to rebut the obvious defences of accident, mistake, or other innocent state of mind (*post,* chap. xii.), or to corroborate the witnesses (*sup.*). Where none of these purposes is invoked, can it be given to rebut a defence of mistaken identity or *alibi?* On principle such evidence seems admissible and to be sanctioned by the cases of *Makin* v. *A.-G., R.* v. *Ball,* and *Thompson* v. *R.,* cited, *ante,* 158. In the last named case, Ld. Parmoor held that *Makin* v. *A.-G.* justified the reception of other crimes if they were relevant to rebut the defence of mistaken identity; and in *R.* v. *Ball,* 1911, Scrutton, J. (at the trial), and the Ld. Chancellor and Ld. Atkinson, considered that in *Makin* v. *A.-G.* system was in fact admitted to prove, not intent, but that the accused did the act (1911, A.C. pp. 52, 71; 11 Cr. App. R. p. 37). See also, *per* Wills, J. Circ. Ev. 6th ed. 77 *n.* So, in an important poisoning case in New Zealand, the Court, while rejecting proof of a subsequent poisoning, on other grounds, remarked, "we are not disposed to deny the general proposition that a series of similar occurrences, manifestly not accidental, conjoined with the prisoner's agency in one or more, may sometimes constitute ground for inferring that he is the cause of all" (*R.* v. *Hall, post,* 180). Prof. Wigmore considers the admissibility of such evidence to be a question of *degree,* and regards it as receivable if a sufficient number of common characteristics be proved. There must, he suggests, be something more than the mere similarity in gross features (*e.g.* the same doer and the same sort of act) which suffices to negative innocent intent; the present purpose demanding such a concurrence of common features that the various acts are naturally to be explained as caused by the general plan of which they are the individual manifestations (*e.g.* the addition of the same mode of acting and other common characteristics). He regards the precedents, however, as difficult to reconcile, because the courts have not always perceived that there are these two distinct purposes and tests (s. 304). He cites no American *decision* in support of the proposition, though some of the *dicta* are, perhaps, wide enough to include it; see also *People* v. *Molineux,* 168, N.Y. 264.

EXAMPLES.

General Similarity.

Admissible.	*Inadmissible.*
	Contract. The question being whether A. made a contract with B. subject to a certain qualification;—the fact that he made contracts with other persons subject to the same qualification is inadmissible (*Hollingham* v. *Head,* 4 C.B.N.S. 388. It would be admissible if A. testifies that he

Admissible. *Inadmissible.*

made the same contract with all. *Spenceley* v. *De Willott*, 7 East. 108. To show the terms on which A. let land to B., the terms on which A. let land to other tenants are not receivable. *Carter* v. *Pryke*, Peake, 95. They might be if all the lands were subject to the same custom, see *inf.;* and *cp. Doe* v. *Sisson*, 12 East, 62, 63).

Tort. A. is charged with negligently performing a surgical operation. Evidence that in other similar cases A. had been negligent or skilful is inadmissible [*R.* v. *Whitehead*, 3 C. & K. 202, *per* Maule, J., who explained that in *R.* v. *Williamson*, 3 C. & P. 635, where such evidence was admitted, the witnesses were asked generally their opinions *causa scientiæ* (*post*, 170). *Cp. Brown* v. *E. & M. Ry.*, 22 Q.B.D. 391, 393; *Brown* v. *Lambeth Corp.*, 32 T.L.R. 61; *R.* v. *Peel*, *post*, 183; *Edmondson* v. *Amery*, Times, Jan. 28, 1911, *per* Phillimore, J.; *Hales* v. *Kerr*, *infra*, 171. For a case, however, in which A.'s habit of teasing a horse was admitted to show that he teased it on a particular occasion and so caused his own death, see *Joy* v. *Phillips*, *post*, Animals, 169.

Crime. A. is charged with committing an unnatural offence with B. An admission by A. that he had committed the same offence with C. on another occasion, and had a tendency to such pratices, is not receivable [*R.* v. *Cole*, 1810, by all the judges, MS. cited 1 Phill. & Arn Ev., 10th ed. 508. As to proof of intercourse between the same parties on other occasions, see *R.* v. *Ball*, *infra*, Incest].

A. is charged with burglary. A witness for the prosecution, having been allowed at the trial to state that, three days after the burglary, he went for a walk with A. who admitted that he had committed several burglaries (none of which had any connection with that in question) on various recent occasions;—Held inadmissible and the conviction quashed (*R.* v. *Coulter*, 5 Cr. App. R. 147).

Similar acts by third persons. A., a tradesman, sues B. for goods sold. Defence that credit was given to C. (B.'s father-in-law);—evidence that other tradesmen had given credit to C. for goods ordered by B.; held inadmissible (*Smith* v. *Wilkins*, 6 C. & P. 180).

So, in an action to recover goods alleged to have been unlawfully delivered by a bankrupt to a creditor, after the commission of an act of bankruptcy, evidence that other creditors had returned goods sent to them by the bankrupt a few weeks before, is not admissible to show that the delivery in question was invalid [*Backhouse* v. *Jones*, 6 Bing. N.C. 65. Mr. Taylor, s. 318, and Mr. Gulson, s. 526, treat this as conduct amounting to hearsay and so inadmissible because not on oath. This is a very unsatisfactory ground, see 'Conduct

Admissible. *Inadmissible.*

as Hearsay,' *post*, 207, and 'Treatment,' *ante*, 120]. And in a libel case, the fact that the defendant's informants were actuated by malice is not evidence of the defendant's malice (*Hennessy* v. *Wright*, *ante*, 156).

Specific Connection.

Agency. The question being whether B., in fraudulently obtaining a certain premium from C., acted as agent to A., an insurance company;—the fact that B. obtained similar premiums from D., E. & F. to A.'s knowledge and for A.'s benefit, held admissible [*Blake* v. *Albion Society*, 4 C.P.D. 94, cited *ante*, 83, 85; *cp. R.* v. *Mean*, *ante*, 56, *Woodward* v. *Buchanan*, *infra* Title; *R.* v. *Boyle*, 1914-3, K.B. 339, 348].

Agency. A. sues B. on a bill of exchange, indorsed to A. in B.'s name by C. To disprove C.'s authority to indorse, B. tenders evidence that C. had on two previous occasions forged letters from B. to other persons stating that C. had B.'s authority to indorse bills. Held inadmissible (*Prescott* v. *Flinn*, 9 Bing. 19; *ante*, 97; *cp. R.* v *Holt*, *post*, 181).

Partnership. The question being whether A. and B. bought a certain property as partners;—the fact that they bought a number of other properties as partners is irrelevant [*Kennedy* v. *Dodson*, 1895, 1 Ch. 334, C.A. *Semble*, it would have been admissible on cross-examination—(1) if either party denied the partnership in question—not to prove what the transaction had been, but to show that his evidence as to it was not to be credited on account of his admissions with regard to the other purchases (*per* Ld. Herschell, L.C.); (2) if either party denied that he had ever been in partnership with the other (*per* Lopes, L.J.), see *post*, 478.

Sexual Intercourse: Adultery, Incest. A. petitions for divorce from B., his wife, on the ground of her adultery with C;—evidence of (1) ante-nuptial incontinence by B. with C. (*Cantello* v. *C.*, Times, Feb. 1, 1896; *King* v. *K.*, *id.* Jan. 26, 1901; *Weatherley* v. *W.*, 1 Spinks, 193); and (2) of post-nuptial acts both prior (*Harris* v. *H.*, 27 L.T. 428; *Howard* v. *H.*, Times, July 14, 1904) and subsequent (*Wales* v. *W.*, 1900, P. 63; *Boddy* v. *B.*, 30 L.J.P. & M. 23) to those charged,—is relevant to prove the acts alleged in the petition. *Cp.* Corroboration, *post*, p. 491-4.

Sexual Intercourse: Adultery, Incest. A. petitions for divorce from B., her husband, on the ground *inter alia* of his adultery with C. Evidence that B. had committed adultery with D. and was a man of immoral habits, held inadmissible [*Pollard* v. *P.*, Times, Mar. 26, 1904, *per* Jeune, P.; *cp. R.* v. *Cole*, *ante*, 165; *R.* v. *Rodney*, *post*, 185. *Contra*, *Joyce* v. *J.*, Times, April 9, 1909, where attempts by B. to enter the women servants' bedrooms were proved; and such evidence might, subject to the protection of 32 & 33 Vict. c. 68, s. 3, *post*, 216-7, be relevant as affecting credit; *cp.* also Corroboration, *post*, 491-4].

A. and B., brother and sister, are charged with incest in 1910. Evidence that at the time charged they occupied the same bed, having been given, further evidence, viz., that they had *previously* lived together and had a child in 1907;—Held admissible as showing a guilty passion, and that the proper inference from occupying the same bed was one of guilt, or, which is the same thing, that the defence of innocent association as brother and sister failed. The evidence was here held admissible not to show the *mens rea*, but as an element in proving illicit connection in fact [*R.* v. *Ball*, 1911, A.C. 47; *R.* v. *Shellaker*, cited *post*, 493; *R.* v. *Copper*, 10 Cr. App. R. 195; *R.* v. *Stone*, 6 Cr. App. R. 89 (where *subsequent* similar acts were received)].

Admissible.	*Inadmissible.*
A. is charged with carnal knowledge of B., a girl under sixteen. Evidence that A. had previously had connection with B. is admissible to prove the act charged, although A. could not have been prosecuted for the former act since it had been committed more than 6 months earlier (*R. v. Shellaker*, 1914, 1 K.B. 414, overruling *R.* v. *Beighton*, 18 Cox 535, where the lapse of 6 months was held to exclude the evidence; see, also, *R.* v. *Rogers*, 10 Cr. App. R. 276; but *cp. R.* v. *Probats*, 8 *id.* 113. In *R.* v. *Shellaker*, *sup.*, the evidence was also held admissible, following *R.* v. *Ollis*, *post* 182, to show intent and guilty knowledge].	
Insanity. A. is charged with the murder of B.—defence, insanity. Evidence that A. exhibited symptoms of insanity prior and subsequent to the time in question, and that his ancestors and collaterals had been insane, is admissible (*R.* v. *Cason*, 1905, Times, Nov. 25; *R.* v. *Loake*, 7 Cr. App. R. 71).	*Insanity.* A. is charged with the murder of B. Defence that B. committed suicide. A letter by B., shortly before her death, showing her unhinged mental state, and the fact that C., her brother, had attempted to commit suicide, held inadmissible [*R.* v. *Devereux*, 1905, Times, July 28. *Cp. R.* v. *Cowper*, *ante*, 80].
A. is charged with the murder of B., her child; her defence being sudden mania. Evidence of a voluntary confession by A. as to how she killed C., another child, was received in rebuttal to show A.'s state of mind [*R.* v. *Wells*, 123 C.C.C. Sess. Pap. 1203, *per* Collins, J., cited *ante*, 86, 161; *post*, 181].	
Acts done as to parts of same whole. The question being whether A., a brewer, sold good beer to B., a publican;—the fact that A. sold good or bad beer to other publicans is admissible if it be shown that all the beer was of the same brewing (*Manchester Brewery* v. *Coombs*, 82 L.T. 347, 349, *per* Farwell, J.; Steph. art. 10, *illus. b.*). So, as to the quality of milk, if the two consignments were taken from the same cows and at the same milking (*Marshall* v. *Skett*, 108 L.T. 1001; *Wilkinson* v. *Clark*, 1916, 2 K.B. 636).	*Acts done as to parts of same whole.* The question being whether A., a brewer, sold good beer to B., a publican;—the fact that A. sold good or bad beer to other publicans is inadmissible [*Holcombe* v. *Hewson*. 2 Camp. 391 (1810). Ld. Ellenborough, C.J., remarked,—"This is *res inter alios acta*. We cannot enquire into the quality of different beer sold to different persons. The party might deal well with one and not with others. . . . I cannot admit evidence of his general character and habits as a brewer"].
The question being whether A. had forged B.'s signature to a bill of exchange;—the fact that he had forged B.'s signature to other bills is receivable if all formed parts of the same collection (*Griffits* v. *Payne*, 11 A. & E. 131, *semble; cp. Roupell* v. *Haws*, *ante*, 68-9, where all the forgeries were part of the same transaction).	The question being whether A. had forged B.'s signature to a bill of exchange;—the fact that he had forged B.'s signature to other bills is not receivable (*Viney* v. *Barss*, 1 Esp. 293).
The question being whether an interlineation in a will had been made before its execution;—evidence that another interlineation in the same will had been so made is admissible (*Re Foley*, 25 L.T. (O.S.), 311; *post*, 328, 529).	A. sues B. for libel. In mitigation B. alleges the publication by A. of newspapers and books reflecting on B. Evidence that a copy of one of such newspapers had been printed and deposited at the Stamp Office, held not admissible to show that other copies of the same issue had been printed and published to the world so as to come to B.'s knowledge (*Watts* v. *Fraser*, 7 A. & E. 223; *cp. Prescott* v. *Flinn*, *ante*, 166).
Title. Acts at same or other places. In an action by A. against B. for work done to certain houses on the orders of C.;—it is admissible, in order to prove that B. is the owner of the houses and the real principal, to show that other persons had (although unknown to A.) received orders from B. for work done to the *same* houses	*Title. Acts at same or other places.* The question being whether a slip of waste land, bordering a certain road, belonged to A., the owner of the adjacent land, or to B., the lord of the manor;—acts of ownership by B. over other parcels of waste land merely shown to border *other* roads

Admissible.

(*Woodward* v. *Buchanan*, L.R. 5 Q.B. 285. *Aliter* as to orders for work done at *other* houses).

The question being whether a slip of waste land, lying between a highway and the enclosed lands of A., belonged to him or to B., the lord of the manor;—acts of ownership by B. on other parts of the waste within the *same* manor on either side of the *same* road and between it and the inclosures of other persons, although at a distance of two miles from the spot in dispute, and although the continuity of the waste was interrupted by houses at the sides of the road, are admissible in B.'s favour (*Doe* v. *Kemp*, 2 Bing. N.C. 102; *Dendy* v. *Simpson*, 18 C.B. 831; *Vaughan* v. *De Winton*, 15 W.R. 1135; *Leake* v. *Portsmouth Corporation*, 107 L.T. 260). Working in one part of a mine is evidence of possession of the whole (*Wild* v. *Holt*, 9 M. & W. 672); and working under one part of a demised tract of land is evidence of the possession of the mines under a different part (*Taylor* v. *Parry*, 1 M. & G. 604).

So, to prove that A. owned the whole of the bed of a river between his lands and B.'s;—acts of ownership by him on the bed, banks, and fences of the river on B.'s side, but below the latter's land, are admissible [*Jones* v. *Williams*, 2 M. & W. 331; *Neill* v. *Duke of Devonshire*, 8 App. Cas. 135; and as to acts on the foreshore of a navigable tidal river, see *Lord Advocate* v. *Blantyre*, 4 App. Cas. 770, 791. As to acts on a river and adjoining lake, see however, *Johnson* v. *O'Neill*, 1911 A.C. 552, 612 *per* Ld. Robson].

To prove that a certain mountain ridge formed the boundary between manor A. and manor B.;—the fact that the same ridge formed the boundary between manor A. and manors C. and D. is admissible, since being a *natural* boundary, equally suitable to both cases, it was unlikely to have been varied (*Brisco* v. *Lomax*, 8 Ad. & E. 198).

The question being whether the tenants of a manor were entitled to certain mineral rights;—evidence that the tenants of other detached manors were entitled to the same rights was admitted on proof that all the manors belonged to a group called "assessionable manors," forming part of the possessions of an ancient earldom and duchy, and that their tenants answered the same description and held their tenements on similar terms (*Rowe* v. *Brenton*, 8 B. & C. 737, 758).

The question being whether the Crown had the right of appointing a coroner within the honour of Pontefract, in the Duchy of Lancaster;— evidence of its appointment of coroners, and of their acting in other parts of the duchy without the honour of Pontefract, is admissible (*Jewison* v. *Dyson*, 9 M. & W. 540).

Inadmissible.

in the same manner held inadmissible (*Doe* v. *Kemp*, 2 Bing. N.C. 102).

A., as lord of a manor, claims a strip of land by the side of a highway as part of the waste of the manor. Acts of ownership by A. over similar and contiguous strips, but which strips are not part of the same waste (*Doe* v. *Kemp*, 2 Bing. N.C. 102, 107), and of the same manor (*Leake* v. *Portsmouth Corporation* (No. 2) 107 L.T. 260; *Vaughan* v. *De Winton*, 15 W.R. 1135, *per* Blackburn, J.), are inadmissible.

The question being whether the tenants of a manor had a right of pasture over land A. in the manor;—evidence that they had such right over land B. in the same manor, was rejected on proof: (1) That the two parcels of land were physically distinct, being separated by a deep creek; (2) That there was no identity of character or predicament between them—one being natural soil, covered with grass; the other artificial land, apparently reclaimed from the foreshore, dotted with sheds, and sparsely sown with herbage; (3) That there was no similarity in the rights exercised over both,—the tenant having habitually depastured their sheep in one, while in the other there had been only occasional pasturings, so trivial as to partake of the nature of trespasses rather than of the exercise of a right (*Scrutton* v. *Stone*, 10 T.L.R. 157, *per* Lopes, L.J.).

The question being whether certain land had been dedicated to the public;—evidence that other land, though part of a continuous strip and of a similar description, had been fenced off from the highway with the consent of the highway authority, held inadmissible (*Coats* v. *Herefordshire Council*, *ante*, 131).

Admissible.

In an action for tithes, the question being whether a certain payment was a farm *modus*;—evidence of similar payments by other farms in the same township, is admissible to disprove such *modus* (*Blundell* v. *Howard*, 1 M. & S. 292).

Custom. The question being whether a certain custom prevailed in the cod-fisheries of Newfoundland;—the fact that the same custom prevailed in the cod-fisheries of Labrador is admissible (*Noble* v. *Kennoway*, 2 Doug. 510). So, to prove a custom of the bleaching trade at Loughboro', evidence that the same custom existed in the bleaching trade at Nottingham, fourteen miles distant, may be received (*Plaice* v. *Allcock*, 4 F. & F. 1074). And a custom of the fruit trade in London may be proved by a similar custom in the colonial trade (*Fleet* v. *Murton*, L.R. 7 Q.B. 126).

Animals. To prove that A.'s dog had killed certain sheep belonging to B.;—the fact that the *same* dog had been seen to kill one of B.'s sheep on a mountain on a Saturday morning, and that other sheep of B.'s were found dead on the same mountain in the evening, held admissible (*Lewis* v. *Jones*, 49 J.P. 198; 1 T.L.R. 153. As to the habits of sheep, see *Heath's Garage* v. *Hodges*, 1916, 1 K.B. 206).

A. sues a railway company for injury caused by his horse shying at an obstruction on the road. To prove (1) that the obstruction was likely to cause horses to shy; and (2) that A.'s horse in fact shied thereat (which was denied);—evidence that other horses had shied at the same obstruction, held admissible (*Brown* v. *E. & M. Ry.*, 22 Q.B.D. 391).

A. sues B. for injury to his horse from defects in a road. Defence, that the injury was caused by the horse being a shyer;—evidence of his *general habit*, and *previous and subsequent instances*, of shying, held admissible to show that he was so at the time in question (*Todd* v. *Rowley*, 8 Allen (Mass.) 51; *Kennon* v. *Gilmer*, 131 U.S. 227.

In a Workman's Compensation claim, the question being as to the cause of an accident to A., a stable-boy, who was found dead in a stable from the kick of a horse and with a halter in his hand; — Evidence (1) that the horse was a quiet and not a vicious one; but (2) that A. was in the habit of teasing it with a halter;—Held admissible (*Joy* v. *Phillips*, 85 L.T. K.B. 770, C.A.; see *ante*, 138-9).

Operation of Physical Agencies. The question being whether A.'s land was injured by noxious discharges from B.'s works;—proof that B.'s works had, or had not, injuriously affected neighbouring lands similarly situated to A.'s is admissible (*Tennant* v. *Hamilton*, 7 C. & F. 122). So, where B.'s defence was that the injury was due not to his works, but to local causes, evidence that the same effects were

Inadmissible.

Animals. The question being whether A.'s dog had a propensity to bite strangers;—evidence that (1) it barked at strangers (*Sanders* v. *Waugh*, 1897, Times, April 10, C.A.); or (2) had a propensity to bite animals (*Osborne* v. *Chocqueel*, 1896, 2 Q.B. 109; *ante*, 148), is inadmissible.

Operation of Physical Agencies. The question being whether an obstruction to a harbour was caused by the erection of a sea-wall in its vicinity;—evidence that similar obstructions occurred at some other harbours on the same coast which were in the vicinity of sea-walls, held inadmissible, as an attempt *litem lite resolvere* [*Folkes* v. *Chadd* (1782), 3 Doug. 157. A scientific witness who had given his

Admissible.

found in the vicinity of B.'s works at other places, where such local causes did not exist, is admissible (*R.* v. *Fairie*, 8 E. & B. 486, 488).

The question being whether a small-pox hospital, managed by a certain Corporation, had communicated diseases to residents in the neighbourhood;—evidence that *other* small-pox hospitals, not managed by the Corporation, had, or had not, communicated disease to residents in their respective neighbourhoods, is admissible, and of more or less weight according as the management of the others is, or is not, shown to have been similar to that of the Corporation [*Metropolitan Asylums District* v. *Hill*, 47 L.T. 29 H.L. For other cases in which such evidence has been received see *A.-G.* v. *Nottingham*, 1904, 1 Ch. 673; in that case Farwell, J., considered its admission wrong, as raising side issues the decision of which necessarily prejudiced absent parties].

The question being whether A. murdered B. by poison;—proof that C. and D., to both of whom A. had access, had (the one previously and the other subsequently to B.'s death) died from the same poison, is admissible to show that B.'s death was caused by that poison [*R.* v. *Geering*, 18 L.J.M.C. 215; *R.* v. *Flannagan*, 15 Cox, 403; it is also admissible to rebut a defence of accident, mistake, &c., see *post*, 180; as to similar deaths to show *symptoms* in corroboration of the opinions of experts, see *post*, 398; as to the action of explosives, see *ante*, 70, and of oil-cake on cattle, *Brougham* v. *Pattinson*, Times, May 18, 1901].

Mechanical Agents. The question being whether A.'s premises were ignited by sparks escaping from a railway engine;—proof that (1) the *same* engine, and (2) *other* engines of similar construction belonging to the same company, had previously caused fires along the same line is admissible [*Aldridge* v. *G. W. Ry.*, 3 M. & Gr. 515; *Piggott* v. *E. C. Ry.*, 3 C.B. 229. As to liability for such damage, see generally *Powell* v. *Fall*, 5 Q.B.D. 597; *Gunter* v. *James*, 72 J.P. Rep. 448; The Railway Fires Act, 1905; 41 L.Jo. 15; and 71 J.P. 603].

To prove the speed of a motor-car;—evidence that, by a constable's watch, the

Inadmissible.

opinion that the sea-wall had not caused the obstruction in question was allowed to support such opinion by proof that in same cases, along the same coast, harbours near sea-walls were *not* so obstructed. See a discussion of this case in *Metropolitan Asylums District* v. *Hill*, *opposite;* and such evidence was received by Lord Ellenborough in *R.* v. *Williamson*, 2 C. & P. 635, on the ground, as explained by Maule, J., in *R.* v. *Whitehead*, *ante*, 165, that the witnesses were asked generally their opinions *causa scientiæ*].

The question being whether the removal of certain stones from a river had caused the latter to wash away the plaintiff's land;—evidence that the removal of stones from another part of the river had had the same effect was rejected as tending to mislead the jury, no satisfactory proof being given that the conditions of the two occurrences were the same [*Hawks* v. *Charlemont*, 110 Mass. 110. See *Comm.* v. *Piper*, 120 Mass. 185, cited *post*, 398].

The question being whether A. committed a common law nuisance in 1856 in manufacturing animal charcoal;—evidence that A. was convicted of a statutory nuisance at the same place and in the course of the same trade in 1855, and that the trade was carried on in the same manner at both times, held inadmissible (*R.* v. *Fairie*, 8 E. & B. 486. So, also, by a majority of the Court, if the two offences had been precisely similar, disapproving *R.* v. *Neville*, 1 Peake, N.P.C. 91, *contra*).

The question being whether A. murdered B. by poison;—proof that C. and D., to whom A. was not proved to have had access, had both died from the same poison, is not admissible to show that B.'s death was caused by that poison (*R.* v. *Flannagan*, *opposite*). Nor, though A.'s access to C. and D. was proved, are their deaths admissible to show that A. administered the poison to B. (*R.* v. *Geering*, *&c.*, *opposite*). [Though these cases do not in terms exclude the evidence, yet, as was pointed out in *R.* v. *Hall*, cited *post*, 172, 180, all the cases disavow its admissibility for the latter purpose: *cp. R.* v. *Smith*, 11 Cr. App. R. 229, 233; *Perkins* v. *Jeffrey*, 1915, 2 K.B. 702; *R.* v. *Coulter*, *ante*, 165. In *R.* v. *Smith*, *sup.*, however, Lush, J., considered that in *R.* v. *Geering*, the evidence was admitted not to prove the intent, but the administration of the poison by A.; and see "system to show identity," *ante*, 164].

Admissible.

car traversed a measured distance of 176 yards in fifteen seconds, held admissible, without showing that the watch had been tested or was accurate (*Gorham* v. *Brice*, 18 T.L.R. 424; *Plancq* v. *Marks*, 94 L.T. 577). And the fact that the car was so geared that such a rate was impossible, is admissible in rebuttal (*R.* v. *Cooper*, Times, Dec. 11, 1905).

Conditions of places and things. The question being whether A.'s death by drowning was due to the defendant's negligence in keeping his dock in a dangerous condition; — evidence that other drownings had occurred thereat and complaints been made, is relevant to show that the dock was dangerous [*Moore* v. *Ransome*, 14 T.L.R. 539, C.A. See as to the condition of a railway stairway, *Hart* v. *L. & Y. Ry.*, *ante*, 126, 134; and as to an obstruction in a road being likely to frighten horses, *Brown* v. *E. & M. Ry.*, *ante*, 153; and *cp. Glamorgan Co.* v. *Standing Committee*, &c., 1914, W.N. 443; 138 L.T.Jo. 110].

A. sues B. for damages for injury by an explosion of gas under a street;—evidence that escapes of gas and explosions had occurred at the same and adjacent places on former occasions, is admissible (*Ogden* v. *Gas Co.*, 1905, Times, Mar. 16).

The question being whether a ship was seaworthy when starting on a certain voyage; evidence that she had made previous voyages safely under similar conditions as to cargo, &c., is relevant (*Ajum* v. *Union Ins. Co.*, 1901, A. C. 362; *Thompson* v. *Farmer*, 9 Q.B.D. 372, 383; *ante*, 104).

To show that a drop of 22 inches from the footboard of a railway carriage to the platform was not dangerous;—evidence that a similar drop existed at other stations and had caused no accidents is admissible (*Manning* v. *L. & N. W. Ry.*, 23 T.L.R. 22, C.A.).

A. sues B., a barber, for injury from ringworm caused by B.'s negligence in using unsterilized razors. Evidence that C. and D. had previously contracted the same complaint after being shaved by B. (or other barbers), Held admissible, not to show B.'s negligence as a barber, but that the use of unsterilized razors was dangerous (*Hales* v. *Kerr*, 77 L.J.K.B. 870).

Inadmissible.

CHAPTER XII.

SIMILAR FACTS.

Admissible to Prove States of Mind.

After evidence has been given that an act has been done by a party, similar acts done by the same party and connected therewith, are admissible to show his state of mind in doing the act. Similar facts are also admissible to affect the credit of witnesses, or explain the meaning of the terms used in a document. [Tay. ss. 328-348; Ros., Cr. Ev., 13th ed., 80-88; Archb. Cr. Pl., 23rd ed., 308-12; Steph. arts. 11-12.]

Principle. Such evidence, which is more often resorted to in criminal than in civil proceedings, is admitted on grounds of necessity—since the acts which it is received to explain are usually of an equivocal character, as to which, when standing alone, no presumption of intent would arise. To supply this element, evidence of similar acts may be both opened (*ante,* 38), and proved to the jury, not to show that because the defendant has committed one crime therefore he would be likely to commit another, but to establish the animus of the act and rebut, by anticipation, the obvious defences of ignorance, accident, mistake or other innocent state of mind [*Makin* v. A.-G. of *N.S. Wales,* 1894, A.C. 57; *R.* v. *Bond,* 1906, 2 K.B. 389.] On the other hand, where these defences are not clearly put forward (*Perkins* v. *Jeffery,* 1915, 2 K.B. 702; *R.* v. *Bond, sup.,* at pp. 409, 416-17; *Thompson* v. *R.,* 1918, A.C. 221, 232, *per* Ld. Sumner), or perhaps where the intent is manifest (*R.* v. *McDonnell,* and *R.* v. *Quilter, post,* 184), the evidence may be rejected.

Qualifications. (1) *Primâ facie* proof both of the main act, and of the connection of the party implicated, is a condition precedent to the admission of evidence under the present head (*R.* v. *Francis,* L.R. 2 C.C. 128; *Blake* v. *Albion Soc.* 4 C.P.D. 94; *R.* v. *Baird,* 11 Cr. App. R. 186; *R.* v. *Smith,* 11 *id.* 230; Wills, Circ. Ev. 6th ed., 77-8 *n; R.* v. *Hall,* 5 N.Z.L.R. 93, 104, C.A., where the court remarked: "It is always supposed that the doing of an act, as a fact capable of external observation, is first confessed; or that there is sufficient independent testimony on the subject to be laid before the jury. Were the law otherwise, it is obvious that under the pretence of proving the prisoner's state of mind, the external act itself could be proved and that the common law principle excluding evidence of other unconnected crimes would be wholly set aside"). Indeed, the proper course would seem to be to exhaust the evidence on both points before tendering it under the present head. The jury, however, cannot be asked to pronounce upon one before hearing the other (*Barnes* v. *Merritt, post,* 183; Wills, Circ. Ev. *sup.;* and *cp.*

R. v. *Mason, post,* 177). (2) The sufficiency of proof of the similar facts is for the judge, not the jury (*R.* v. *Colclough,* 15 Cox, pp. 98, 102, 106; *R.* v. *Hall, sup.; R.* v. *Hicks,* 39 L.Jo. 421; *Com.* v. *Robinson,* 146 Mass, 571). There must be *primâ facie* evidence sufficient to submit to the jury; but if after admission it turns out insufficient, the jury should be warned to disregard it (*id.; R.* v. *Girod, post,* 164) or, if the prejudice be considerable, the case may be tried before a fresh jury (*R.* v. *Bond,* 1906, 2 K.B. pp. 413-14). (3) Evidence of similar facts may be direct, or presumptive, or consist of the voluntary admissions or confessions of the defendant (*R.* v. *Bond, post,* 171; *R.* v. *Wells, post,* 181; *R.* v. *Hall, sup.; Com.* v. *Robinson, sup.*). Whether in the case of documents, *e.g.* other forged notes, these must be duly produced, appears doubtful. On charges of forgery, it has been considered that evidence of the prisoner having destroyed the other notes should be received (1 Phill. & Arm. Ev. 10th ed. 511; Ros. Cr. Ev. 13th ed. 81); while in some cases, even though the documents were in existence, an admission by the defendant without their production was held sufficient (*R.* v. *Balls,* 1 Moo. C.C. 470; *R.* v. *Forbes,* 7 C. & P. 224; *contra, R.* v. *Millard,* Rus. & Ry. 245; *R.* v. *Cooke,* 8 C. & P. 586; and *cp. R.* v. *Brown,* 2 F. & F. 559). (4) Generally, evidence of similar facts not only *prior,* but *subsequent,* to that in question may be given (*R.* v. *Rhodes, post,* 181; *R.* v. *Mason,* 10 Cr. App. R. 169), as well as of the defendant's conduct and demeanour connected therewith (*R.* v. *Whiley,* 2 Leach, 983), and of any surrounding facts showing their motive or intention (*R.* v. *Heesom, post,* 180); *R.* v. *Stephens,* 16 Cox 387; *R.* v. *Gray, post,* 184; *R.* v. *Smith,* 1915, 84 L.J.K.B. 2153; *R.* v. *Smith,* 1918, 2 K.B. 415; *contra, R.* v. *Flannagan, post,* 180); *e.g.,* that they were not subject to the same excuse as that alleged as to the main fact (*Blake* v. *Albion Soc.,* 4 C.P.D. 94, 98); while, in rebuttal, the defendant may disprove or explain them, *e.g.* where other libels are proved against him to show malice, he may prove that such libels were true (*inf.*; Steph. art. 12, note 1). The similar facts, however, must have occurred *within a reasonable limit of time* (*R.* v. *Wyatt,* 1904, 1 K.B. 188; *R.* v. *Rhodes,* 1899, 1 Q.B. 77, *per* Ld. Russell, C.J.; *R.* v. *Stephens, sup., per* Ld. Coleridge, C.J.; *Perkins* v. *Jeffery,* 1915, 2 K. B. 702; *R.* v. *Ball,* R. & R. 132); although where by statute a charge has to be brought within six months of the offence, evidence of similar offences committed beyond the six months limit is not thereby inadmissible (*R.* v. *Shellaker* 1914, 1 K.B. 414, overruling *R.* v. *Beighton,* 18 Cox, 535; as to the statutory limit in cases of guilty knowledge, see *inf.*). With regard to *subsequent* similar facts it used to be thought, apparently on the authority of *R.* v. *Holt, post,* 181, that these were inadmissible to show intent in the case of false pretences; but this is not so now, at all events where the subsequent acts form part of the same general fraudulent scheme as those in question, and are not merely isolated and disconnected acts (*R.* v. *Rhodes, sup.; R.* v. *Smith, post,* 182). (5) In Ireland it has been held that evidence of system is in civil cases only admissible if pleaded (*Edinburgh Life Assn.* v. *Y.,* 1911, 1 Ir. 306). (6) Subject to the above, it is no objection that the similar facts form the subject of prior indictments on which the prisoner has already been acquitted (*R.* v. *Ollis,* 1900, 2 Q.B. 758; *cp.,* however, *R.* v. *Havard,* 11 Cr. App. R. 2; *R.* v. *Barron, post,* 185), or of other counts in the same indictment on which he was subsequently so (*R.* v. *Stephens,* 16 Cox, 387,), or of separate indictments still to be tried (*R.* v. *Jones,* 14 Cox, 3);

though in *R.* v. *Angel,* 137 C.C.C. Sess. Pap. 252-3, the court appears to have rejected evidence of other *larcenies* on the ground that they might by statute, and ought to have been charged in the same indictment (see Indictments Act 1915, *ante,* 57).

Single Acts. System. Acts by Whom Done. As a general rule, a single additional act, provided it is connected with the act charged by similarity of character and circumstances and by proximity of time, is admissible under the present head to prove knowledge, or rebut accident, mistake and the like (see fully *infra*); and *à fortiori* a series of such acts tending to show system, or a systematic course of conduct. But a single other act, though similar to that in question, is not necessarily admissible, without further evidence, to establish *system* (*R.* v. *Bond, post,* 185; though see *R.* v. *Thomson, id.*).

Usually it is only the acts of the party whose intent is in question that are relevant. But this is not always so. Thus, where a principal is chargeable with his agent's act, the intent may be shown by other acts of the same agent (*Blake* v. *Albion Soc.,* and *Budd* v. *Lucas, post,* 183). Indeed, to rebut accident, even *anonymous* acts may, if they show system, be proved, without showing the connection of the defendant (*R.* v. *Bailey, post,* 183, *R.* v. *Roden,* 181; Wigmore Ev. ss. 302-304; *R.* v. *Donellan,* cited *id.*) And sometimes the intent of a party may be shown, even in his own favour, by similar acts of strangers, such acts operating as a standard of comparison by which the intent of the act in question may be gauged (*R.* v. *Spencer, ante,* 155; *R.* v. *O'Connell, post,* 184; *cp. ante,* 107, 125-7). So, on a charge of murder, previous assaults by the deceased on the prisoner are admissible in the latter's favour to show the nature of the assault he had reason to fear (*R.* v. *Hopkins,* 10 Cox, 229; *post,* 190).

Similar Facts to Show Knowledge. A party's knowledge of the nature of a particular transaction—*e.g.* that an agency was dangerous (*R.* v. *Cooper,* 3 Cox, 547, 549-50), a representation false (*R.* v. *Francis,* L.R. 2 C.C. 128; *R.* v. *Ollis,* 1900, 2 Q.B. 758), a deed forged (*R.* v. *Mason,* 10 Cr. App. R. 169), or money passed counterfeit (*R.* v. *Forster,* 24 L.J.M.C. 134; *R.* v. *Forbes,* 7 C. & P. 224), may generally be shown either by a single similar occurrence, or *à fortiori* by a series, or system (*R.* v. *Bond,* 1906, 2 K.B. 389, 416-7; *post,* 185).

Receiving with Guilty Knowledge. The same rule was formerly applied to proof of guilty knowledge in cases of receiving (*R.* v. *Bleasdale,* 2 C. & K. 765; *R.* v. *Dunn,* 1 Moo. C.C. 146; *R.* v. *Davis,* 6 C. & P. 177); but later, in a leading case, the Court held that evidence of the possession of other goods, stolen at other times or from different people, whether found in the prisoner's possession *at* or *before* the finding of the property in question, was inadmissible (*R.* v. *Oddy, post,* 178; approved, *Makin* v. *A.-G.,* 1894, A.C. 57, 67). This topic is now regulated by the Larceny Act, 1916, s. 43, which (repealing s. 19 of the Prevention of Crimes Act, 1871), provides that: "Whenever any person is being proceeded against for receiving any property knowing it to have been stolen, or for having in his possession stolen property, for the purpose of proving guilty knowledge, there may be given in evidence at any stage of the proceedings (*a*) the fact that other property stolen within the period of 12 months preceding the date of the offence charged, was found or had been

in his possession; (*b*) the fact that within 5 years preceding the date of the offence charged he was convicted of any offence involving fraud or dishonesty. This last mentioned fact may not be proved unless, (i) 7 days notice in writing has been given to the offender that proof of such previous conviction is intended to be given; (ii) evidence has been given that the property in respect of which the offender is being tried was found or had been in his possession." Mere proof, however, of such conviction is not *per se* sufficient to cast the burden of disproving guilty knowledge upon the defendant (*R.* v. *Davis,* L.R. 1 C.C. 272; *R.* v. *Sporton,* 148 C.C.C. Sess. Pap. 232). [The above statute renders the cases of *R.* v. *Drage,* 14 Cox, 85; *R.* v. *Carter,* 12 Q.B.D. 522, and *R.* v. *Rowland,* 1910, 1 K.B. 458, inoperative]. Irrespective of the statute, however, which does not here apply, the thief may be called at Common Law to prove either the theft in question (*R.* v. *Bryant,* 13 Cr. App. R. 49), or that he sold other articles found in the prisoner's possession, to the latter *as* stolen property (*R.* v. *Powell,* 3 *id.* 1). The thief's plea of guilty in presence of the jury is not, however, evidence of the theft against the receiver, although the fact that the goods were stolen, to the receiver's knowledge, may of course, be inferred from the circumstances of the case without direct proof (*R.* v. *Sbarra,* 13 *id.* 118). If, however, the charge is substantially one of stealing, and not of receiving, though a count has been added for the latter, the evidence should be excluded (*R.* v. *Ballard,* 12 Cr. App. R. 1; *R.* v. *Bromhead,* 71 J.P. Rep. 102). while if, though admitted, it falls short of satisfactory proof that the other property found was *stolen,* the judge should warn the jury to disregard it (*R.* v. *Girod, post,* 179).

Similar Facts to rebut Accident, Mistake, Innocent Intent, &c. Accident. To show that an act proved *aliunde* was intentional and not accidental, a single similar act (*R.* v. *Bond,* 1906, 2 K.B. pp. 413-416), and *á fortiori,* a series of similar acts, showing a systematic course of conduct, by the same party, are admissible (*Makin* v. *A.-G. of N.S. Wales,* 1894, A.C. 57; *R.* v. *Heesom,* 14 Cox, 40; *R.* v. *Stephens,* 16 Cox, 387; Ros. Cr. Ev. 13th ed. 82-3; Steph. art. 11; Arch. Cr. Pl. 308-12). And in rebuttal, evidence is probably receivable that such other acts were themselves accidental (Steph. art. 12 *n.; cp.* libel cases, *inf.*). **Mistake.** So, where the defence of mistake is raised, similar evidence is receivable to disprove it (*R.* v. *Bond, sup.; R.* v. *Francis, sup.; R.* v. *Stephens, sup.; R.* v. *Richardson,* 2 F. & F. 343). **Fraud.** And, to prove that a given transaction was fraudulent, similar frauds by the same party either prior (*R.* v. *Wyatt,* 1904, 1 K.B. 188; *Barnes* v. *Merritt,* 15 T.L.R. 419; *Blake* v. *Albion Soc.* 4 C.P.D. 94), or subsequent thereto (*R.* v. *Rhodes,* 1899, 1 Q.B. 77; *R.* v. *Smith,* 92 L.T. 208), may be shown. **Malice.** The same rule also applies to malice. Thus, in cases of libel, prior libels written by the defendant of the plaintiff several years before, or subsequent ones written after issue of the writ, as also the circumstances attending their publication, are admissible to show actual malice or deliberate publication (*Barrett* v. *Long,* 3 H.L.C. 395; *Pearson* v. *Lemaitre,* 5 M. & G. 700; *Bolton* v. *O'Brien,* 16 L.R.I. 97, 483; *Anderson* v. *Calvert,* 24 T.L.R. 399). It is not necessary that such libels should be connected with, or refer to, the libel in question, provided they tend to establish malice at the date of the latter's publication (*id.*). And it is immaterial whether they were addressed to the plaintiff or to others, were

equivocal or not, or were themselves actionable or not (*Pearson* v. *Lemaitre, sup.*); the jury should, however, be warned not to give damages in respect of such libels, although the omission of such caution is not a misdirection (*Darby* v. *Ouseley,* 1 H. & N. 1; *Anderson* v. *Calvert, sup.*) In rebuttal, the defendant may prove the truth of such libels, since, as they are not set out on the record, he could not plead justification (*Warne* v. *Chadwell,* 2 Stark., 457; but this will not apply when such libels are a mere repetition of the words sued on, *Higgs* v. *Snell,* cited Ros. N.P., 17th ed., 848). Moreover, when the meaning of the libel is ambiguous, other libels contained in the same, but not in other, publications may, it has been said, be referred to in order to construe the libel in question (*Bolton* v. *O'Brien, sup.*). When, however, the libel is founded on information received from others, the fact that the informants were actuated by malice is not admissible to prove the defendant's malice (*ante,* 156). [Odgers on Libel, 314-315; Starkie on Libel, 6th ed. 483; Ros. N.P. 845-847, Tay. s. 340]. **Other intents.** Similar evidence is admissible to establish various other illegal or dishonest motives or intentions (*post,* 183-5); as also to rebut a defence of sudden mania (*R.* v. *Wells, post,* 181). **Resulting Trust. Double Portions.** On the same principle, in order to rebut a resulting trust, and show that the testator intended a payment to be an advance, evidence of similar advances to third persons is receivable (*Hopwood* v. *H.,* 7 H.L.C. 728; *Fowkes* v. *Pascoe,* 10 Ch. Ap. 343; Tay. s. 1129; *post,* 668, 670); and similar evidence is receivable to rebut the presumption against double portions (*Palmer* v. *Newell,* 20 Beav. 32, 40-1).

Similar Facts to affect Witnesses and Documents. Similar facts are also sometimes admissible in order to corroborate the testimony or affect the credit of witnesses (*post,* 488), to illustrate the opinions of experts (*post,* 397-8); or to explain the meaning of terms used in documents (*post,* chap. xlvi.).

EXAMPLES.

Similar Facts to Show Knowledge.

Admissible.	*Inadmissible.*
Negligence. A. is sued for damage caused by his child's air-gun. Evidence that the child had previously broken a window with the gun and that A. had promised to destroy it, is admissible to show A.'s knowledge of the danger [*Baker* v. *Sales,* 32 T.L.R. 413; *cp. Chilvers* v. *L.C.C. id.* 363, where to rebut negligence, evidence was admitted that the toy used was similar to those generally played with by children. See, also, *ante* 149, 155-6].	*Libel.* A. sues B. for libel. In mitigation of damages, B. alleges the publication by A. of newspapers and books reflecting on B. Evidence that a copy of one of such newspapers had been printed and deposited at the Stamp Office;—Held not admissible to prove that other copies of the same issue had been printed and published to the world so as to come to B.'s knowledge (*Watts* v. *Fraser,* 7 A. & E. 223).
Forgery. Uttering. A. is charged with uttering counterfeit coin knowing it to be such;—evidence that other counterfeit coins were found in his pocket, separately wrapped up in paper (*R.* v. *Jarvis,* 7 Cox, 53); and that he had *previously* or *subsequently* uttered counterfeit coins of the *same* or *different descriptions;*—held admissible to show his knowledge, although such utter-	*Forgery. Uttering.* A. is charged with forging and uttering B.'s indorsement to a cheque drawn on their joint banking account;—other cheques on the same account, in which A. had merely altered the word "order" into "bearer" held inadmissible to prove *scienter,* since the account was under A.'s control (*R.* v. *Horton,* 119 C.C.C. Sess. Pap. 60; *aliter* as to other

Admissible.

Inadmissible.

ings were themselves the subject of separate indictments (*R.* v. *Foster*, 24 L.J.M.C. 134, *sub nom. R.* v. *Forster*, 1 Dears. 456; *R.* v. *Weeks*, 8 Cox, 455). So, also, the fact that A. gave a false name and address at the time of such utterings (*R.* v. *Whiley*, 2 Leach, C.C. 983). And on a charge of *making* such coins, the fact that A. had previously *uttered* others, is receivable (*R.* v. *Rowlands*, 3 Cr. App. R. 224).

A. is charged with forging B.'s name to a bill of exchange and uttering the same; —evidence that other bills to which B.'s name had been forged were found upon A. when he was arrested, is admissible (*R.* v. *Hough*, R. & R. 120). So, to rebut a defence that A. believed from their course of dealing, that he had a right to use B.'s name;—a letter written by A., after he was in custody, to C., telling him that he had forged his name on another bill, but would get it met if C. would say it was genuine, held admissible to prove A.'s guilty knowledge, though *aliter* to prove the forgery of C.'s bill unless the bill is produced (*R.* v. *Forbes*, 7 C. & P. 224; *cp. Gibson* v. *Hunter*, 2 H. Bl. 288). And on a charge of uttering a forged Polish note; —evidence given by a detective that the defendant had agreed to make him 1000 spurious Austrian notes for fifty florins, held admissible, though no notes were made in pursuance of the agreement [*R.* v. *Balls*, 1 Moo. C.C. 470]. So, perhaps, on a charge of possessing a mould for counterfeit coin, evidence of uttering other coins of a different description and not capable of being made by that mould, may be admissible (*R.* v. *Baker*, 7 Cr. App. R. 252)].

A. is charged in separate counts, with forging in March and uttering in April the lease of a house. To show guilty knowledge and rebut honest intent when uttering the deed, evidence that two other deeds forged by A. and of a similar character were found in his possession, one a fortnight and the other 5 months *subsequently* to the uttering in question;—Held, admissible [*R.* v. *Mason*, 10 Cr. App. R. 169. This evidence had been objected to, but received, before a verdict of acquittal as to the forgery was returned].

A., a stamp distributor of the Q.B. Division, is charged with uttering three forms of the Exchequer Division bearing forged stamps;—evidence that other forms of the Q.B. Division with forged stamps were filed in A.'s office, bearing A.'s special mark, with date-stamps affixed by the same instrument as that used in forging the Exch. document, and that tools suitable for fabricating counterfeit stamps were also found in A.'s office;—Held admissible to show A.'s guilty knowledge, and cheques in which A. had forged the indorsement of other payees).

A. is charged with forging B.'s name to a bill of exchange and uttering the same; evidence of a conversation between them in reference to prior forged bills, in which B. told A. he should have to transport him if he did not leave off forging his name, on hearing which A. fell on his knees and began crying,—held inadmissible to prove *scienter* (*R.* v. *Cooke*, 8 C. & P. 586, 587; so in *R.* v. *Brown*, 2 F. & F. 559, evidence of statements by the prisoner as to other notes supposed to have been the subject of a guilty uttering was rejected on the authority of *R.* v. *Cooke*, though with doubts as to the correctness of that case).

On a charge of uttering a certain forged note;—the fact that the defendant had returned the money for other notes when they were objected to and allowed the word "forged" to be written across them, held inadmissible without producing or accounting for the absence of such notes (*R.* v. *Millard*, Russ. & Ry. 245; *R.* v. *Phillips*, 1 Lew. C.C. 105).

Admissible.

sufficient evidence both of the uttering of the Q.B. documents and of A.'s connection therewith (*R.* v. *Cololough*, 15 Cox, 92; 10 L.R.Ir. 241, C.C.R. See *R.* v. *Ball*, R. & R. 132, where the similar documents were proved to be in A.'s handwriting).

Embezzlement. A., a clerk, is charged with embezzling three sums of £2 each from B., his employer, by means of false entries in a ledger;—evidence that, both before and after the dates in question, other sums had been obtained by A. by similar means is admissible to rebut the defence of an innocent mistake in book-keeping (*R.* v. *Richardson*, 2 F. & F. 343; *R.* v. *Proud*, 31 L.J.M.C. 71; *R.* v. *Adlington*, 98 C.C.C. Sess. Pap. 514).

Receiving. A. is charged with receiving goods knowing them to be stolen;—evidence that other property stolen six months previously was found in A.'s possession at the same time as the goods in question, is admissible to show A.'s guilty knowledge, though the other goods were the subject of a second indictment under the Pr. Cr. Act of 1871, s. 19 [*R.* v. *Jones*, (1877) 14 Cox, 3].

A. is charged with receiving goods stolen by B. from C.;—evidence that A. had, five months before her arrest, pledged, or disposed of, or had in her possession, other articles of C.'s stolen by B., and received by A. from B., held admissible to show her guilty knowledge [*R.* v. *Dunn* (1826) 1 Moo. C.C. 146; affd. by the judges. See *ante*, 155-6]).

A. was charged with receiving goods stolen from B. on April 30, the goods being found in A.'s warehouse in London on June 2;—evidence that other property stolen from C. and received by A. within the preceding twelve months, was found at another warehouse of A.'s at Southend on June 7;—held admissible on proof that it had been there on June 2 [*R.* v. *Fennell*, 98 C.C.C. Sess. Pap. 701-2, *per* Chambers, R., after consulting Hawkins, J.; though, in deference to *R.* v. *Drage*, *opposite*, he offered to reserve the point].

So, where the goods were stolen on Feb. 14 and found in A.'s possession on Oct. 1;—evidence of the finding on the latter date of property stolen *subsequently* to Feb. 14, held admissible (*R.* v. *Lydon*, 111 C.C.C. Sess. Pap. 113-4, *per* Chambers, R., who offered to reserve the point).

So, where the goods, stolen from B. on Aug. 15, found in A.'s possession on Sept. 6 when he was arrested;—evidence that other property stolen from C. was found in another of A.'s shops on Sept. 9;—held admissible [*R.* v. *Tillard*, 114 C.C.C. Sess. Pap. 1235, *per* Charley, C.-S. In this case *R.* v. *Drage*, and *R.* v. *Carter*,

Inadmissible.

Receiving. A. was charged with receiving goods stolen from B. on March 3, 1851. The goods were found in A.'s possession on March 10, 1851;—evidence that four other pieces of property had been stolen from C. and D. on Dec. 5, 1850, and that (*a*) two of these were found in A.'s possession on March 10; and (*b*) two others *had been* in his possession on Dec. 13, 1850,—held inadmissible [*R.* v. *Oddy*, (1851) 2 Den. C.C. 264; 5 Cox, 210; since possession of stolen property being *prima facie* evidence of stealing, not of receiving, the crimes were dissimilar and disconnected and merely went to show that A. was a bad man, not that he had received the property stolen on March 3 with guilty knowledge. This case was followed in *R.* v. *Emmett*, 1905, Vict. L. Rep. 718. See now, however, the Larceny Act, 1916, s. 43, cited *ante*, 174].

A. was charged with receiving goods stolen from B. on Nov. 27 and found in A.'s possession on Dec. 22;—evidence that a few weeks before Nov. 27 other property was stolen from C., which early in December had been sold for half its value by A.,—held inadmissible to show A.'s guilty knowledge, as it was not found in A.'s possession on Dec. 22 (*R.* v. *Drage*, 14 Cox, 85, *per* Bramwell, J.). So, where the goods were stolen from B. on May 20, found in A.'s possession immediately after, and sold by him on May 26;—evidence that other goods, stolen from C. in the previous October, had been in A.'s possession but had been sold by him on May 9, was rejected to prove *scienter* as not having been found in A.'s possession at the time of finding the goods in question [*R.* v. *Carter*, 12 Q.B.D. 522, C.C.R.; the two findings need not be at the same identical moment—one may be found at the first and the second on a return search, *per* Hawkins, J. Where the goods were stolen on May 6 and found on July 17, evidence that other goods stolen on July 6 were found together with those in question, held inadmissible, being stolen subsequently to

Admissible.

opposite; and *R.* v. *Fennell, sup.*, were cited].

A. is charged with receiving property stolen from B. by C.;—evidence that the proceeds of other property, stolen from B. both before and after that in question, had passed to A., some from C. and some from D., another receiver, though none of it was found in A.'s possession,—held admissible (*R.* v. *Hobinstock*, 37 L.Jo. 106; 135 C.CC. Sess. Pap. 169, *per* Fulton, R.).

A. was charged with receiving lead stolen from B. on Feb. 11, and found in A.'s possession on that date;—evidence that in Jan. other lead had been stolen from B., which lead had been sold by A. before Feb. 11, held admissible [*R.* v. *Nicholls*, (1858) 1 F. & F. 51, per Cockburn, C.J. In this case both *R.* v. *Oddy* and *R.* v. *Dunn*, *sup.*, were cited].

A. is charged with receiving. On proof that the stolen goods had been pawned by him the day before his arrest;—Held they were *found in his possession* within the second paragraph of sec. 19 of the Prevention of Crimes Act, 1871, and evidence was admissible of his conviction for fraud within the preceding 5 years (*R.* v. *Rowland*, 1910, 1 K.B. 458).

A. is charged with receiving stolen tin. On the police searching A.'s premises for stolen iron, A. makes a statement both as to the tin and the iron. Held, the whole was admissible, as otherwise the statement about the tin, which was clearly evidence, would be garbled and might be misunderstood by the jury (*R.* v. *Mansfield*, Car. & M. 140; this case is referred to in *R.* v. *Oddy, sup.*).

A. is charged with receiving metal knowing it to have been stolen. To show guilty knowledge, evidence was given by the police that, before his arrest, he stated to them that he had no metal on his premises, having giving up buying it. They then searched and found other metal which was the subject of other indictments. A., on being asked how he accounted for it, replying "I don't know who I bought it from. If I didn't buy it, someone else would." It was then proved that most, but not all, of this other metal was stolen. Held, that under the Larceny Act, 1916, sec. 43, not only the fact of finding the other metal was admissible, but all the circumstances thereof, as well as A.'s statements (*R.* v. *Smith*, 1918, 2 K.B. 415. The fact that the other metal was produced in Court before proof that it was *stolen*, was also held not to be a fatal objection).

[As to similar facts admissible or not to show a defendant's knowledge that representations made by him were false, see *R.* v. *Francis* and *R.* v. *Ollis*, *post*, 181-2].

Inadmissible.

the latter (*R.* v. *Head*, 67 J.P. Rep. 459, *per* Loveland, D.C., on the authority of *R.* v. *Carter, sup.*) [See now, however, the Larceny Act, 1916, s. 43, cited *ante*, 174].

A. is charged with receiving goods stolen by B. Evidence that other goods, stolen by B. within the preceding 12 months, were found in A.'s possession, but had been parted with by selling or pawning before the property charged was so found;—Held inadmissible [*R.* v. *Hardy*, (1910) 74 J.P. Rep. 396, following *R.* v. *Carter* and *R.* v. *Drage*, and holding that *R.* v. *Rowland opposite* only applied to the 2nd and not to the 1st paragraph of sec. 19 of the Pr. Cr. Act 1871; *per* Fulton, R. after consulting Bosanquet, C.S.].

A. was charged with receiving goods stolen from B. At the trial it was opened that other goods (blouses) belonging to C., and stolen from him *after* B.'s goods, were found in A.'s possession within the statutory period. The evidence as to the blouses consisted of (1) Contradictory accounts by A., on her arrest, as to where she had bought them; (2) Testimony by C.'s shop assistants that they had neither sold the blouses to A. nor given her receipts for the price; though they produced counterfoil receipts as to other goods which had been purchased by A.; (3) No receipts for the blouses produced by A.—Held, the evidence as to the blouses was inadmissible, there being no sufficient proof to go to the jury that they had been *stolen* [*R.* v. *Girod*, 22 T.L.R. 720; 70 J.P. Rep. 514. The latter report is fuller, but its headnote was, in *R.* v. *Harding*, 3 Cr. App. R. 10, said to be incorrect].

A. is charged with receiving stolen goods;—evidence that there were found in A.'s possession, at the same time as the stolen goods, pawn-tickets for other stolen property, held inadmissible, as the Prevention of Crimes Act, 1871, s. 19, only refers to property actually found and not to mere documents of title (*R.* v. *Cheshire*, 106 C.C.C. Sess. Pap. 663-4).

A. is charged with stealing a marked shilling from B. A constable, having found the shilling upon A., asked him if he had any more of B.'s money. A. then produced some half-crowns, and made a statement about them. Held, this statement was inadmissible, since if the second charge had been included in the indictment, and appeared to be a different taking from the first, the prosecution would have been put to their election, but here it was not on the record at all (*R.* v. *Butler*, 1848, 2 C. & K. 221).

Similar Facts to rebut Accident, Mistake, Innocent Intention, &c.

Admissible.

Murder. A. is charged with the murder of B. (her husband) by poison. After proof of its administration by A., and also that A. had insured B.'s life;—evidence (1) that C. and D., other members of B.'s family, to whom A. also had access, had died (one previously, and the other subsequently, to B.'s death) from the same poison,—held admissible to show that the administration of the poison to B. was *intentional* and *not accidental* [*R.* v. *Geering*, 18 L.J.M.C. 215 (for other points decided in this case, see *ante*, 170); *R.* v. *Garner*, 3 F. & F. 681; *R.* v. *Cotton*, 12 Cox, 400]; and (2) that the lives of C. and D. had been insured by A. in the same or kindred offices,—held admissible to show A.'s motive for murdering them [*R.* v. *Heesom*, 14 Cox, 40, *per* Lush J.,—"To prove the intention you may prove the motive, and this is a link in the chain." *Cp. R.* v. *Stephens*, 16 Cox, 387; *R.* v. *Gray*, *post*, 184; and *R.* v. *Smith*, *infra*].

A. is charged with the murder of B., an infant, whom she had promised to adopt and maintain on receipt of a small premium from B.'s mother, but whose body was afterwards found buried in A.'s garden;—evidence that A. had received other infants from their mothers on similar terms, who had afterwards disappeared, and that the bodies of unidentified infants were found buried in the garden of other houses occupied by A.;—Held admissible to rebut the defence that B.'s death was accidental [*Makin* v. *A.-G. of New South Wales*, 1894, A.C. 57; *R.* v. *Walters and Sachs*, 137 C.C.C. Sess. Pap. 284; *R.* v. *Chapman*, *id.* 471].

A., a doctor, is charged with the murder of B., an unfortunate, by strychnine;—evidence of the deaths by strychnine of three other unfortunates with whom A. had been intimate, and of his attempted administration thereof to a fourth, was received, after connecting those acts with the prisoner by showing his possession of strychnine, and that this was the cause of all the deaths. [*R.* v. *Neill Cream*, 116 C.C.C. Sess. Pap., 1417, 1451-2, *per* Hawkins, J. No grounds are stated, but the evidence was tendered to show identity; motive; that the prisoner understood the nature and quality of the act; and to negative the defence of accident or mistake. It was objected that the other women did not live under the same roof as the prisoner; nor was he shown to have prepared their food; and that the possession of a common drug like strychnine, to which all other doctors and chemists equally had access, was not exceptional in the case of the prisoner. *Cp. R.* v. *Klosowski*, 137 *id.* 471.]

A. is charged with the murder of B., his bigamous wife, who was found dead in her

Inadmissible.

Murder. A. is charged with the murder of B. (his wife) by poison on Jan. 26, 1886;—evidence that six months afterwards A. administered the same poison to C., his father-in-law (who did not die);—Held inadmissible, no sufficient proof having been given either (1) that A. had administered the poison to B.; or (2) that the two events were connected as part of the *same transaction*, or as actuated by a *common design* [*R.* v. *Hall*, 5 N.Z.L.R. 93, C.A. See comments in this case upon *R.* v. *Geering*, *opposite*. The evidence was also rejected to show *symptoms*, which the Court remarked should be confined to pathological facts (*post*, 398)].

A. is charged with the murder of B. by poison. After proof of its administration by A.; that A. had insured B.'s life; and that A. had caused the deaths of *other* persons by similar means;—further evidence that A. had also obtained *their* insurance-moneys, held inadmissible to prove A.'s motive for murdering B. [*R.* v. *Flannagan*, 15 Cox, 403, *per* Butt, J.; see, however, *R* v. *Smith*, *infra*. For other points decided in *R.* v. *Flannagan*, see *ante*, 170].

A. (the manager of B.'s eating-house) is charged with the murder of B. by poison;;—evidence that three other members of B.'s family died of the same poison, and that A. was present at all the deaths and administered "something" to two of them, was tendered—(1) to rebut accident; (2) to show A.'s possession of poison, since this was found in them and he had administered "something"; (3) to exculpate C., a niece of B., who sometimes visited B. and whom A. accused of the murder, it being proposed to show that C. was absent and could not by any possibility have poisoned one of the other three; (4) as parts of the same transaction. Held inadmissible [*R.* v. *Winslow*, 8 Cox, 397, *per* Martin and Wilde, BB. No reasons are given. In *Makin* v. *A.-G. sup.*, Ld. Herschell, L.C., remarked that, seeing that in *R.* v. *Gray*, *post*, 184, similar facts were admitted by Willes, J., after consultation with Martin, B., "it could not be regarded as certain that the latter dissented from *R.* v. *Geering*, *sup.*, and other cases." In any event, it seems that *R.* v. *Winslow* must now be regarded as overruled. It is noticeable that in this case, in order to avoid prejudice, the arguments for and against the evidence were put into writing and the decision given in private; see also *R.* v. *Taylor*, 5 Cox, 138; *R.* v. *Irimy*, 107 C.C.C. Sess. Pap. 581; *R.* v. *Godhino*, 155 *id.* 499; *R.* v. *Horsford*, *ante*, 83; *R.* v. *Booth*, 5 Cr. App. R. 177, 180; *R.* v. *Ball*, 1915, A.C. 47, 50; *ante*, 42, 83. In *R.* v. *Watt*, 70 J.P. Rep. 29, however, Phillimore, J., refused to

Admissible.

bath. Evidence that, subsequently to B.'s death, C. & D., with both of whom A. had contracted bigamous marriages, had also been found dead in their baths, under very similar circumstances, and that in all three cases A. had benefited by their deaths;—Held admissible to rebut accident, or innocent intent [*R.* v. *Smith*, (1915) 11 Cr. App. R. 229; reported less fully, 84 L.J. K.B. 2153].

A. is charged with the murder of B., her child,—her defence being sudden mania;—evidence of a voluntary confession as to how she had killed C., another child, was received to rebut this defence and show her state of mind (*R.* v. *Wells*, cited *ante*, 86, 161, 167).

A. is charged with the murder of B., her child, by suffocation;—evidence that four other of A.'s children had died early from *causes unknown*—held admissible to show that B.'s death was intentional and not accidental (*R.* v. *Roden*, 12 Cox, 630; *cp. R.* v. *Bailey*, *post*, 183.

False Pretences, &c. A. is charged with attempting to obtain money from B. by falsely pretending that a certain ring was a diamond ring;—the fact that A. had *previously* attempted to obtain money from other persons by false representations as to the genuineness of other rings and jewellery, is admissible to show his knowledge that the ring in question was not genuine (*R.* v. *Francis*, L.R. 2 C.C. 128).

A. is charged with obtaining and attempting to obtain money by false pretences from four persons, by an advertisement offering employment to all who sent him 1*s.* in stamps. Letters from 281 other persons, expressed to be in answer to the advertisement and each enclosing twelve stamps, which letters had been intercepted at the post-office and had never in fact reached A.,—held admissible although only constructively in his possession. [*R.* v. *Cooper*, 1 Q.B.D. 19. It is not clear whether the evidence was received to show a fraudulent design or a criminal attempt; but it would seem admissible on either ground, *cp. Blake* v. *Albion Soc.*, *post*, 183. As to the admissibility of the letters as evidence of the *truth* of their contents see *ante*, 74, *post*, 257, 261].

A. is charged with obtaining eggs from B. by falsely pretending, in an advertisement, that he was carrying on business as a dairyman. Evidence that A. *subsequently* obtained eggs from several other persons by a similar advertisement is admissible as showing a general scheme to defraud. [*R.* v. *Rhodes*, 1899, 1 Q.B. 77; *R.* v. *Alexander*, 147 C.C.C. Sess. Pap. 989. *Aliter*, if the other similar transactions had been of an isolated character and not part of a general scheme connected by the continuing advertisement]

A. is charged with obtaining money from B., C. and D. by worthless cheques. Evi-

Inadmissible.

allow such discussion in the absence of the jury].

False Pretences, &c. A., B.'s servant, is charged with obtaining money from C. by falsely pretending that B. had authorised him to collect it. B. having sworn that he had forbidden A. to collect money, and that A. had never accounted for any to him, evidence was tendered that within a week *after* collecting C.'s money A. had also collected money from D. by a like false pretence. At the trial this evidence was received to show A.'s intent as to C.'s money. Held, on appeal, that it was inadmissible. [*R.* v. *Holt*, 30 L.J.M.C. 11. No reasons are given; but in *R.* v. *Francis*, *opposite*. Blackburn, J., remarked of *R.* v. *Holt*, "The alleged false pretence was an assertion of authority to receive the money, and the question was authority or no authority; the evidence was wholly irrelevant." This comment is adopted by Lawrence J., in *R.* v. *Bond*, 1906, 2 K.B. p. 424, who adds that the receipt of other money on the same statement tended to support the defence as much as the prosecution (see *Prescott* v. *Flinn*, *ante*, 166). *R.* v. *Holt* was approved in *R.* v. *Rhodes*, *opposite*, and *R.* v. *Smith*, *infra*, 182, but upon the ground that the second act was *distinct and unconnected*].

A. is charged with obtaining a shawl from B. by false pretences on Sept. 26;—evidence that he obtained another shawl from B. on Sept. 29, by similar false pretences, held inadmissible [*R.* v. *Fuidge*, 33 L.J.M.C. 74, C.C.R. No reasons are given; but *R.* v. *Holt sup.* was cited and apparently followed].

A. is charged with obtaining a pony and trap from B. by false pretences. Evidence that A. had, subsequently, obtained a quantity of oats and fodder from C. by falsehood;—Held, not admissible to show that his statements as to the pony and trap were false, since the two transactions

Admissible.

dence that A. had previously obtained a cheque from E. by the same means, held admissible as part of a course of conduct showing guilty knowledge and intent and negativing any reasonable belief that the cheques would be met, although A. had already been tried and acquitted as to E.'s cheque (*R.* v. *Ollis*, 1900, 2 Q.B. 758, C.C.R.).

A. is charged with obtaining furniture and credit from B. at Brighton by falsely pretending that he was agent for a London syndicate. Defence, that he bought as principal and merely gave the syndicate as a reference. To rebut this and show that his alleged business was a sham;—evidence that a week later A. obtained furniture and credit from C. at Brighton by the same pretence, held admissible (*R.* v. *Smith*, 92 L.T. 208).

A. is charged with obtaining goods from B. by falsely pretending, by a bill-head, that he was a 'wholesale and retail merchant.' Evidence that 3 months earlier he had obtained goods from C. by producing a similar bill-head;—Held admissible, not to prove system, but to rebut innocent intent, A.'s defence being that he merely used the bill-head to give his name and address and not to include his business [*R.* v. *Wilks*, 10 Cr. App. R. 16; here C. swore it was the 'wholesale and retail merchant' that had induced him to part with the goods].

As to proof of system to negative innocent mistake in cases of larceny, see *R.* v. *Hill*, *ante*, 71.

Fraud (Other than False Pretence). A. is charged with fraudulently obtaining credit for board and lodging from B.;—evidence that, shortly before, A. had hired lodgings from several other persons, and left without paying, and that he still owed this money when he went to lodge with B.;—held admissible, as showing a systematic course of conduct negativing any reasonable or honest motive [*R.* v. *Wyatt*, 1904, 1 K.B. 188; *R.* v. *Walford* (1907) 71 J.P. Rep. 215].

A. sues B. for a libel which charged A. with fraudulently obtaining goods on credit in Limerick. Defence, justification, of which, however, no particulars had been given or required. A., on cross-examination, admits that he obtained goods for which he still owed, both in Limerick and Cork. Held, that witnessea might be called to prove the Cork frauds, as no

Inadmissible.

were dissimilar [*R.* v. *Fisher*, 1910, 1 K.B. 149. Channell, J., remarked that the falsity of the statement in question was not proved by evidence that in other cases A. made other false statements, though it did tend to show A. was a swindler. But swindling in a particular manner cannot be shown by swindling in some other manner. *Aliter* if all the frauds had been of a similar character, showing a systematic course of swindling by the same method. In this case other crimes, that would have been admissible, were also left to the *jury* who, on a conflict of evidence, found A.'s connection therewith not proved. This case was approved in *R.* v. *Ellis*, *infra* and several other cases].

A. is charged with obtaining money from B. by false pretences. A had agreed to sell articles of *vertu* to B. at cost price *plus* 10% profit, but by misrepresenting the cost price obtained larger sums from B. than he was entitled to. Evidence (elicited from A. on cross-examination) that A. had, on other occasions when there was no such agreement as above, obtained money from B. by pretending certain china figures were genuine which he knew were spurious;—Held, inadmissible to prove intent, the latter pretences being of an entirely distinct character and *not* proving a systematic course of swindling by the same methods (*R.* v. *Ellis*, 1910. 2 K.B. 746 C.A. by 5 judges).

A. is charged with obtaining money by false pretences from B. by getting him to cash post-dated cheques drawn by A., but afterwards dishonoured. The fact that A. obtained money from C. by getting her to cash a cheque drawn by D., but which D. dishonoured because A. failed to carry out the terms on which he obtained it from D.;—Held inadmissible, since A.'s fraud, if any, was upon D. not upon C., against whom D. had no defence on the cheque (*R.* v. *Morgan*, 13 Cr. App. R. 2).

Fraud (Other than False Pretences). A. is charged with fraudulently obtaining credit from B. for a motor-bicycle. Evidence that some weeks earlier he had obtained a motorcycle from C. and a camera from D. without paying for them, but under different names as to which no false pretence was alleged by C. or D.;—Held inadmissible to show fraudulent intent, the other acts and methods not being similar to that charged (*R.* v. *Baird*, 84 L.J. K.B. 1785; 11 Cr. App. R. 186).

Admissible.	*Inadmissible.*
particulars had been given confining the acts to Limerick (*Hewson* v. *Cleeve*, 1904, 2 I.R., 536).	
The question being whether an insurance company acted fraudulently in obtaining a premium from A. through their agent, B., who had represented to A. that if he would insure, B. would procure him a loan from the company;—the fact that premiums had previously been obtained by the same agent and means from other persons, to the knowledge and for the benefit of the company, without loans being made, held admissible, as showing the fraudulent character of the transaction in question (*Blake* v. *Albion Society*, 4 C.P.D. 94; *ante*, 97).	A. (an insurance company) sues B. to set aside a policy of which B. had fraudulently obtained an assignment to himself. Evidence that B. had fraudulently procured other policies to be assigned to him;—Held inadmissible, as the other frauds were not pleaded in the statement of claim, nor was the defendant given any notice thereof (*Edinburgh Life Association* v. *Y.*, 1911, 1 I.R. 306, C.A.)
A., a brewer, is charged with falsely describing certain beer supplied to B., a customer, as a "barrel" of thirty-six gallons, instead of a "cask" of thirty-four;—evidence that A.'s drayman had, on previous occasions, delivered casks falsely invoiced as barrels is admissible to show the latter's intent to defraud (*Budd* v. *Lucas*, 1891, 1 Q.B. 408; *cp. ante*, 95).	
A. sued B., a wine-merchant, for the price of advertisements;—The defence raised at the trial (though not apparently on the pleadings) was two-fold, *i.e.* that the order was obtained by *misrepresentation*, and that this was made with *fraudulent intent*. Having given evidence of the making of the misrepresentation, B., to show A.'s intent, tenders evidence that other wine-merchants had previously been defrauded by him in the same way. A.'s counsel admits that if the misrepresentation were made it was made fraudulently, and that A. cannot recover; and therefore claims that, as the only issue for the jury is whether it was made or not, evidence of intent is inadmissible. This contention having prevailed, and the jury found that A. did not make the misrepresentation;—Held, by the C.A., that both issues having been raised by B., at the trial, evidence on the second could not by such an admission be shut out, or postponed until the jury had decided the first [*Bornes* v. *Merritt*, 15 T.L.R. 419, C.A. *Aliter*, however, if the first issue were the only one raised].	
Arson. A. is charged with setting fire to B.'s rick by firing a gun;—evidence that the day before, A. was seen close to the same rick with a gun, and that the rick was then on fire, held admissible to show A.'s intent (*R.* v. *Dossett*, 2 C. & K. 306; *cp.* cases, *ante*, 67-9).	*Arson.* A. is charged with setting fire to hay in B.'s barn in Oct. 1905. A., having confessed that he entered the barn, lit his pipe and fell asleep on the hay;—a previous confession by him that he had in July caused a fire in C.'s barn in a similar manner was tendered (1) to rebut accident; and (2) to show that, knowing the result in C.'s case, he was criminally reckless in B.'s. There was, however, no suggestion of any grudge against B. or C. Held inadmissible—the barns being several miles apart, and the interval between the fires too long (*R.* v. *Peel*, 50 Sol. Jo. 137).
A. is charged with setting fire to his house with intent to defraud an insurance company,—defence, accident. To rebut this defence, evidence that (1) previous attempts (not shown to have been by A.) had been made to set fire to the same house (*R.* v. *Bailey*, 2 Cox, 311); and (2) that two other houses, in which A. had previously lived, had been burned down, and	A. is charged with setting fire to B.'s rick. Evidence having been given that A.

Admissible.

that he had obtained the money for which they had been insured;—held admissible [*R.* v. *Gray*, 4 F. & F. 1102; this case was doubted by Sir J. Stephen, since it might involve the trial of several distinct charges at once, as it would be hard to exclude evidence that the other fires were accidental (Dig. Ev. art. 12); it was, however, approved in *Makin* v. *A.G.*, *sup.*].

Sedition. A. is charged with bringing the courts of justice into contempt, by proposing the substitution of another code of rules for the settlement of disputes;—evidence that similar rules to those proposed by A. were adopted by the Quakers for the settlement of their disputes, is admissible to negative the alleged intent (*R.* v. *O'Connell*, 5 St. Tr. N.S. at 533-536. Pennefather, J., for the majority of the Court, remarked, "Surely, to show *quo animo* the act was done, it is material to show that a vast number of respectable people have done the same thing and been universally considered as acting legally." Crompton, J., *diss.*, observed "The intent is to be gathered from the acts and declarations of the parties, and not from those of strangers").

Blackmail, &c. A. is charged with falsely accusing B. of indecently assaulting him, with intent to extort money from B. Evidence having been given that A. gave B. into custody, saying, "I charge him with indecently assaulting me," declarations by A. on a former occasion that he had obtained money from C. by threatening to accuse him of a similar crime,—held admissible to show A.'s intent [*R.* v. *Cooper*, 3 Cox, 547; approved in *R.* v. *Bond*, *infra*.]

A., the proprietor of a financial paper, is charged with demanding money from B. by threats, made through C., to attack a company of which B. was chairman, in A.'s paper. Evidence that some months previously a similar threat had been made by C. and a sum of money obtained by C. from D. to abstain from attacks in A.'s paper;—Held admissible (1) to show intent; and (2) to show that C. was the agent of A. [*R.* v. *Boyle*, 1914, 3 K.B. 339; as to agency, see further, *ante*, 160, 166].

Procuring Abortion. A., a medical man, is charged with using certain instruments on B. with intent to procure abortion;—evidence that nine months *before* (1) A. had performed a similar, though unsuccessful, operation on C. with the avowed intention of procuring her miscarriage; and (2) had then stated to C. that he was in the *habit* of performing *similar* operations for the same purpose;—held admissible to

Inadmissible.

had been seen leaving the burning rick,—the fact that A. and his wife had been seen laughing at another fire on B.'s premises, and hindering another person from throwing water on it, held inadmissible. [*R.* v. *Harris*, 4 F. & F. 342, *per* Willes, J., apparently on the ground that the latter conduct did not tend to explain that in question (Ros. Cr. Ev. 85). In a note to the report, however, it is said that "it was here proposed to eke out doubtful evidence of *identity* by ambiguous evidence of the prisoner's mere demeanour on former occasions"; as to this ground, see *ante*, p. 173 (4)].

A. is charged with setting fire to B.'s rick. Evidence having been received that later on the same night, fires had also occurred at the ricks of C. and D., about half a mile and a mile away, respectively;—evidence of threats, statements and particular acts by A. pointing alone to C.'s or D.'s fires, and not implicating A., or explaining his conduct, as to B.'s fire, held inadmissible (*R.* v. *Taylor*, 5 Cox, 138; and see Wills, Circ. Ev., 6th ed. 73).

Blackmail, &c. A. is charged with threatening to accuse B. of an infamous crime, with intent to extort money. B. having sworn that A. said to him, "if you don't give me £1, I will charge you with indecent assault."—Held, that, if the jury believed B., the intent was manifest; and therefore evidence that two years before A. had made a similar charge against C., and when arrested had given a false address, was inadmissible (*R.* v. *McDonnell*, 5 Cox 153, distinguishing *R.* v. *Cooper*, *opposite*, where the evidence was necessary to explain the act).

A. and B. are tried for conspiring falsely to charge C. with having posted a threatening notice on Oct. 16th, 1911. Both A. and B. had sworn false informations or depositions against C., but C. had been acquitted on Oct. 26th. Evidence that the police had found in the possession of A. and B. on Nov. 17th a faked notice similar to that which they had charged C. with posting;—Held, inadmissible, being (1) subsequent to C.'s acquittal; and (2) unnecessary, since the guilty intent of one who swears a false affidavit is obvious [*R.* v. *Quilter*, (1913) 47 Ir. L.T. Rep. 264, *per* Cherry, L.J.].

Procuring Abortion. A. is charged with using a certain instrument on B. with intent to procure abortion. Evidence that four months later A. had treated another married woman in a similar manner,—held inadmissible, since two instances, especially where the second is a subsequent one, could not be relied on as proof of a systematic course of action [*R.* v. *Hicks* (1904) 39 L.Jo. 421, *per* Ridley, J.].

Admissible.

show intent, and rebut A.'s defence that the instruments were used for a lawful purpose, viz., to examine B. for leucorrhœa [*R.* v. *Bond*, 1906, 2 K.B. 389; *R.* v. *Dale*, 16 Cox, 703; *R.* v. *Cooper*, 3 Cox, pp. 549, 550. In *R.* v. *Bond*, *sup.*, it was held further that evidence of (1), alone, would have been inadmissible (*per* Ld. Alverstone, C.J., p. 395; *per* Kennedy, J., p. 405; *per* Ridley, J., p. 407; *per* Bray, J., p. 418; *contra*, *per* Jelf, J., p. 413 who considered that a number of instances goes to weight and not admissibility). In *R.* v. *Thomson*, 7 Cr. App. R. 276 cited on other points (*ante*, 80), however, on a similar charge, evidence that 6 months prior to the offence alleged, A. had examined B. for pregnancy and done something to her which caused blood to flow and which was followed by a miscarriage was admitted on the principle of *Bond's* case, and as testing the probability of his excuses for touching B. on the later occasion and as showing the history leading up to that interview; *cp. R.* v. *Loveqrove*, 15 Cr. App. R. 50].

Carnal Knowledge, Indecent Exposure. A. is charged with carnal knowledge of B., a girl under 16. Evidence that A. had had connection with B. seven months prior to the charge;—Held admissible on the principle of *R.* v. *Ball*, *ante* 166, and *R.* v. *Ollis*, *ante*, 182, to show intent and guilty knowledge [*R.* v. *Shellaker*, 1914. 1 K.B. 414; followed in *R.* v. *Rogers*, 10 Cr. App. R., pp. 277, 279].

A. is charged with indecently exposing himself in July to B., a female, with intent to insult. Held: A. might be asked on cross-examination if he had done the same thing and about the same time of day to B. in the previous May; and, on his denial, that B. might be called to rebut such denial. The Court said this evidence was admissible (1) to show that B. was not mistaken in her identification of A.; (2) that A.'s act was wilful and not accidental; and (3) that it was done with intent to insult B. [*Perkins* v. *Jeffrey*, 1915, 2 K.B. 702].

Living on Earnings of Prostitution. A. is charged with living on a particular day upon the earnings of B.'s prostitution. Evidence of similar acts on days prior and subsequent to the alleged date;—Held admissible as explaining their relations on that date [*R.* v. *Hill*, 10 Cr. App. R. 56; *ante*, 69].

Inadmissible.

Rape, Sodomy. A. is charged with burglary with intent to ravish B. Evidence that an hour later A. entered another house, down the chimney, and had connection with C., another woman, with C.'s consent;—Held, inadmissible to show A.'s intent (*R.* v. *Rodney*, 1913, 3 K.B. 468; *cp. ante*, 160-1, 166].

A. is charged with assaulting B. with intent to ravish. Evidence that on former occasions A. took liberties with B., held not admissible to show such intent. [*R.* v. *Lloyd*, 7 C. & P. 318; Patterson, J., remarked, "All the cases in which such evidence has been admitted have been cases of malice; I can find none in which former conduct has been admitted to show a lustful intent." This remark, however, would not afford a safe guide in the present day; and *cp.* proof of adultery, incest, &c., *ante*, 146, 150. Prior liberties, however, would seem slight, if any, evidence of an intent to *ravish*, *i.e.*, notwithstanding any resistance on B.'s part.]

A. is charged with sodomy with B. on July 18th. Evidence that A. had been charged with a similar offence with B. on June 6th, which charge, however, had been abandoned; — Held inadmissable on the ground that the judge at the July trial had told the jury that A. must be treated as innocent of the June charge [*R.* v. *Barron* (No. 1) 78 J.P. Rep. 184].

In *Perkins* v. *Jeffrey*, opposite, evidence by other witnesses of a systematic course of similar conduct on A.'s part was rejected because it did not appear that the defence of accident, mistake, or absence of intent to insult were clearly relied on, nor that the other occasions were sufficiently proximate to show system.

Cruelty to Children. A. is charged, under the Prevention of Cruelty to Children Act, 1894, with cruelty to children "between Nov. 9, 1900, and April 9, 1901." Evidence of cruelty to them on prior dates held not admissible either (1) to rebut the theory of accident; or (2) under s. 18 (4) of the Act, by which it was not necessary to specify the dates of the acts constituting a continuous offence [*R.* v. *Miller*, 65 J.P. 313, *per* Phillimore, J. No reasons are stated, but it was said to be otherwise, perhaps, if dates had not been given; and the evidence was in fact admitted on A.'s cross-examination. See *ante*, 68).

CHAPTER XIII.

CHARACTER.

CHARACTER IN ISSUE. When a party's general character is in *issue* proof must necessarily be received of what that general character is, or is not (Tay. s. 335; Best, s. 258). Thus, in a libel action, the question being whether a governess was "competent, ladylike, and good-tempered," while in her employer's service, witnesses were allowed to assert or deny her general competency, good manners, and temper (*Fountain* v. *Boodle,* 3 Q.B. 5; *Brine* v. *Bazalgette,* 3 Ex. 692; *King* v. *Waring,* 5 Esp. 14; *Jones* v. *James,* 18 L.T. 243); and in such cases particular instances are also admissible, whether occurring *prior* or *subsequent* to the publication of the libel (*Maisel* v. *Financial Times,* 112 L.T. 953, H.L.; Best, s. 258; Ros. N.P. 87; *cp.* Custom, *ante,* 106). So, where A. sued an Insurance Co. for loss sustained by a burglary, to which the defence was that the loss was caused by the dishonesty of B., A.'s servant, evidence was received that B. was an associate of burglars and had entered A.'s service by means of a forged character (*Hurst* v. *Evans,* 1917, 1 K.B. 372). And where A. was charged with defrauding B. at a mock auction, A.'s defence being that he was only the servant of C., the proprietress of the business, evidence that he was living with C. as his mistress was admitted as showing their real relations, notwithstanding the Cr. Ev. Act, 1898, s. 1 (*f*) (*R.* v. *Kurasch,* 1915, 2 K.B. 749).

Character of Places, Things or Animals. The same rule holds where the character of places, things, or animals is in issue (*post,* 192; but see *ante,* 135). Thus, to prove the disorderly character of licensed premises, convictions against former occupiers are receivable, though the present one is admittedly respectable (*R.* v. *Miskin Higher,* 1893, 1 Q.B. 275); as, also, evidence that he had permitted gambling, even though he had already been acquitted of that charge on the same facts (*Latimer* v. *Birmingham,* 60 J.P. 660; *Smith* v. *Shann,* 14 T.L.R. 443). The dangerous character of a dock, railway-station, or road may also be shown by previous accidents thereat (*ante,* 163, 171); and the condition of a ship by its previous condition (*id.*).

CHARACTER NOT IN ISSUE. Where, however, character is tendered in proof or disproof of some other issue, it is, in general, even though logically relevant, excluded on grounds of policy and fairness, since its admission would surprise and prejudice the parties by raking up the whole of their careers, which they could not possibly come into Court prepared to defend without notice (*R.* v. *Rowton,* 34 L.J.M.C. 57). [Tay. ss. 349-63; Ros. N.P. 87; Ros. Cr. Ev. 86-8; 2 Russ. Cr., 7th ed., 2119-20; Steph. art. 57; Wills, Circ. Ev., 6th ed., 272-9; Whart. s. 50; Wigmore, Ev. 52-80.]

Thus, in criminal cases, to prove that the defendant committed the crime charged, evidence may not be given either that he (1) bore a bad *reputation*

in the community (*R.* v. *Rowton, sup.*); or (2) had a *disposition* to commit crimes of that kind (*id.; R.* v. *Cole, ante,* 159, 165); or (3) had on other occasions committed *particular acts* of the same class evincing such a disposition (*R.* v. *Rowton, sup., per* Willes, J., at p. 67; see fully *ante,* 158).

The same rule prevails in civil cases. Thus, where a will was impeached for fraud, the defendant was not allowed to prove his good character in answer (*Goodright* v. *Hicks,* B.N.P. 296). Nor, in divorce cases, can a husband, in disproof of a particular act of cruelty, tender evidence of his general character for humanity (*Narracott* v. *N.,* 33 L.J.P. & M. 61; and see *Jones* v. *James, sup.*) So, to rebut a charge of cowardice on a particular occasion, both general evidence of courage, and specific acts of bravery on other occasions, are inadmissible (*Edmondson* v. *Amery,* Times, Jan. 28, 1911).

EXCEPTIONS.

(1) **Prisoner's Character.** *Good Character in Defence.* In all criminal cases involving punishment as distinguished from penalty (*A.-G.* v. *Bowman,* 2 B. & P. 532; *A.-G.* v. *Radloff,* 10 Ex. 84), the accused is, on grounds of humanity, and for the purpose of raising a presumption of his innocence, allowed to prove his general *good character* (though not specific instances thereof) either by cross-examination of the witnesses for the prosecution, or in chief by his own testimony or that of independent witnesses. It has been held, however, that such evidence does not stand on precisely the same plane as that concerning the relevant facts going to prove or disprove the issue, but that the jury is only entitled to take into consideration the good character of the defendant when the other facts proved leave them doubtful of his guilt (*R.* v. *Broadhurst,* 13 Cr. App. R. 125, C.C.A.).

[*R.* v. *Rowton,* 34 L.J.M.C. 57; Tay., ss. 349-363; Best, pp. 256-263; 2 Russ. Cr., 7th ed., 2116-2120; Archb. Cr. Pl., 25th ed., 353-4; Ros. Cr. Ev., 13th ed., 86-7].

History. Before the Norman Conquest the character of the accused decided whether he was to be allowed to clear himself by compurgation, or to be sent to the ordeal. In later times, also, the prisoner's character must have weighed with the jury when they acted as witnesses. Under the Stuarts, evidence appears to have been freely given of particular crimes or misconduct committed by the prisoner, although unconnected with the matter in issue; and evidence of his good character was, at all events as early as 1664, also admitted in his favour (*R.* v. *Turner,* 6 How. St. Tr. 613). Sir J. Stephen remarks that "all through the eighteenth century evidence of character was given on behalf of the prisoner as it is now"; but for a time it was certainly the practice to allow proof of the prisoner's character on capital charges only (1802, MacNally, Ev. 320-2). Moreover, from 1699 to 1839, the cases show that it was not the prisoner's reputation in the community that was called for, but the witness's own belief, founded on personal intimacy, as to the trait of character in question,—particular acts, showing such disposition, being alone excluded. In 1863, however, it was decided in *R.* v. *Rowton, sup.,* that character means reputation, as distinguished from disposition, a decision of which it has been said that, though settling the law, it is found impossible to maintain in practice [Steph. 1 Hist. Cr. Law, 449-50; *id., infra;* Tay., s. 350; Wigmore, Ev. s. 56; *id.* 32 Am. L. Rev. 713; see *infra*].

Scope. The character proved must be of the *specific kind impeached, e.g.,* honesty where dishonesty is charged, good character in other respects being irrelevant (*R.* v. *Shrimpton,* 2 Den. C.C. 319, 322; *R.* v. *Rowton, sup.,* p. 65; Tay., s. 351). And it must be *general,* and not relate to *particular instances* of such honesty, &c. (*R.* v. *Rowton, sup.*). In strictness, also, it seems that the witness should depose to the prisoner's *reputation* (*i.e.,* the estimate formed of him by the community), and not to his own *individual opinion* of the prisoner's character or disposition [*R.* v. *Rowton, sup.,* where, on a charge of indecency, a witness called to rebut evidence of the defendant's moral character was not allowed to state that he knew nothing of the neighbourhood's opinion, but that his own opinion and that of his brothers', who were pupils of the defendant, was that his character was that of a man capable of the grossest indecency and the most flagrant immorality; *contra* in impeaching the character of a witness, *post,* 482.] But this distinction is seldom, if ever, acted on in practice, the question always put to a witness to character being: What is the prisoner's character for honesty, morality, or humanity? as the case may be. Nor is the witness ever warned that he is to confine his evidence to the prisoner's reputation. It would be no easy matter to make the common run of witnesses understand the distinction (Steph. *note* xxv.). As the best character is often the least talked of, the witness may even give *negative* as well as *affirmative* evidence on the subject—*e.g.,* that he has never heard anything *against* the prisoner (*R.* v. *Rowton, sup.; R.* v. *West,* 112 C.C.C. Sess. Pap. 725). Finally, the character proved must relate to a period *proximate to the date of the charge* (*R.* v. *Swendsen,* 14 How. St. Tr. 596).

Bad Character in Rebuttal, &c. Whenever the accused gives evidence of good character, either by cross-examination or by his own or others' testimony (unless perhaps such evidence has been inadvertently introduced) the prosecution may rebut it either by cross-examination or independent testimony (*R.* v. *Gadbury,* 8 C. & P. 676; *R.* v. *Shrimpton,* 2 Den. C.C. 396; *R.* v. *Farrington,* 1 Cr. App. R. 113, 116, 119). (*a*) *Cross-examination.* The accused's witnesses may (though this is not usual) be cross-examined as to their means of knowledge, grounds of belief, or suspicions of misconduct on his part, since the last named are integral parts of character as above defined (*R.* v. *Wood,* 5 Jur. 225). It seems also that questions as to his previous conviction may, even at common law, be put to them [*R.* v. *Hodgkiss,* (1836) 7 C. & P. 268, *per* Alderson, B., "It is not usual to cross-examine witnesses to character, except you have some definite charge to which to examine them"; *R.* v. *Rogan* (1846), 1 Cox 281, where, though a question as to a *later* larceny by the prisoner on the same evening was disallowed, Erle, J., remarked: "It might have been very material to show a *prior* robbery"]. But as the cross-examiner would, in cases not falling within the statute, be bound by the witness' answer, such questions are obviously dangerous. With regard to cross-examination of the prisoner himself, he may now, under the Criminal Evidence Act, 1898, sec. 1 (*f*), be asked any question tending to show that he has committed, been convicted of, or charged with offences other than that wherewith he is then charged, in all cases in which he gives evidence of his good character, or makes imputations on the character of the prosecutor or his witnesses, or gives evidence against a co-defendant (see fully *post,* 454-5); and his denial may, apparently, independently of the statutes *infra,* be contradicted

under 28 & 29 Vict. c. 18, sec. 6 (see *post*, 482). (*b*) *Independent Testimony.* At common law, evidence in rebuttal (other than cross-examination as above), must be of the same kind and subject to the same limits as that to which it is in answer, *i.e.*, it must be *general* and not to relate to specific instances (*R.* v. *Rowton, sup.*). By statute, however, this limitation has been largely abrogated; and now, whenever an indictment charges *any offence as having been committed after a previous conviction* and the accused gives evidence of his good character (either by cross-examination or independent testimony, *R.* v. *Gadbury* and *R.* v. *Shrimpton, sup.*), the prosecution may, in answer thereto, prove such conviction before the jury return their verdict and the jury may enquire into both matters at the same time. This latitude of proof was progressively established by the Previous Conviction Act, 1836, the Larceny Act, 1861, s. 116, the Coinage Offences Act, 1861, s. 37, the Prevention of Crimes Act, 1871, ss. 9, 20, and the case of *Faulkner* v. *R.*, 1905, 2 K.B. 81, which decided that the words "any offence" in the Larceny Act, *sup.*, were general and not confined to offences punishable under that Act, a case which, if correct, renders, it has been said, the first and last mentioned Acts superfluous (2 Russ. Cr., 7th ed., 1957). Where, indeed, the previous conviction forms an essential part of the crime, as under s. 7 of the Prevention of Crimes Act, 1871, and does not merely effect punishment, it may be proved to the jury before verdict irrespective of rebutting good character (*R.* v. *Penfold*, 1902, 1 K.B. 547; *Faulkner* v. *R., sup.; ante*, 42); as is also the case under s. 15 of the same Act, which provides that in proving an intent to commit a felony under the Vagrancy Act, 1824 (amended by later Acts), it is not necessary to show any particular acts, but the intent may be gathered from the circumstances of the case and the known character of the prisoner; thus, evidence may, irrespective of rebuttal, be given before verdict, that he has been previously convicted of theft, is an associate of thieves, and on arrest gave a false name, address and account of the property (not proved to have been stolen) found in his possession (*Clark* v. *R.*, 14 Q.B.D. 92; *Hartley* v. *Ellnor*, 81 J.P. Rep. 201).

As to proof of previous convictions *before* verdict generally, see *ante*, 38, 41. Proof of previous convictions may, of course, in many cases be given *after* verdict to increase punishment. And, after conviction upon indictment, proof may now also be given under the Prevention of Crimes Act, 1908 (8 Ed. VII. c. 59), s. 10, that the prisoner is an *habitual criminal* and is *leading persistently a dishonest or criminal life*, and so liable to preventive detention under the Act. Strict proof is required of the three previous convictions necessary for the former purpose; but others may be proved informally by the police, not necessarily from their own knowledge but from their records, as evidence of character and repute (*R.* v. *Franklin*, 3 Cr. App. R. 48; *R.* v. *Westwood*, 8 *id.* 273; *R.* v. *Summers*, 10 *id.* 11), though if merely read out by the judge from his calendar, without proof, this will vitiate a conviction (*R.* v. *Culliford*, 75 J.P. Rep. 232; *R.* v. *Stewart*, 74 *id.* 246). A conviction in a foreign country is admissible in proof of a persistently dishonest life (*R.* v. *Heard*, 7 Cr. App. R. 80). As to proof of the various formalities under this Act, *e.g.*, consent of the Director of Public Prosecutions, notice to the Clerk of the Peace and the accused, and the age of the latter, see fully *R.* v. *Turner*, 1910, 1 K.B. 346; *R.* v. *Waller*, *id.* 364; and 79 J. P. Jo. 159, 170). The above

consent, like that of a judge to prosecutions under the Vexatious Indictment Act, 1859, must in fact be obtained (*R.* v. *Waller, sup.; R.* v. *Metz,* 84 L.J.M.C. 1462; *R.* v. *Bates,* 1911, 1 K.B. 964); but it is not part of the case for Crown and, in the absence of objection at the trial, will be presumed (*id.; cp. R.* v. *Dexter,* 19 Cox 360). Where it had been proved at the police court, but not at the trial, an objection on appeal was held to be too late (*R.* v. *Metz, sup.*). The consent must be in writing (*R.* v. *Turner, sup.; cp. Department of Agriculture* v. *Parker,* 44 Ir. I.T.R. 13); but it is sufficient if the witness produces the document and swears it was obtained in the ordinary course of correspondence with the Director's office and that he believes it genuine, without calling someone who knows the handwriting (*id.*). As to the consent of corporations to a prosecution and the appointment of solicitors to represent them thereat, see *ante,* 91; and as to proof of consent generally, *ante,* 47.

(2) **Character of Third Persons—Rape.** On charges of rape, or attempts to ravish, the *general bad character* of the prosecutrix is material, not only to her credit as a witness, but also to the issue, and is therefore admissible whether she be, or be not, cross-examined (*R.* v. *Gibbons,* 31 L.J.M.C. 98, 99-100; *R.* v. *Clarke,* 2 Stark. 241). So, to show consent, she may be cross-examined as to *other immoral acts with the prisoner,* and if she denies these they may be independently proved (*R.* v. *Riley,* 18 Q.B.D. 481). She may also be cross-examined as to such acts with *other men,* but she may decline to answer, and if she deny them they cannot be independently proved (*R.* v. *Cockroft,* 11 Cox, 410; *R.* v. *Holmes,* L. R. 1 C.C. 334). So, on a charge of *carnal knowledge* of a girl under 16, where it had improperly, but without objection, been opened, and proved by the prosecutrix, that she was seduced by the defendant, and the defendant in cross-examination put to her that she was of loose character and had had connection with other named men, he was not allowed to call these men in rebuttal, since the evidence was only relevant to credit and not to the issue, and he had not objected, as he might have, to her evidence in chief on this point (*R.* v. *Cargill,* 1913, 2 K.B. 271). **Legitimacy.** On questions of legitimacy, the ill-fame of the child's mother has been received (*Pendrell* v. *P.,* 2 Str. 924); though not declarations by the parents as to access (*post,* 198-9); as to affiliation cases, see *ante,* 139. **Divorce.** And, in divorce cases, the moral character of the co-respondent or other person with whom adultery is charged is relevant (*Astley* v. *A.,* 1 Hag. Ecc. 714; *Buchart* v. *B.,* 1899, Times, Mar. 24; *Von Eckhardstein* v. *Von E., id.* 1907, July 5; *Com.* v. *Gray,* 129 Mass. 474). **Murder.** As to the character of the deceased in cases of homicide, see below. **Servants, &c.** As to the character of servants and employees, see *ante,* 186. Thus where A. was charged with forging a letter giving B. a good character, evidence that B. was of bad character was received (*R.* v. *Taplin,* 131 C.C.C. Sess. Pap. 285; and see *Hurst* v. *Evans* and *R.* v. *Kurasch, ante,* 186).

(3) **Character as affecting States of Mind.** It seems doubtful how far one person's character is admissible as evidence of another's state of mind. On a charge of homicide, the bad character of the deceased (*R.* v. *Macarthy,* 2 Russ. Cr., 7th ed., 2092, *notes* (*o*) and (*t*)), and previous assaults by the latter (*R.* v. *Hopkins, ante,* 174), have been received to show that the prisoner had reasonable grounds for apprehending violence. So, in America, evidence of the character of, and threats by, the deceased is admissible on a plea of self-

defence (Whart., Cr. Ev., ss. 69-84, 306, 758; Wigmore, Ev., ss. 63, 110, 246-8). On the other hand, the bad character of a prisoner has been rejected to show that a constable had reasonable grounds for suspecting him of felony [*R.* v. *Tuberfield* (or *Turberfield*), 1 L. & C. 495; doubted in 2 Russ. Cr., 7th ed., 2118 *n; cp. Walters* v. *Smith,* 1914, 1 K.B. 595, where the defendant was a private person], or of the unlawful pursuit of game (*R.* v. *Spencer,* 3 F. & F. 854). So, in actions for malicious prosecution or false imprisonment, the bad character of the plaintiff is not admissible to show reasonable and probable cause on the part of the defendant (*Newsam* v. *Carr,* 2 Stark. 69; *Cornwall* v. *Richardson,* Ry. & M. 305; *Downing* v. *Butcher,* 2 M. & Rob. 374; *contra, Rodriguez* v. *Tadmire,* 2 Esp. 721, is not law).

(4) **Character as affecting Damages.** In civil cases, good character being presumed, may not be proved in *aggravation* of damages; but the party attacked may repel general evidence of bad character by general evidence of good character; or meet evidence of specific acts of impropriety by disproof of such acts, though not by evidence of general good character (*Jones* v. *James,* 18 L.T. 243; *Narracott* v. *N.,* 33 L.J.P. & M. 61). Bad character is admissible in chief in *mitigation* of damages, in the four cases mentioned below, provided that it would not, if pleaded, amount to a justification [Tay., ss. 356-63; Steph. art. 57; Mayne, Damages, 7th ed., 418, 515, 523, 527; *Watt* v. *W.,* 1905, A.C. 115, 118]. Sir J. Stephen extends this to *all* civil cases (art. 57), but this seems unsustainable; and Taylor (8th ed., s. 356) and Mayne (Damages, 7th ed., title "Character") confine it to the four cases here given. The point is, however, of less importance now, since the person whose character is assailed may, if called as a witness, be asked as to such facts, even where amounting to a justification, on cross-examination to credit (*Watt* v. *W., sup.; R.* v. *Perryman,* 112 C.C.C. Sess. Pap. 655-6; *Sievier* v. *Duke,* Times, 1904, May 7), *unless,* indeed, he has been called by the opposite side (*Scott* v. *Sampson,* 8 Q. B. D. 491), or has merely been put into the box for cross-examination without having been asked any question in chief (*Bracegirdle* v. *Bailey,* 1 F. & F. 536; *post,* 475). (1) **Defamation.** The bad general reputation of the plaintiff, but not rumours or suspicions to the same effect as the libel, nor particular facts showing bad character or disposition (*Scott* v. *Sampson,* 8 Q.B.D. 491; *Wood* v. *Durham,* 21 Q.B.D. 501; *Wood* v. *Cox,* 4 T.L.R. 652, 655); provided that where the defendant does not plead the truth of the libel, he cannot give evidence in chief in mitigation of damages, of the circumstances under which the libel or slander was published, or of the character of the plaintiff, without the leave of the judge, unless seven days at least before the trial he furnishes particulars to the plaintiff of the matters of which he intends to give evidence [O. 36, r. 37; which, however, does not alter the law as laid down in *Scott* v. *Thompson, sup.* (*Mangena* v. *Wright,* 78 L.J.K.B. 879). See on this subject, Spencer Bower on Defamation, 189-193]. As to cases where justification has been pleaded but no particulars given, see *Hewson* v. *Cleeve, ante,* 28, 183. (2) **Breach of Promise.** The plaintiff's general character for, and specific acts of, immorality (*Foulkes* v. *Sellway,* 3 Esp. 236; *Baddeley* v. *Mortlock,* Holt, N.P. 151). Where a general charge of immorality, and not merely of specific acts, is *pleaded* by the defendant the plaintiff may, in the first instance, give evidence of general good character as part of her case (*Jones* v. *James,* 18 L.T. 243). (3) **Seduction.** Evidence both of general character for, and *previous,* but (for the

reasons stated under the next heading) not subsequent, specific acts of immorality on the part of the person seduced (*Bamfield* v. *Massey,* 1 Camp. 460; *Dodd* v. *Norris,* 3 Camp. 519; *Verry* v. *Watkins,* 7 C. & P. 308). **(4) Petitions for Damages for Adultery.** The wife's general character for, and *previous* acts of adultery (*Smith* v. *Allison,* B.N.P. 27), but not subsequent acts, for these might be the effect of the co-respondent's own misconduct (*Elsam* v. *Faucett,* 2 Esp. 562; *Winter* v. *Henn,* 4 C. & P. 494; this reason applies also to cases of seduction); as well as the husband's general character for, and particular acts of, infidelity; for in such a case he can hardly complain of the loss of that society upon which he has himself placed so little value (*Bromley* v. *Wallace,* 4 Esp. 237).

(5) **Character of the Witnesses.** The character of a witness, whether party or not, is always material as affecting his credit (*post,* 193, 477-9).

So, where the character of a deceased attesting witness to a document is impeached on the ground of fraud, connected with its execution, evidence of the good general character of the deceased is admissible in rebuttal (*Doe* v. *Stephenson,* 3 Esp. 284; *Provis* v. *Reed,* 5 Bing. 435; Tay., s. 1476); but not statements by the deceased impeaching his attestation (*Stobart* v. *Dryden, post,* 277).

(6) **Character of Places, Things and Animals.** When the doings of animals are in issue, it is relevant to prove the general character or habits of the species, or of the particular animal, as well as the doings of the same, or similar, animals on other occasions (*ante,* 148, 153). As to the character of places and things, see *ante,* 163, 171, 186.

CHAPTER XIV.

FACTS AFFECTING WITNESSES, DOCUMENTS, OR THE ADMISSIBILITY OR WEIGHT OF EVIDENCE.

Facts affecting Witnesses. Facts not directly relevant to the issue may often become indirectly so, by tending to (1) corroborate the testimony (*post,* 487-94); (2) affect the credit (*post,* 477-83); or (3) illustrate the opinions (*post,* 392, 397-8) of witnesses. As to facts affecting the credit of deceased declarants, see *post,* 276-7.

Facts affecting Documents. Facts which affect the existence, genuineness, identity, or validity of any material document; or which show the true nature of the transaction it records, or the relationship of the parties thereto; or which enable the Court to construe its meaning, or to identify the persons or things to which it relates:—are admissible, although extrinsic to the document itself, provided in certain cases that they do not contradict its express terms (*post,* chaps. xlii.-xlvi.).

Facts affecting the Admissibility or Weight of Evidence. So, all preliminary facts and conditions necessary to show the admissibility of other evidence are themselves admissible, although such facts may have no logical bearing on the issue (*ante,* 50), *e.g.,* all circumstances which show whether a declaration is part of the *res gesta;* a communication privileged; a confession voluntary; a hearsay declarant deceased, or in a pedigree case, legitimately connected with the family; a dying declaration made without hope of recovery; the issues, on a plea of *res judicata,* identical; a witness competent, or sufficiently ill for his deposition to be read; a document duly executed or stamped, or produced from proper custody, or after sufficient search; or a notice to produce duly served [Tay., ss. 23-4, 517; Best, s. 82]. The decision of such facts is generally for the *judge,* since, as the jury are only sworn to try the issue, it is not competent to take an interlocutory verdict, or receive evidence *de bene esse,* leaving it to be decided at the end of the case whether it should have been received or not [See fully, *ante,* 11-12].

Facts affecting the weight of evidence are similarly admissible. Thus, facts showing any special means of knowledge, opportunities for observation, reasons for recollection or belief, or other circumstances increasing the witness's competency to speak to the particular case, may be elicited in chief, or challenged on cross-examination (*post,* 466, 477-83).

CHAPTER XV.

FACTS EXCLUDED BY PUBLIC POLICY.

EVIDENCE of the following matters is excluded on grounds of public policy: (1) Affairs of State; (2) Information given for the detection of crime; (3) Judicial disclosures; and (4) Statements by parents tending to bastardise their offspring.

(1) **AFFAIRS OF STATE.** Witnesses may not be asked, and will not be allowed, to state facts or to produce documents, the disclosure of which would be prejudicial to the public service. And this exclusion is not confined to official communications or documents, but extends to all others likely to prejudice the public interest (*Asiatic Petroleum Co.* v. *Anglo-Persian Co.*, 1916, 1 K. B. 822). Thus, a Minister may not be asked the grounds on which a prisoner received the royal pardon (*R.* v. *Cobbett*, 2 St. Tr. N.S. 873); nor whether a defendant's advice as to measures to stop disturbances throughout the kingdom was not salutary (*id.* 877).

[Tay., ss. 946-948; Best, s. 578; Ros. N.P. 174-176; Ros. Cr. Ev. 137-139; Steph. art. 112; Ann. Pr. Notes to O. 31, r. 1.]

Scope of Rule. Under this general head come the *Deliberations of Parliament*—thus, the speeches and votes of members may not be divulged except by leave of the House (*Plunkett* v. *Cobbett*, 5 Esp. 136; *Chubb* v. *Solomons*, 3 C. & K. 75), though the mere fact that a certain member spoke, or particular person acted as Speaker, in a given debate, may (*id.*); the *Proceedings of the Privy Council* when confidential, e.g., minutes of an examination of witnesses before the Lords of the Council (*R.* v. *Layer*, 16 How. St. Tr. 214; 1 Stark. Ev., 4th ed., 42); *State secrets and papers*—thus, an officer of the Tower may refuse to say whether a plan of that building, which is produced, is accurate or not (*R.* v. *Watson*, 2 Stark. 116, 148; and as to penalties for disclosing Government plans, documents, and information, see now the Official Secrets Act, 1911); *Communications by or to public officials in the discharge of their public duties—e.g.*, communications made by or to the Lord Chamberlain in his official capacity as to persons to be invited to Court (*West* v. *W.*, 27 T.L.R. 476, C.A.); between the governor of a colony and its legal or military officers as to the condition of the colony or the conduct of its agents (*Wyatt* v. *Gore*, Holt, N.P. Rep. 299; *Cooke* v. *Maxwell*, 2 Stark. 183); communications between the governor of a colony and a Secretary of State (*Hennessy* v. *Wright*, 21 Q.B.D. 509; *Wright* v. *Mills*, 62 L. T. 558); confidential reports and plans made to the War Office, or Board of Ordnance or Trade (*Mercer* v. *Denne*, 1904, 2 Ch. 534, 544), reports made as to the conduct of an officer by a military court to the commander-in-chief (*Home* v. *Bentinck*, 2 Brod. & B. 130; *Beatson* v. *Skene*, 5 H. & N. 838; *Dawkins* v. *Rokeby*, L.R. 8 Q.B. 255; *Ford* v. *Blest*, 8 T. L. R. 295), or by an inferior to a superior officer (*Edmonson* v. *Amery*, Times, Feb. 1, 1911); reports as to a collision

at sea by a naval captain to the Admiralty (*The Bellerophon*, 44 L.J. Adm. 5; as to depositions in a wreck inquiry, see *The Palermo*, post, 198, 208); reports by the Inspector-General of Prisons to the Lord Lieutenant of Ireland (*M'Elveney* v. *Connellan*, 17 Ir. C.L.R. 55); police reports under the Irish Crimes Act (*R.* v. *McCormack*, Crimes Act Cas. 244; *Ashtown* v. *Waterford*, 42 Ir. L.T.Jo. 77); communications between the Director of Public Prosecutions and his Assistant (*R.* v. *Benson*, 151 C.C.C. Sess. Pap. 705), or even between them and the solicitor to the prisoner though claimed to have been made in order to be communicated to the prisoner (*R.* v. *Carpenter*, 156, *id.* 298, *per* Channell, J.); reports by an Inspector to the Local Government Board as to a public hospital (*A.-G.* v. *Nottingham*, 20 T.L.R. 257, 258); report by Government Analyst to the Home Office as to *post-mortem* examination of corpse (*Williams* v. *Star Co.*, 72 J.P.Jo. 65); correspondence between an officer of Customs and the Board of Commissioners (*Anderson* v. *Hamilton*, 2 B. & B. 156 *n*); a communication by a justice of the peace to the Commissioners of the Great Seal, as to another justice (*Fitzgibbon* v. *Greer*, I.R. 9 C.L. 294); a report by an officer of Inland Revenue to his superiors (*Hughes* v. *Vargas*, 9 R. 661, C.A.); or even, it seems, confidential letters containing the characters of employés at the Mint (*Latter* v. *Goolden*, C.A., Nov. 18, 1894, cited in *Williams* v. *Star Co.*, *sup.*).

On the other hand, letters by a private individual to the Postmaster-General, complaining of the conduct of a postal official, are not protected (*Blake* v. *Pilford*, 1 M. & Rob. 198); nor are official books showing the appointment of a collector of property tax, although the clerk producing them is under an oath of office not to divulge official information (*Lee* v. *Birrell*, 3 Camp. 337; nor communications between the keeper of a lunatic asylum and the Commissioners of Lunacy (*Hill* v. *Philp*, 7 Exch. 232.)

Objection, how taken. Objections to the disclosure of such matters may be taken on oath by the head of the department, either orally or by affidavit (*Re Hargreaves*, 1900, 1 Ch. 347); or by a subordinate, or counsel instructed by him to object (*A.-G.* v. *Nottingham*, *sup.*; *Williams* v. *Star Co.*, *sup.*); or by the party interested in excluding the evidence; or by the judge himself (*Hughes* v. *Vargas*, *sup.*; *Chatterton* v. *Sec. of State*, 1895, 2 Q.B. 189; *Hennessy* v. *Wright*, *sup.*). Where the head of the department, by person or proxy, objects, the judge will not compel the production, nor decide upon the validity of the objection, unless it is a palpably futile one (*Hughes* v. *Vargas*, *Latter* v. *Goolden*, *A.-G.* v. *Nottingham*, *Beatson* v. *Skene*, *sup.*)

Effect of Exclusion, Unlike the rule in cases of private privilege (*post*, 200), the exclusion, when allowed, is here absolute, so that in the case of documents no secondary evidence is admissible (*Hughes* v. *Vargas*, *Chatterton* v. *Sec. of State*, *sup.*). A subordinate official may, however, be asked whether he did not act under the direction of his superior, though the written instructions would be inadmissible (*Cooke* v. *Maxwell*, 2 Stark, N.P. 183).

(2) **INFORMATION FOR THE DETECTION OF CRIME. Public Prosecutions.** In public prosecutions, informations for fraud committed against the revenue laws, or civil proceedings arising out of either, witnesses may not be asked, and will not be allowed, to disclose the channels through which information has been obtained by the executive, unless the judge considers that such disclosure is necessary to show the innocence of the accused (*Marks*

v. *Beyfus,* 25 Q.B.D. 494, C.A.). The protection does not depend upon a claim being made, for it is the duty of the judge, apart from objection taken, to exclude the evidence (*id.*) [Tay. ss. 939-941; Best, s. 578; Ros. Cr. Ev. 136-137; Steph, art. 113.]

Scope of Rule. The rule protects not only the names of the persons by, or to, whom the disclosure was made, but the nature of the information given, and any other question as to the channel of communication or what was done under it (*R.* v. *Hardy,* 24 How. St. Tr. 808, 816; *R.* v. *Watson,* 32 *id.* 82; *Marks* v. *Beyfus, sup.*). Thus the witness cannot be asked whether he himself was the informer (*A.-G.* v. *Briant,* 15 M. & W. 169); or even by whom he had been advised to communicate his information to the authorities (*R.* v. *Hardy, sup.*); nor can a police constable be cross-examined as to what passed between himself and his superior officer (*R.* v. *Herlihy,* 32 Ir. L.T.R. 38; see generally 65 J. P. Jo. 209), or as to enquiries made in the course of his duties (*R.* v. *Carpenter,* 156, Sess. Pap. C.C.C. 298, *per* Channell, J.). A witness may, however, be asked whether the person to whom he made the communication was a magistrate or not (*id.*); and a constable has been compelled to disclose in which house he was secreted whilst watching licensed premises kept open after hours (*Webb* v. *Catchlove,* 3 T.L.R. 159).

Private Prosecutions. The rule does not apply to private prosecutions; in these such information must, if material, be disclosed [*R.* v. *Richardson,* 3 F. & F. 693; *Marks* v. *Beyfus, sup.* Mr. Justice Stephen states that in such cases it is for the judge to decide whether the allowance of the question would, under the particular circumstances, be injurious to the administration of justice; art. 113].

(3) **JUDICIAL DISCLOSURES.** **Judges** of the superior Courts cannot be compelled to testify to matters which have arisen before them in other trials (*R.* v. *Gazard,* 8 C. & P. 595; *R.* v. *Harvey,* 8 Cox, 99; *Buccleuch* v. *Met. Bd. of Works,* L.R. 5 H.L. 418; Tay. s. 986 *n*); though this does not extend to collateral incidents occurring during such trials—*e.g.* the attempted rescue of a prisoner in court (*R.* v. *Thanet* (Earl), 27 How. St. Tr. 845). As to unsworn explanations from the bench, see *post,* 462, and as to Judges acting on their own knowledge, general or private, *ante,* 19.

Arbitrators. The protection of an arbitrator is somewhat narrower. He may be examined as to the general history of the litigation up to the time of delivering his award; as to what claims were made or admitted; and as to whether he included in his award matters outside the scope of the reference (*Buccleuch* v. *Met. Bd. of Works, sup.; Falkingham* v. *Victorian Rys. Com,* 1900, A.C. 452, 463; *Recher* v. *North British &c., Co.,* 1915, 3 K.B. 277). So, he may be called to prove his own mistake or misconduct (*id.; Re Whiteley,* 1891, 1 Ch. 558; *Re Dare Valley Ry. Co.* 6 Eq. 429), or that he adopted an erroneous principle of decision [*Davidson* v. *Logan,* 124 L.T.Jo. 233 (Sc.)]. But the inquiry may not extend further; thus, he may not be asked the grounds of his award, or what items (provided they are within the scope of the reference) it included, or how a general sum was apportioned, or what were his intentions when giving it; for the award speaks for itself, and any evidence to explain, add to, or contradict it is inadmissible (*Buccleuch* v. *Met. Bd. of Works, sup.; Re Whitely, sup.; O'Rourke* v. *Comrs. for Railways,* 15 App. Cas. 371; *post,* 576). As to Awards, generally, see *post,* 433-4.

Barristers. When statements made by a barrister in conducting a case in Court are required to be proved in another trial, they should in general be established *aliunde*, and not by calling the speaker, who may refuse to disclose them (*Curry* v. *Walter*, 1 Esp. 456). As to explanations by counsel not upon oath, see *post*, 462.

Jurors. Neither the testimony, nor the unsworn statements, of *Petty Jurors* are receivable to impeach their verdict. Thus, affidavits by a juryman that he did not agree to the damages awarded (*Nesbitt* v. *Parrett*, 18 T.L.R. 510), or by all the jury that by mistake they gave less than they intended (*Jackson* v. *Williamson*, 2 T.R. 281), or that their verdict had been decided by lot (*Vaise* v. *Delaval*, 1 T.R. 11), have been rejected. So, a compensation juror (unlike an arbitrator) cannot be examined to show that the verdict included compensation for matters outside the scope of the inquiry (*Buccleuch* v. *Met. Bd. of Works, sup., per* Martin, B.). The same rule obtains as to proof of misconduct in criminal trials. Thus, a letter from a juryman explaining the circumstances under which he had separated himself from his colleagues after retiring to consider the verdict, has been rejected (*R.* v. *Ketteridge*, 1915, 1 K.B. 467, in civil cases, however, separation does not invalidate the verdict, *Fanshaw* v. *Knowles*, 1915, 2 K.B. 538, C.A.); as also his evidence as to the matters which influenced them in arriving at their verdict [*R.* v. *Melik*, 11 Cr. App. R. 100; *cp. R.* v. *Syme*, 112 L.T. 136; though where, in answer to the judge, the foreman in court disclosed that they had decided the case on inadmissible grounds, the conviction was quashed, *R.* v. *Newton*, 7 Cr. App. R. 214]. So, a juryman was not allowed to prove that questions were put to and answers given by the Clerk of Assize in the jury room, which influenced their finding (*R.* v. *Willmott*, 10 *id.* 173); nor that one of the jury stated his intention to acquit the prisoner whatever the evidence against him (*R.* v. *Brown*, 1907, 7 N. S. W. State Rep. 296). Although, however, misconduct connected with the verdict cannot be proved by intrinsic evidence, yet it may be extrinsically, as by the officer in charge of the jury or by any other actual witness of the transaction; thus, in *R.* v. *Willmont, sup,* the Clerk of Assize was allowed to report to the Court what had occurred (*cp. R.* v. *Hancox*, 8 Cr. App. R. 193 and *R.* v. *Syme*, 10 *id.* 284). And the evidence of a juryman is receivable upon collateral points—*e.g.* to show the circumstances under which he came into the box (*Bailey* v. *Macaulay*, 13 Q.B. 815, 829); or matters transpiring in Court (*Nesbitt* v. *Parrett, sup.*); so, he may (without leaving the box, or retiring from the case) be examined as to any facts material to the case which he knows of his own knowledge (Tay. s. 1379; *ante*, 19).

Grand Jurors. As grand jurors are sworn to secrecy, their proceedings are, in general, similarly protected. Thus, neither they, nor their clerk, nor the prosecuting officer, may disclose the number or names of the jurors present nor the votes given (*R.* v. *Marsh*, 6 A. &. E. 236; Tay. s. 943); nor may they explain their finding (*R.* v. *Cooke*, 8 C. & P. 582); nor, perhaps, disclose the evidence they heard [*Micklethwait's Case*, 1641, Clayton Rep. 84; *R.* v. *Hughes*, 1 C. & K. 519, where Tindal, C. J. in allowing an ordinary witness to prove perjured evidence given before the grand jury, remarked 'he is not a grand juror'; Tay., s. 943]. But in *R.* v. *Scarlet*, 12 Co. 98, on a charge of fraudulently acting on the grand jury, the judges demanded of the latter on what testimony they proceeded; and in a case

cited by Mr. Christian, 4 Blackst. Com. 126, a witness at York was committed for perjury to be tried upon the testimony of the grand jury. So, in an action for malicious prosecution, a grand juryman has, on two occasions, been permitted to prove that the defendant was the prosecutor (*Sykes* v. *Dunbar,* 2 Selw. N.P., 3rd ed., 1915; *Freeman* v. *Arkell,* 1 C. & P. p. 137). And the rule apparently, does not apply to ordinary witnesses, as these are not sworn to secrecy. Thus, in *R.* v. *Watson,* 32 St. Tr. 107, Ld. Ellenborough, while intimating his own doubts, cited a case in which a witness was questioned as to what passed before the grand jury and was permitted to answer. So, a witness on cross-examination has been compelled to say whether he had not stated certain facts before the grand jury (*R.* v. *Gibson,* Car. & M. 672, *per* Parke, B.,; *R.* v. *Russell, id.* 247); and in cases of perjury committed before that body, other witnesses present are competent to prove the false evidence given (*R.* v. *Hughes, sup.*)

[Tay, ss. 938, 942-945; Best ss. 579, 580; Steph. arts. 111-114; 2 Russ. Cr., 7th ed. 2237; Whart. ss. 599-603.]

Private Examinations and Records in Bankruptcy, Winding-up, Lunacy, &c. Private examinations taken under the Bankruptcy Acts 1883, s. 27 and 1914, s. 25 (*Re Beall,* 1894, 2 Q.B. 135; *Re Walker,* 16 Manson's Bpy. R. 207), and the Companies Act, 1908, s. 174 (*Re Greys Brewery,* 25 Ch. D. 400; *North Australian, &c., Co.* v. *Goldsborough,* 1893, 2 Ch. 381; *Re London and Northern Bank,* 1902, 2 Ch. 73; *Re Property Ins. Co.,* 1914, 1 Ch. 775; *post,* 208) to obtain information as to a debtor's or company's assets, &c., are of a secret nature, and in general protected from disclosure. Nor has a debtor any right to inspect the trustee's minute-books of meetings of the committee of inspection, &c. (*Re Solomons,* 1904, 2 K.B. 917), nor a creditor's liquidator those of the official receiver (*Re Lake George Mines,* 1904, 1 Ch. 803). So, as to depositions taken by the Receiver of Wrecks (*The Palermo,* 9 P.D. 6; *post,* 207), Reports by the Official Receiver to the Court under the old Companies (Winding Up) Act, 1890 (*Bottomley* v. *Brougham,* 24 T.L.R. 262), and Reports of Chancery Visitors under the Lunacy Act, 1890, ss. 184-186 (*Roe* v. *Nix,* 1893, P. 55); and see generally as to privilege in Lunacy cases, *Re Strachan,* 1895, 1 Ch. 439.

(4) **STATEMENTS BY PARENTS BASTARDIZING THEIR OFFSPRING.** When the legitimacy of a child born in wedlock is in question, neither the testimony, nor the declarations out of court, of the parents are admissible to prove their *access* or *non-access* during marriage. [Tay. ss. 950-951; Best, s. 586; Steph. art. 98; Ros. N.P. 1034-6; Whart. s. 608; Hubback, Ev. of Succ. 382-384. The editor of the 10th ed. of Taylor doubts whether this rule still exists (s. 637 *n*); it was, however, expressly recognized in the *Aylesford Peerage,* 11 Ap. Cas. 1, 9-11, the *Poulett Peerage,* 1903, A.C. 393, 399, *Hewat's Divorce Bill,* 12 App. Cas., 312, *Nottingham Guardians* v. *Tomkinson,* 4 C.P.D. 343, and *Lord* v. *O'Leary,* 40 Ir. L.T.R. 166. See a discussion of the rule in 26 Law Quart. Rev. 47, and 25 Harv. Law Rev. 746].

Principle. The grounds of exclusion are said to be that, where the evidence tends to show *access,* it is unnecessary as proving that which the law presumes; and where it tends to show *non-access,* it offends against public morality, decency, and policy [Hubb. Ev. of Succ. 382; *Goodright* v. *Moss,* Cowp. 591, 594; *R.* v. *Kea,* 11 East, 132; *post,* chap. xlvii.].

Scope of the Rule. The rule excludes not only direct but collateral inquiries as to access. Thus, the testimony of a husband is not admissible to prove either connection or opportunities therefor; nor, in rebuttal, are the declarations of the wife admissible to prove her hostile feeling towards him (*Wright* v. *Holdgate,* 3 C. & K. 158). So, to disprove access, the husband cannot be asked whether he did not, at the time in question, live 100 miles away from his wife and cohabit with her sister (*R.* v. *Stourton,* 5 A. & E. 180), or only go once to the place where she resided and then to collect evidence for a divorce (*Re R.'s Trusts,* 39 L.J. Ch. 192). The rule has been held to apply, also, where the evidence is tendered merely to contradict admissions of paternity by a father (*Ulverstone Union* v. *Park,* 53 J.P. 629; although in *Watson* v. *Little,* 5 H. & N. 472, where a mother having denied, on cross-examination, that she had ever affiliated her child, or stated to a magistrate that it was born on a date before the marriage, the magistrate's order reciting these facts was held admissible in contradiction, though not to prove the bastardy or date of birth.) So, neither the testimony of a surviving parent (*R.* v. *Kea, sup.*), nor the declarations of a deceased one (*R.* v. *Luffe,* 8 East, 193; *Murray* v. *Milner,* 12 Ch.D. p. 849) can be received, unless the latter are tendered, not to prove the truth of the facts stated, but merely as parts of the *res gesta, i.e.* of a general course of conduct indirectly establishing non-access, when they will be admissible whether the parents are living (*Aylesford Peerage,* 11 App. Cas. 1; *Burnaby* v. *Baillie* 42 Ch. D. 282, cited *ante,* 77), or deceased (*Hargrave* v. *H.,* 2 C. & K. 701).

But the rule is confined to direct issues of legitimacy, and to the particular ground of access during marriage. Thus, evidence of access or non-access is admissible in divorce proceedings (32 & 33 Vict. c. 68, s. 6; *Nottingham Guardians* v. *Tomkinson,* 4 C.P.D. 343; *Re Walker,* 53 L.T. 660; *Keys* v. *K.,* 34 Ir. L.T.R. 190; *post,* 204). So, proof may be given of the *time* of birth, *i.e.* that this was before, or after, the marriage (*Goodright* v. *Moss, sup.; Re Turner,* 29 Ch.D. 985); or that the marriage itself had never taken place (*R.* v. *Bramley,* 6 T.R. 330; *Murray* v. *Milner, sup.*), or was valid or invalid (*Staden* v. *S.,* 1 Peake N.P. 45; *Anon.* v. *A.,* 23 Beav. 273, 274; *Re Darcys,* 11 Ir.C.L.R. 298). Nor does the rule preclude proof of the paternity of a child born more than nine months after the judicial separation of husband and wife (*Hetherington* v. *H.,* 12 P.D. 112), though the direct effect may be to bastardize or legitimatize the child, respectively. Moreover, in affiliation proceedings, after independent proof of non-access, the wife may testify as to who was the father (*Legge* v. *Edmonds,* 25 L.J.Ch. 125).

On the other hand, the access or non-access of the parents *before* marriage is provable either by their own testimony or, if deceased, by their declarations, as relating to a question of pedigree (*Poulett Peerage,* 1903, A.C. 395, overruling *Anon.* v. *Anon.,* 23 Beav. 273; *post,* 309). And their access or the reverse *during* marriage may, of course, be proved presumptively, *e.g.* by showing that, at the time in question, the husband was absent, or incapable; or the wife living in adultery with another man; or the child reputed to be, or treated by the family as, illegitimate (*Morris* v. *Davies,* 5 C. & F. 163; *Barony of Saye & Sele,* 1 H.L.C. 507; *Poulett Peerage, sup.; Hawes* v. *Draeger,* 23 Ch.D. 173; *Aylesford Peerage, Burnaby* v. *Baillie, sup.; Evans* v. *E.,* 20 T.L.R. 612; as to the sufficiency of such evidence, see *Barony of Saye & Sele, sup.; Gordon* v. *G.,* 1903, P. 141; and *post,* chap. xlviii.).

CHAPTER XVI.

FACTS EXCLUDED BY PRIVILEGE.

THE matters protected from disclosure or production on the grounds of privilege are the following: (1) Professional confidences; (2) Title-deeds, Evidence, Lien; (3) Matrimonial communications; (4) Criminating questions; and (5) Admissions of adultery in divorce cases.

Nature of the Claim. The privilege may be that either of the witness himself, or of another whom he represents; in the former case he will *not be compelled,* and in the latter he will *not be allowed* (without the principal's consent), to disclose the protected matter (*post,* 201). Such claims arise more frequently on applications for discovery or inspection before trial, than with reference to testimony in the witness-box, but the principles are substantially the same (*Greenough* v. *Gaskill,* 1 M. & K. p. 115, *per* Lord Brougham; *Hennessy* v. *Wright,* 21 Q.B.D. 509, *per* Wills, J.).

By Whom and when made. They should, in strictness, be made by the witness himself, and not be made or argued by counsel, whether in the cause (*Thomas* v. *Newton,* Moo. & M. 48 *n; R.* v. *Adey,* 1 Moo. & Rob. 94; *Doe* v. *Date,* 3 Q.B. 609), or specially instructed (*Doe* v. *Egremont,* 2 M. & R. 386); but in practice they are now usually both taken and argued by the latter on his client's behalf (*Rochefoucauld* v. *Boustead,* 65 L.J. Ch. 794; *Cowley* v. *C.,* 1897, Times, Jan. 20; *Evans* v. *E.,* 1904, P. 378; *post,* 198) as, otherwise the privilege might be lost through ignorance, since, though the judge ought, yet he is not obliged (*A.-G.* v. *Radloff,* 10 Ex. 88), to advise the witness of his rights. The claim may be made at any stage of the examination and is determinable by the judge, who may, if he think fit, hear other witnesses on the point (*Cleave* v. *Jones,* 7 Ex. 421; *ante,* 12). He may also read the document itself to determine its privilege (*Re Daintry, Exp. Holt,* 1893, 2 Q.B. 116; *Kerry Council* v. *Liverpool Assoc.,* 38 Ir. L.T.R. 7; *Power* v. *Freeman,* 42 *id.* 115; *contra, Volant* v. *Soyer, post,* 197; *Nagle* v. *Shea,* I.R. 9 C.L. 389, and Tay. s. 919, are not now law on this point); so, in Chambers, on applications to inspect under O. 31, R. 19a (2) (*Birmingham &c. Co.* v. *L. & N. W. Ry.,* 1913, 3 K.B. 850, C.A.).

Effect, when allowed. When allowed, the privilege protects the witness not only from further answers, but from partial ones already given (*R.* v. *Garbett,* 1 Den. C.C. 236); and where a document is privileged he cannot be compelled to state its contents (*Davies* v. *Waters,* 9 M. & W. 608), or his knowledge, information, or belief founded thereon (*Lyell* v. *Kennedy,* 9 App. Cas. 81), since otherwise the privilege would be illusory. But, unlike the rule as to public policy (*ante,* 195), if the privileged document, or second-

ary evidence of it, has been obtained by the opposite party independently, even through the default of the legal adviser, or by illegal means, either will be admissible, for the Court will not inquire into the methods by which the parties have obtained their evidence (*Calcraft* v. *Guest,* 1898, 1 Q.B. 759, C.A.; *Lloyd* v. *Mostyn,* 10 M. & W. 478; *R.* v. *Leatham,* 8 Cox, 498, 501; *contra, Joyce* v. *J.,* 1909, Times, April 30, *per* Deane, J., *sed qu.;* and as to the illegal obtainment of evidence generally, see Wigmore, Ev. s. 2183 and cases cited); this, however, will not apply where the right to retain or use the privileged documents is the very subject matter of the action (*Ashburton* v. *Pape,* 1913, 2 Ch. 469, C.A.). On the other hand, a prisoner has been prevented from using a letter which had fallen into his hands, written by the prosecutrix to her solicitor, or from cross-examining her thereon, when she refused to waive her privilege (*R.* v. *Leverson,* 11 Cox, 152; *sed qu.*); so Kelly, C.B., rejected a letter from a prisoner to his wife, which had been intercepted by a constable who had undertaken to post it, on the ground apparently that the letter belonged to the wife, who could not have been called to produce it had it reached her hands (*R.* v. *Pamenter,* 12 Cox, 177; *sed qu.*; this case is doubted by Mr. Taylor, 8th ed. s. 881, but in the 10th ed. and the addenda to the 9th it is supported on the authority of an American case, *Scott* v. *Com.,* 42 Am. St. Rep. 371, which is to the same effect; *cp. post,* 211, 269).

No adverse presumption is to be drawn from the non-waiver of the privilege (*Wentworth* v. *Lloyd,* 10 H.L.C. 598,) except, perhaps, in the case of not answering criminating questions (Tay. s. 1467; as to comment on prisoners refusing to testify, see *post,* 453). And the privilege, being that of the witness or his principal, and not of the litigants, no new trial can be had for an erroneous ruling on the point (*R.* v. *Kinglake,* 11 Cox, 499; *post,* chap. xlix.).

(1) **PROFESSIONAL CONFIDENCES.** A client (whether party or stranger) cannot be compelled, and a legal adviser (whether barrister, solicitor, the clerk or intermediate agent of either, or an interpreter, *Du Barré* v. *Livette,* Peake, 77) will not be allowed without the express consent of his client, to disclose oral or documentary communications passing between them in professional confidence. [Tay. ss. 911-913; Best, s. 581; Ros. N.P. 171-194; Ros. Cr. Ev. 133-135; Steph. arts. 115-116; Bray on Discovery, 1884; *id.* Digest of Discovery, 1904; Ann. Pr., Notes to O. 31, r. 1).

Principle. The rule is established for the protection of the client, not of the lawyer; and is founded on the impossibility of conducting legal business without professional assistance, and on the necessity, in order to render that assistance effectual, of securing full and unreserved intercourse between the two (*Jones* v. *Great Central Ry.,* 1910, A.C. 4, 5; *Lyell* v. *Kennedy,* 9 App. Cas. p. 86; *Wheeler* v. *Le Marchant,* 17 Ch.D. pp. 681-2). The privilege, therefore, may be waived by the *client,* but not by the *adviser* (*Wilson* v. *Rastall,* 4 T. R. 758; *Proctor* v. *Smiles,* 55 L.J.Q.B. 527, C.A.; *Re Cameron's Co.,* 25 Beav. 1, 4; *R.* v. *Leverson, sup.; Humphery* v. *Wake,* 33 T.L.R. 433; *cp. post,* 211).

Privilege confined to Legal Advisers. The privilege attaching to confidential professional disclosures is confined to the case of legal advisers and does not protect those made to *Clergymen* [*Normanshaw* v. *N.,* 69 L.T. 468;

Wheeler v. *Le Marchant,* 17 Ch. D. 681; *Gedge* v. *G.* (reported 1909, Globe, July 13, and on other points, Times, July 14, where a claim made by a cleric to withhold a communication to his bishop was disallowed, Best, ss. 129B *n,* 583; Steph. art. 117, note xliv.; 3 Jur. Soc. Pap. 137-40; but there exists a strong body of opinion against the correctness, or at least the enforcement, of the rule, see *R.* v. *Griffin,* 6 Cox, 219; *Broad* v. *Pitt,* 3 C. & P. 518; *R.* v. *Hay,* 2 F. & F. 4; *Re Keller,* 22 L.R.I. 158, 160; *Tannian* v. *Synnott,* 37 Ir. L.T. Jo. 275; *Ruthven* v. *De Bour,* 45 Sol. Jo. 272]; *Doctors* (*R.* v. *Gibbons,* 1 C. & P. 97; *Broad* v. *Pitt, sup.; Wheeler* v. *Le Marchant, sup.*); *Agents* (*Slade* v. *Tucker,* 14 Ch. D. 824, 827; *Kerry* v. *Liverpool Assoc.,* 38 Ir. L.T.R. 7; so, as to patent agents, *Mosely* v. *Victoria Co.,* 55 L.T. 482); *Pursuivants of the Herald's Office,* employed to oppose enrolment of a pedigree (*Slade* v. *Tucker,* 14 Ch. D. 824); and *Stewards, Clerks, or Confidential friends* (*Wheeler* v. *Le Marchant, sup.;* Tay. s. 916.) A qualified protection, however, is accorded to *Bankers,* who are not compellable, in proceedings to which they are not parties, to produce or give secondary evidence of their books, unless by order of a judge for special cause (*post,* 375, 457); while in the case of *Trade Secrets* and the like, discovery will only be ordered when, and to the extent that, the Court considers their disclosure strictly necessary for the purposes of justice, *i.e.* when not oppressive [Ann. Pr., Notes to O. 31, r. 7; as to restraining disclosure in other cases, see *Morrison* v. *Moat,* 9 Hare 241; and *Alperton Co.* v. *Manning,* 33 T.L.R. 235].

The Retainer. Neither a formal retainer, nor the payment of fees, is necessary to constitute the relationship of solicitor and client; it is enough if the adviser is in any way consulted in his professional character.

And the protection exists notwithstanding a *bonâ fide* mistake in supposing that the solicitor had consented to act (*Smith* v. *Fell,* 2 Curt. 667); or the latter's subsequent refusal of the retainer (*Cromack* v. *Heathcote,* 2 Br. & B. 4); or the fact that the solicitor had, unknown to the client, become disqualified (*Calley* v. *Richards,* 19 Beav. 401).

But no privilege attaches to communications passing *before* the relationship existed, or *after* it had ceased (*Greenough* v. *Gaskell, ante,* 186); nor to those made to a lawyer consulted merely as a friend (*Smith* v. *Daniell,* 44 L.J.Ch. 189). And where a prisoner, charged with forgery, requested a friend "to ask G. or any other attorney, as to his probable punishment," it was held that the relationship had not been established between G. and the prisoner (*R.* v. *Brewer,* 6 C. & P. 363); so, where a party applied to another, not a solicitor, or pretending to be one, to get a conveyance prepared, and the latter wrote to a legal relative, who replied that "the party could not convey," the communication was held not privileged (*Doe* v. *Jauncey,* 8 C. & P. 99, 101).

Joint Retainer. When two parties employ the *same solicitor,* the rule is that communications passing between either of them and the solicitor, in his *joint* capacity, must be disclosed in favour of the other—*e.g.* a proposition made by one, to be communicated to the other (*Baugh* v. *Cradocke,* 1 M. & R. 182; *Perry* v. *Smith,* 9 M. & W. 681); or instructions given to the solicitor in the presence of the other (*Shore* v. *Bedford,* 5 M. & G. 271; *Ross* v. *Gibbs,* L.R. 8 Eq. 522); though it is otherwise as to communications made to the solicitor in his *exclusive* capacity (*Perry* v. *Smith, sup.;* Tay, s. 926; Bray, 427, 442-443). The title of either client is generally deemed to fall under

the latter head—*e.g.* where a borrower applies for a loan to the solicitor of the lender, and furnishes him with an abstract of title, the solicitor will not be allowed to prove the abstract as against the borrower (*Doe* v. *Watkins,* 3 Bing. N.C. 421; *Doe* v. *Seaton,* 2 A. & E. 171). So, where one of two joint adventurers referred the other to the former's solicitors as to a matter connected with the adventure, communications between the latter and such solicitor were held privileged in an action against him by a third party as to the subject-matter of the adventure, although the former waived his privilege (*Rochefoucauld* v. *Boustead,* 65 L.J.Ch. 794).

Scope of Employment. The matter must be within the *ordinary scope of professional employment,* though it need not involve actual or prospective litigation (*Pearce* v. *Foster,* 15 Q.B.D. 114). A correlative test has been said to be whether the nature of the employment would give the Court summary jurisdiction over the solicitor (*Turquand* v. *Knight,* 2 M. & W. 98, 101).

The sale, purchase, and conveyance of estates (*Carpmael* v. *Powis,* 1 Phill. 687), or negotiations for a loan (*R.* v. *Farley,* 2 C. & K. 313), are within the scope. But not communications to a solicitor acting merely as under-sheriff (*Wilson* v. *Rastall,* 4 T.R. 753), rent-collector (*Stratford* v. *Hogan,* 2 Ball & B., 164; *Doe* v. *Hertford,* 19 L.J.Q.B. 526), patent-agent (*Mosely* v. *Victoria Co.,* 55 L.T. 482), or trustee (*Tugwell* v. *Hooper,* 10 Beav. 348).

Communications in furtherance of a fraud or crime, whether the solicitor was a party to, or ignorant of, the illegal object, are not protected (*R.* v. *Cox,* 14 Q.B.D. 153; *R.* v. *Downer,* 14 Cox, 486; *Re Arnott,* 60 L.T. 109; *Postlethwaite* v. *Rickman,* 35 Ch.D. 722: *Williams* v. *Quebrada Ry.,* 1895, 2 Ch. 751; *R.* v. *Smith,* 11 Cr. App. R. pp. 233-4); nor, probably, are forged documents, though entrusted to the solicitor in professional confidence (*R.* v. *Hayward,* 2 C. & K. 234; *cp. R.* v. *Jones,* 1 Den. 166; *R.* v. *Brown,* 9 Cox, 281; *R.* v. *Downer, sup.;* Tay. s. 929, however, cites two earlier cases, *contra*). So, a fraudulent, as distinguished from an innocent, device to evade payment of probate duty, is not privileged (*Bullivant* v. *A.-G. of Victoria,* 1901, A.C. 196). But, in order to displace the *primâ facie* right to protection, there must be some definite evidence produced, or charge made, of fraud or illegality (*id.*).

The Communications must be necessary and confidential. The communications must have been *confidentially made for the purpose of the employment,* or the knowledge *confidentially obtained solely in consequence of it,* to be privileged (*Gardner* v. *Irvin,* 4 Ex. D. 49; *O'Shea* v. *Wood,* 1891, P. 286; *Doe* v. *Hertford,* 19 L.J.Q.B. 526).

Joint Interest. No privilege attaches to communications between solicitor and client as against persons having a *joint interest* with the client in the subject-matter of the communication, *e.g.* as between partners (*Re Pickering,* 25 Ch. D. 247; *Gourand* v. *Edison,* 59 L.T. 815); a company and its shareholders (*Woodhouse* v. *W.,* 30 T.L.R. 559, C.A.); trustee and *cestui que trust* (*Talbot* v. *Marshfield,* 2 Dr. & S. 549; *Re Mason,* 22 Ch. D. 609; *Postlethwaite* v. *Rickman,* 35 Ch. D. 722; even though the party resisting production has paid for the communication, *Bacon* v. *Bacon,* 34 L.T. 349; as to where the solicitor is also a co-trustee, see *O'Rourke* v. *Darbishire,* 1920, A. C. 581); lord and tenants of a manor as to customs of manor (*Warrick* v. *Queen's Coll.,* L.R. 3 Eq. 683; *Owen* v. *Wynn,* 9 Ch. D. 29); a lessor and lessee as to production of the lease (*Doe* v. *Thomas,* 9 B. & C. 288); reversioner and tenant for life as to

common title (*Doe* v. *Date,* 3 Q.B. 609); two persons stating a case for their joint benefit (*A.-G.* v. *Berkeley,* 2 J. & W. 291); or a husband and wife who are not genuinely, but only collusively, in contest (*Ford* v. *De Pontes,* 5 Jur. N.S. 993). Nor does any privilege attach as between joint claimants under the *same client*—*e.g.* between claimants under a testator as to communications between the latter and his solicitor (*Russell* v. *Jackson,* 9 Hare, 387; see, however, *Curtis* v. *Beaney,* 1911, P. 181).

But where the communications relate to matters *outside* the joint interest, they are privileged even as against a person bearing the expense of the communication—*e.g.* communications between a plaintiff corporation and its solicitors, as against a defendant ratepayer as to matters not connected with the rates (*Bristol Corp.* v. *Cox,* 26 Ch.D. 678); or between a company and its solicitors consisting of confidential advice to the former in an action against a shareholder (*Woodhouse* v. *W., sup.*); or between a trustee and his solicitor as against the *cestui que trust,* where the communication is not made for the former's guidance in the trust, but to enable him to resist litigation by the latter (*Thomas* v. *Sec. of State,* 18 W.R. 312); or where it concerns his character, not as trustee, but as mortgagee, of the client (*Johnson* v. *Tucker,* 11 Jur. 382).

In cases of joint interest it is sufficient, as against third persons, if one only of the interested parties claims the privilege (*Newton* v. *Chaplin,* 19 L.J.C.P. 374; *Kearsley* v. *Phillips,* 10 Q.B.D. 465; *Rochefoucauld* v. *Boustead,* cited *ante,* 189; *Rattenbury* v. *Munro,* 55 Sol. J. 76); though all must concur in waiving it (Bray, 427).

Duration of Privilege. Generally speaking, a communication or document "once privileged is always privileged" (*Bullock* v. *Corrie,* 3 Q.B.D. 356; *Pearce* v. *Foster,* 15 Q.B.D. 114; *Calcraft* v. *Guest,* 1898, 1 Q.B. 759, 761). Thus, the protection is not lost in future litigation; on change of solicitors; by the solicitor becoming either personally interested (*Chant* v. *Brown,* 7 Hare, 790), or disqualified (*Cholmondeley* v. *Clinton,* 19 Ves. 268); or by the death of the client (*Bullivant* v. *A.-G. of Victoria,* 1901, A.C. 196). It has been held, however, that this principle only applies where the parties and the subject-matter are the same, or where the communications are between solicitor and client (*Kerry Council* v. *Liverpool Assoc.,* 38 Ir. L.T.R. 7, C.A.),

Waiver. The privilege may, however, as we have seen (*ante,* 187), be *waived* by the client (though not by the solicitor), either expressly or impliedly —*e.g.* by the client examining the solicitor as to the privileged matter; though if only examined as to part, he cannot be cross-examined as to the residue (*Bate* v. *Kinsey,* 1 C.M. & R. 38; *M'Donnell* v. *Conry,* Ir. Cir. Rep. 807; *R.* v. *Leverson,* 11 Cox, 152; *Lyell* v. *Kennedy,* 27 Ch. D. 1); or, by sending the opponent a copy (though not necessarily by sending him a mere extract) of the privileged document (*Caldbeck* v *Boon,* I.R. 7 C.L. 32). Where a corporation elected to answer interrogatories through its town clerk, who was also its solicitor, it was held it had impliedly waived its privilege (*Swansea Corp.* v. *Quirk,* 5 C.P.D. 106); though it was otherwise where it had no option, but was bound to comply with an order to answer through the town clerk (*Salford Corp.* v. *Lever,* 24 Q.B.D. 695).

Where the client has parted with the property to which the communication relates, his successor in title may waive the privilege (Bray, 385-387); this has

been held not to apply to a client's trustee in bankruptcy (*Bowman* v. *Norton*, 5 C. & P. 177; but see Bray, 388). And upon his death the same right passes to his personal representative (*Doe* v. *Hertford*, 19 L.J.Q.B. 526; Bray, 385-387).

EXAMPLES.

(i) *Client's Name, Address, Handwriting, Identity, &c.*

Privileged.

A solicitor will not be allowed to disclose his client's address if it has been confidentially communicated to him for the purpose of the employment (*Re Campbell*, 5 Ch. App. 703; *Re Arnott*, 60 L.T. 109. As to names of *witnesses*, see *post*, 207).

Not Privileged.

A solicitor may be compelled to prove his client's name (*Bursill* v. *Tanner*, 16 Q.B.D. 1); address, if not confidentially disclosed (*Re Campbell, opposite*); or, even though confidentially disclosed, if the client is a ward of Court (*Ramsbotham* v. *Senior*, L.R. 8 Eq. 575); or if it was communicated while engaged in an unlawful act (*Re Arnott, opposite*); handwriting (*Dwyer* v. *Collins*, 7 Ex. p. 646); identity—*e.g.* as having executed a deed attested by the solicitor (*R.* v. *Payne*, 49 Sol. Jo. 419; *Robson* v. *Kemp*, 5 Esp. 52; see *inf.* Clients' Documents), sworn an affidavit, or put in a pleading (*Dwyer* v. *Collins, sup.*; *Studdy* v. *Sanders*, 2 Dowl. & Ry. 347; *Greenough* v. *Gaskell*, 1 My. & K. p. 108); the fact of the retainer (*Levy* v. *Pope*, M. & M. 410; *Gillard* v. *Bates*, 6 M. & W. 547; *Forshaw* v. *Lewis*, 1 Jur. N.S. 263); and perhaps its character—*e.g.* whether personal or representative (*Beckwith* v. *Benner*, 6 C. & P. 682); as well as facts showing the client's mental capacity (*Jones* v. *Goodrich*, 5 Moo. P.C. 16, 25).

(ii) *Legal Opinions, Drafts, and Communications.*

Cases submitted to solicitor or counsel for opinion, and opinions thereon (*Reece* v. *Trye*, 9 Beav. 316; *Penruddock* v. *Hammond*, 11 Beav. 59); including the opinion of a foreign lawyer (*Bunbury* v. *B.*, 2 Beav. 173). Instructions from a party's solicitor to counsel to prepare a deed, together with correspondence and papers relative thereto, unless, on the evidence, it was done with the express object of committing a fraud or illegality (*Knaresborough Banking Co.* v. *Lorrimer*, 41 Sol. Jo. 734, C.A.; *Bullivant* v. *A.G. of Victoria*, 1901, A.C. 196). Drafts of agreement, leases, or conveyances (*Reece* v. *Trye, sup.*; *Mostyn* v. *West Mostyn Co.*, 34 L.T. 531); draft advertisement settled by counsel (*Lowden* v. *Blakey*, 23 Q.B.D. 332). Notes of professional interviews and communications, whether made by solicitor (*Ward* v. *Marshall*, 3 T.L.R. 578), or client (*Woolley* v. *N. L. Ry.*, L.R. 4 C.P. 602; *Bristol Corp.* v. *Cox*, 26 Ch.D. 678); or, in the case of a corporation, minutes and reports of a sub-committee in reference to existing or expected litigation (*ibid.*; *Worthington* v. *Dublin Ry.*, 22 L.R. Ir. 310; the last two cases are doubted by Mr. Bray, Ann. Pr., Notes to O. 31, r. 1).

Opinions of counsel, effect of which is set out in pleadings (*Bristol Corp.* v. *Cox*, 26 Ch.D. 678); though the mere reference to a privileged document in the pleadings will not destroy the protection (*Roberts* v. *Oppenheim*, 26 Ch.D. 724); nor will furnishing the opposite side with an *extract* of the opinion necessarily waive privilege as to other parts, or as to the case on which it is founded (*Carey* v. *Cuthbert*, I.R. 6 Eq. 599; see Waiver, *ante*, 204).

Communications which are *not necessary for the purpose of the employment*—*e.g.* a defendant's direction to his attorney, or the latter's clerk, to send a particular person, not a sheriff's officer, with the sheriff to point out the person to be arrested under a *ca. sa.* (*Caldbeck* v. *Boon*, I.R. 7 C.L. 32; *cp. Sandford* v. *Remington*, 2 Ves. Jun. 189); or a plaintiff's admission to his attorney, after trial, that he had given no consideration for a note sued upon (*Cobden* v. *Kendrick*, 4 T.R. 431); or a prosecutor's remark that "he would give a large sum to have his adversary hanged" (*Annesley* v. *Anglesea*, 17 St. Tr. 1224).

Client's confession of adultery, to her solicitor, unless latter specifically prohibited from disclosing it (*Getty* v. *G.*, 76

Privileged.

Solicitor's confidential letters to client, for purpose of obtaining information or instructions as to legal proceedings, although containing a statement of fact as to what took place therein in presence of opposite party (*Ainsworth* v. *Wilding*, 1900, 2 Ch. 315; *Irish Society* v. *Crommelin*, 2 Ir.L.T.Jo. 265). Solicitor's bill of costs, in his own or his client's possession; entries relating to actual or contemplated litigation (*Ainsworth* v. *Wilding*, *sup.*), or other matters of confidential professional advice or assistance (Bray, Discovery, 396).

Not Privileged.

L.J.P. 158; the report, 1907, P. 334, does not show the full ruling).

Communications to a solicitor respecting *matters of fact, as distinguished from legal advice* [*Sawyer* v. *Birchmore*, 3 My. & K. 572; *Lyell* v. *Kennedy*, 9 App. Cas. 84. In *Bramwell* v. *Lucas*, 2 B. & C. 745, a client's inquiry of his solicitor, "whether he could attend a meeting of his creditors without being arrested," was held not privileged on this ground; but this case, which seems to fall precisely within the protection, has been disapproved; see Tay. s. 933 *n*].

Communications in furtherance of fraud or crime, e.g., A. being charged with the murder of B., the fact and details of questions asked by A. before the alleged murder and legal opinions obtained by him as to how B.'s property could be secured to A. after B.'s death (*R.* v. *Smith*, 11 Cr. App. R. 230).

Solicitor's bill of costs; entries which are mere notes or reports of proceedings in Court or chambers in presence of opposite party (*Ainsworth* v. *Wilding*, *opposite*); or which show who paid the costs of, and were the real parties to, such proceedings (*Irish Soc.* v. *Crommelin*, *opposite*).

(iii) *Solicitor's or Client's Knowledge.*

Solicitor's or client's knowledge derived solely from *privileged communications* (*Lyell* v. *Kennedy*, 9 App. Cas. 81; *Proctor* v. *Smiles*, 55 L.J.Q.B. 527).

Solicitor's or client's knowledge derived from *independent sources* (*Wheatley* v. *Williams*, 1 M. & W. 533; *Sawyer* v. *Birchmore*, 3 Myl. & K. 572; *Manser* v. *Dix*, 1 K. & J. 451; see *Re Holloway*, 12 P.D. 167, *post*, 209, as to letters to solicitor or client from strangers with reference to the case); or derived from the employment, but as to mere *facts patent to the senses* (*Lyell* v. *Kennedy*, *opposite.*; *Brown* v. *Foster*, 1 H. & N. 736, in which case a barrister was compelled to disclose that his client's document had been altered during the progress of the trial; *sed qu.* perhaps as to this case; and see *Wheatley* v. *Williams*, *infra*).

(iv) *Client's Documents.*

A solicitor will not be allowed to disclose the date when, or purpose for which, his client's documents were entrusted to him (*Turquand* v. *Knight*, 2 M. & W. 98); nor the person from whom he received them (*Re London and Northern Bank*, 1902, 2 Ch. 73, 74, 78); nor their condition while in his possession—*e.g.* whether stamped, indorsed, or bearing erasures (*Wheatley* v. *Williams*, 1 M. & W. 533; though see *Brown* v. *Foster*, *sup.*); nor the circumstances attending their preparation, nor the fact of their subsequent destruction (*Robson* v. *Kemp*, 5 Esp. 52; *Cromack* v *Heathcote*, 2 B. & B. 4;

A solicitor may be compelled to disclose the fact that his client executed a given deed, and the circumstances attending the execution, though the deed is thereby impeached (*Crawcour* v. *Salter*, 18 Ch.D. 30); or that his client put in a pleading or swore an affidavit, for these are matters of publicity (*Studdy* v. *Sanders*, 2 Dowl. & Ry. 347; *Greenough* v. *Gaskell*, 1 M. & K., p. 108); or the fact that he has in his possession his client's documents, so as to let in secondary evidence if they be not produced on notice (*Bevan* v. *Waters*, M. & M. 235; *Dwyer* v. *Collins*, 7 Exch. 639); or perhaps the date when, and per-

Privileged.

Not Privileged.

though see *Banner* v. *Jackson*, and *Cotman* v. *Orton*, *opposite*).

"A solicitor cannot be compelled to disclose the contents of documents professionally entrusted to him, and which he is acquainted with only by virtue of professional confidence" (*Dwyer* v. *Collins*, 7 Ex. 639, *per* Parke, B.)—*e.g.* from having read them at a conference with counsel (*Davies* v. *Waters*, 9 M. & W. 608). So, an account-book which had been made out by the client at the solicitor's request and for the purpose of submission to counsel is privileged, even in a subsequent action by the solicitor against the client (*Cleave* v. *Jones*, 7 Ex. 421; and see *Doe* v. *James*, 2 M. & R. 47; *Moore* v. *Terrell*, 4 B. & Ad. 870). The above, however, only applies to documents which the client himself would be entitled to withhold (see *Bursill* v. *Tanner*, *opposite*).

As to protection of the client's title-deeds, see *post*, 209-10.

son to whom, he parted with them, and when he last saw them (*Banner* v. *Jackson*, 1 D. G. & S. 472; *Cotman* v. *Orton*, 9 L.J.Ch. 268).

A solicitor is not allowed to withhold a deed which the other side is, in the ordinary course of things, entitled to see, merely because he has obtained it in the course of litigation (*Lyell* v. *Kennedy*, 9 App. Cas., p. 87, *per* Lord Blackburn). Nor, in an action against a married woman entitled to property under a settlement, can the solicitor for the trustees refuse to produce the deed, even though the trustees object, since the trustees themselves could not refuse its production (*Bursill* v. *Tanner*, 16 Q.B.D. 1, C.A.; *contra* seems to have been held in *Humphrey* v. *H.*, 33 T.L.R. 433, *sed qu*). Nor can a document which the client intends others to see as well as the solicitor be withheld—*e.g.* a map of glebe lands entrusted to the solicitor to be shown to intending purchasers (*Doe* v. *Hertford*, 19 L.J.Q.B. 526). So, generally with documents of a public nature, as appointments of borough officers (*R.* v. *Woodley*, 1 Moo. & Rob. 390); or documents entrusted to the solicitor for purposes outside the ordinary scope of professional employment—*e.g.* a book describing tithe lands, and given him for the purpose of collecting the tithes (*Doe* v. *Hertford*, *sup.*).

(v) *Names and Proofs of Witnesses; Pleadings; Matters Publici Juris; Copies of pre-existing Documents; Briefs.*

The names of party's witnesses, merely as such, are protected from disclosure before trial (*Marriott* v. *Chamberlain*, 17 Q.B.D. 154; *Knapp* v. *Harvey*, 1911, 2 K.B. 725. C.A.; and even at the trial the judge will sometimes allow a witness in the box not publicly to disclose his name); proofs of witnesses, whether disclosure be sought before (*London Gas Co.* v. *Chelsea*, 6 C.B. N.S. 411; *Fenner* v. *S.E. Ry.*, L.R. 7 Q.B. 767), or at the trial (Tichborne Case, 1872, Times, Feb. 29, *per* Bovill, C.J.; *Campbell* v. *C.*, 1886, Times, Dec. 3, *per* Butt, J.); documents placed in witness's hands and admitted by him to be true, but not read, although entered as such in an order compromising the action (*Goldstone* v. *Williams*, 1899, 1 Ch. 47). [*Cp. post*, 209-10].

Draft pleadings in same or former action (*Walsham* v. *Stainton*, 2 Hem. & M. 1; *Lamb* v. *Orton*, 22 L.J. Ch. 713).

Copies or extracts from public, or non-privileged private, documents, if the collection is the result of the solicitor's (or his agent's) labour and skill, and might disclose his view of the client's case (*Lyell* v. *Kennedy*, 27 Ch.D. 1; *Walsham* v. *Stainton*, *sup.*). Copies of depositions taken before Receiver of Wreck, the copies being obtained by a solicitor for purpose

The names of party's witnesses are not protected from disclosure before trial when constituting material facts in the action—*e.g.* those of persons in whose presence a slander was uttered (*Roselle* v. *Buchanan*, 16 Q.B.D. 656; *Marriott* v. *Chamberlain*, *opposite*; *Dalgleish* v. *Lowther*, 1899, 2 Q.B. 590, C.A.). As to the names of informants in a libel action, see *White* v. *Credit Assoc.* 1905, 1 K.B. 653; *Edmondson* v. *Birch*, 1905, 2 K.B. 523; and *Plymouth Soc.* v. *Trades Assn.*, 75 L.J.K.B. 259; and *cp.* 468.

Pleadings, or copies thereof (*Walsham* v. *Stainton*, *opposite*; as to documents referred to therein, see *Milbank* v. *M.*, 1900, 1 Ch. 376); or copies of depositions (*Goldstone* v. *Williams*, *opposite*), when either have been filed, for they then become *publici juris*; or, for the same reason, transcript of proceeding in a County Court (*Lambert* v. *Home*, 1914. 3 K.B. 86 C.A.)

Public documents—*e.g.*, records and registers, or mere copies thereof (*Lyell* v. *Kennedy*, *opposite*).

Privileged.

of action and as part of brief (*The Palermo*, 9 P.D. 6, C.A.); or copies of private examinations in bankruptcy (*Learoyd* v. *Halifax Co.*, 1893, 1 Ch. 686) or winding-up (*North Australian Co.* v. *Goldsborough Co.*, 1893, 2 Ch. 381), obtained for similar purposes. [In these three cases the depositions were, perhaps, rather protected on public grounds, *ante*, 198]. In *Tyas* v. *Brown*, 28 W.R. 575, examinations in lunacy were held not privileged on the ground, in that case, of the parties' joint interest (*ante*, 203-4).

Indorsements on, or notes and observations in, counsel's brief as to private matters; and solicitor's instructions on, or in, brief (*Nicholl* v. *Jones*, 2 H. & M. 588; *Lamb* v. *Orton*, *sup.*; *Haslam* v. *Hall*, 3 T.L.R. 776; *Re Cooper*, 1911 P. 181).

Not Privileged.

Extracts from private diary kept by party relating to matters subsequently in dispute, the extracts being obtained by the party's solicitor for purpose of action (*Land Corporation* v. *Puleston*, 1884, W.N. 1; and see *Walsham* v. *Stainton*, *opposite*, where, though extracts from a party's account-books were privileged, the books themselves were not).

Notes or reports of evidence and proceedings in open court, whether by counsel, solicitor, or shorthand-writer (*Ainsworth* v. *Wilding*, 1900, 2 Ch. 315; *Rawstone* v. *Preston Corporation*, 30 Ch.D. 116; *Re Worswick*, 38 Ch.D. 370; not following *Nordon* v. *Defries*, 8 Q.B.D. 508, *contra*, which latter case was overruled by *Lambert* v. *Home*, *sup.*)

Indorsements on counsel's brief of an order of Court, and any other matters *publici juris* contained therein—*e.g.* copy pleadings filed in former action (*Nicholl* v. *Jones*, *Lamb* v. *Orton*, *opposite*).

(vi) *Communications from Co-parties, Opposite Parties, and Strangers. Reports from Agents.*

Communications between co-plaintiffs or co-defendants, when directed to be submitted to joint solicitor (*Jenkyns* v. *Bushby*, L.R. 2 Eq. 547; though see *Hutt* v. *Haileybury Coll.*, 4 T.L.R. 277), or when one is the solicitor acting for both (*Hamilton* v. *Nott*, 16 Eq. 112).

Communications between opposite parties made "without prejudice" (*post*, 231); or at joint consultations between both parties and their respective solicitors or counsel (*Rochefoucauld* v. *Boustead*, 65 L.J. Ch. 794).

Communications intended to be made by a party to his own solicitor for purpose of obtaining advice, but by mistake made to the agent of the party's opponent (*Fruerheerd* v. *London G. O. Co.*, 88 L.J. K.B. 15. C.A.).

Oral or documentary information from third persons, which has been *called into existence by the solicitor* (or by his direction, even though obtained by the client) *for the purposes of litigation*—*e.g.* information to be embodied in proofs of witnesses (*sup.*); reports made by medical men at the request of the solicitors of a railway company, as to the condition of a person threatening to sue the company for injury from a collision (*Woolley* v. *N.L.Ry.*, L.R. 4 C.P. 602; *Friend* v. *L.C. & D. Ry.*, 2 Ex. D. 437; and see *Bustros* v. *White*, 1 Q.B.D. 423; *M'Corquodale* v. *Bell*, 1 C.P.D. 471; *Wheeler* v. *Le Marchant*, 17 Ch.D. 675; *Proctor* v. *Smiles*, 55 L.J.Q.B. 527); reports by servant of company made for use of the company's solicitor and in reasonable apprehension of a claim against

Communications between co-plaintiffs or co-defendants merely as such (*Hamilton* v. *Nott*, *opposite*; *Foakes* v. *Webb*, 28 Ch.D. 287; *Proctor* v. *Raikes*, 3 T.L.R. 229; *Hutt* v. *Haileybury Coll.*, *opposite*).

Communications between opposite parties merely as such (*Lyell* v. *Kennedy*, 23 Ch.D. 405)—*e.g.* a notice to produce documents (*Spenceley* v. *Schulenburgh*, 7 East, 357); reports as to an accident and his injuries therefrom, obtained from plaintiff by defendant or his agents in view of litigation (*Baker* v. *L. & S.W.Ry.*, L.R. 3 Q.B. 91; *Wayland* v. *Met. Ry.* 1874, W.N. 96; *Tobakin* v. *Dublin Co.*, 1905, 2 I.R. 58); or an offer to compromise, not made "without prejudice" (*Griffth* v. *Davies*, 5 B. & Ad. 502).

Oral and documentary information from third persons not called into existence by the solicitor, though obtained by him for purposes of litigation—*e.g.* copies of letters written before action by third persons to the client (*Chadwick* v. *Bowman*, 16 Q.B.D. 561); or called into existence by the solicitor, though not for the purposes of litigation—*e.g.* a report made by a surveyor, at the solicitor's request, as to the state of a property upon which the client was about to lend money (*Wheeler* v. *Le Marchant*, *opposite*; *Sammon* v. *Bennett*, 8 T.L.R. 235); or as to matters in respect of which litigation was not at the time contemplated, although it afterwards arose (*Westinghouse* v. *Midland Ry.*, 48 L.T. 462). As to anonymous letters sent to the client, see *inf.*

Privileged.

the company (*Collins* v. *Lond. Gen. Omnibus Co.*, 68 L.T. 831).

Oral or documentary information from third persons, which has been *called into existence by the client for the purpose of submission to the solicitor, either for advice or for the conduct of litigation* (and whether submitted or not)—*e.g.* shorthand notes of interviews held between the chairman of a company and an employee, or between a superior and subordinate employee, in order to obtain information on a subject of expected litigation, for submission to the company's solicitors (*Southwark Co.* v. *Quick*, 3 Q.B.D. 315; *Birmingham Co.* v. *L. & N. W. Ry.* 1913, 3 K.B. 850. C.A.); reports obtained by a party from his subordinates for a similar purpose (*London & Tilbury Ry.* v. *Kirk*, 28 Sol. Jo. 688; *Haslam* v. *Hall*, 3 T.L.R. 776); reports as to the condition of a ship obtained by a party from third persons for the purpose of litigation, but not expressed to have been obtained for submission to, or at the request of, his solicitor [*The Theodor Korner*, 3 P.D. 162; *sed qu.*, and see *Martin* v. *Butchard, opposite*, where the contrary was decided, *cp. Adam Steamship Co.* v. *London Assurance Co.* 1914, 3 K.B. 1256, C.A.].

Anonymous letters sent to the *solicitor* or *counsel* with reference to, and for the purposes of, a trial (*Re Holloway*, 12 P.D. 167).

Not Privileged.

Oral or documentary information obtained by the client *otherwise than for submission to the solicitor*—*e.g.* reports made by agent to principal in the ordinary course of business, even though litigation be anticipated (*Woolley* v. *North London Ry.*, L.R. 4 C.P. 602; *Worthington* v. *Dublin Ry.*, 22 L.R.I. 310; *Cook* v. *North Met. Tram Co.*, 6 T.L.R. 22; *Kerry* v. *Liverpool Assoc.*, 1905, 2 I.R. pp. 42, 44; affd. 38 Ir.L.T.R. 7); or facts and names of witnesses submitted by member of Trades Union to Council of latter, to enable them to judge whether they would take up his case (*Jones* v. *Great Central Ry.*, 1910, A.C. 4); or an answer to letter from principal stating that certain claims had been made, and asking the agent as to the facts (*Anderson* v. *Bank of Columbia*, 2 Ch.D. 644; *London Gas Co.* v. *Chelsea*, 6 C.B. N.S. 411; *English* v. *Tottie*, 1 Q.B.D. 141); or reports made to the principal to be submitted "in the event of litigation" to the latter's solicitor (*Cook* v. *N.M.T. Co., sup.; Westinghouse* v. *Mid. Ry.*, 48 L.T. 462); or, perhaps, obtained by principal from agent for purposes of action, but not at request of the former's solicitor, nor for submission to him (*Martin* v. *Butchard*, 36 L.T. 732; see *Bustros* v. *White*, and *Hutt* v. *Haileybury Coll.*, cited *ante*, 208).

Anonymous letters sent to the *client* in reference to litigation (*Re Holloway, opposite*).

(2) **TITLE-DEEDS. EVIDENCE. LIEN.** A witness, if a *Stranger*, cannot be compelled to produce his title-deeds, or documents in the nature of title-deeds, on account, it is said, of the mischief which, in the present complicated state of the law of real property, might result if titles to estates were subject to compulsory disclosure (*Doe* v. *Date*, 3 Q.B. 609; *Pickering* v. *Noyes*, 1 B. & C. 263; Mr. Best suggests the reason to be the mischief which might ensue from an erroneous decision of the judge as to the nature of the documents: s. 128). Nor can a witness, if a *Party*, be compelled to produce documents which he swears relate solely to his own *title* or *case*, and do not tend to support the title or case of his adversary (*Morris* v. *Edwards*, 15 App. Cas. 309; *Milbank* v. *M.*, 1900, 1 Ch. 376; *Miller* v. *Kirwan*, 1903, 2 I.R. 120; as to title by forfeiture or conditional limitation, see further, *post*, 201). The privilege in the case of a party is not confined to title-deeds, but extends to the *evidence* in support of his case as well (*Budden* v. *Wilkinson*, 1893, 2 Q.B. 432; *Frankenstein* v. *Gavin*, 1897, 2 Q.B. 62; Ann. Pr., Notes to O. 31, r. 1; this subject is usually treated under the head of professional privilege, see, *e.g.*, proofs of witnesses, briefs, &c., *ante*, 207). Moreover, where a principal would be entitled to refuse production of a document, it cannot be compelled from his *solicitor, trustee* or *mortgagee* (*Bursill* v. *Tanner*, 16

Q.B.D. 1; Steph. art. 119; Tay. ss. 458, 918), except for the purpose of identification, which must not extend to a perusal of its contents (*Volant* v. *Soyer*, 13 C.B. 231; *Phelps* v. *Prew*, 3 E. & B. 430; but see *ante*, 200). In *Hibberd* v. *Knight*, 2 Ex. 11, however, it was held that though a solicitor cannot be compelled to disclose the contents of his client's deed which he refuses to produce, yet if he disclose them voluntarily the Court will admit the evidence; *sed qu.* without the express consent of the client, *ante*, 201, 191; and see *subpoena duces tecum, post*, 442. [Tay. ss. 458-459; 918-919; Ros. N.P. 158-160; Steph. arts. 118-119].

The rule does not apply where the title of the witness would not be affected by the production—*e g.* an abstract of title supplied by him in connection with a purchase which subsequently fell through (*Doe* v. *Langdon*, 12 Q.B. 711; *Lee* v. *Merest*, 39 L.J. Ecc. 53). And the oath of the witness is conclusive as to the nature of the document (*Morris* v. *Edwards, sup.*; Ros. N.P. 159).

Lien. A witness cannot withhold production, as distinguished from delivery-up, of a document on the ground that he has a lien upon it as against a *stranger* (*Re Hawkes, Ackerman* v. *Lockhart*, 1898, 2 Ch. 1, and cases cited). That he can withhold production where the lien is against *the party requiring the production*, appears now to be settled (*Re Hawkes, sup.; Re Jones*, 21 T.L.R. 352; *contra*, Stept. art. 118, *n.* 2, is not sustainable), unless the rights of third parties would be prejudiced thereby, as in the case, *e.g.* of Bankruptcy (Bpy. Acts, 1883, s. 27, 1914, s. 25; *Re Winslow*, 16 Q. B. D. 696); Administration (*Re Boughton*, 23 Ch. D. 169; *Re Hawkes, sup.*); Winding-up (Companies Act, 1908, s. 174 (3); *Re Capital Fire Assoc.*, 14 Ch. D. 408); or Partition actions (*Boden* v. *Hensby*, 1892, 1 Ch. 101). It has been held that the witness cannot withhold production even where the third party *claims through* the person against whom the lien exists (*Lockett* v. *Cary*, 10 Jur. N.S. 144; but see *Re Hawkes, sup.*).

(3) **MATRIMONIAL COMMUNICATIONS.** "No husband shall be compellable to disclose any communication made to him by his wife during the marriage, and no wife shall be compellable to disclose any communication made to her by her husband during the marriage" (16 & 17 Vict. c. 83, s. 3; Criminal Evidence Act, 1898, s. 1 (*d*)). [Best, ss. 180, 586; Tay., ss. 909-10 A; Ros. N.P. 170-1.]

Principle. The protection has been considered requisite in order to ensure that unlimited confidence between husband and wife upon which the happiness of the married state and the peace of families depend (Tay., s. 909).

Scope of the Rule. The rule applies equally to parties and strangers; and it probably, in analogy to the old common law rule, extends to all communications made during, or knowledge obtained by means of, the relationship, whether confidential or not (*O'Connor* v. *Marjoribanks*, 4 M. & G. 435; *Doker* v. *Hasler*, Ry. & M. 198; *Cowley* v. *C.*, Times, Jan. 20, 1897, in which case a wife's letter to her husband, which he has been subpœnaed to produce, was protected, the objection being taken by counsel appearing for the witness); and continues after the marriage has been dissolved by death or divorce (*id.; Monroe* v. *Twistleton*, Pea. Add. Cas. 221, explained in *Aveson* v. *Kinnaird*, 6 East, 188, 193).

Whether letters, or secondary evidence thereof, independently obtained, are also admissible, seems doubtful. In *R.* v. *Pamenter,* 12 Cox, 177, Kelly, C.B., rejected a letter from the prisoner to his wife intrusted to, but opened by, a constable; and in *Scott* v. *Com.,* 42 Am. St. Rep. 371, a similar letter though voluntarily surrendered by the wife, was excluded; see, however, *ante,* 201. But conversations at which a third person was present, or which he overheard, may be proved by him (*R.* v. *Smithies,* 5 C. & P. 332; *R.* v. *Simons,* 6 C. & P. 540; *R.* v. *Bartlett,* 7 C. & P. 832; *cp. R.* v. *Mallory, post,* 246); and no protection exists with regard to communications made between the parties *before* marriage; or to facts coming to their knowledge during marriage, but from *extraneous* sources (*O'Connor* v. *Marjoribanks, sup.*); and the protected evidence will, if voluntarily given, be admissible.

(4) **CRIMINATING QUESTIONS.** No witness, whether party or stranger, is, except in the cases hereinafter mentioned, compellable to answer any question or to produce any document the tendency of which is to expose the witness (or the wife or husband of the witness: Tay., ss. 1368, 1453; Best, s. 126; Steph. art. 120 *n*), to any criminal charge, penalty, or forfeiture. *Nemo tenetur prodere seipsum.* [Tay., ss. 1453-1468; Best, ss. 126-128; Ros. N.P. 169-170; Steph. art. 120; Bray on Discovery, 311-349; Whart. Civ. Ev. ss. 533-540; Cr. Ev. 463-71; Wigmore, Ev. ss. 2250-82.]

Principle. The privilege is based on the policy of encouraging persons to come forward with evidence in courts of justice, by protecting them, as far as possible, from injury, or needless annoyance, in consequence of so doing (Best, s. 126). A sensible compromise has, however, been adopted in several modern statutes by compelling the disclosure, but indemnifying the witness in various respects from its results (see *inf.*).

History. At common law the accused enjoyed, in general, no immunity from answering upon oath as to charges made against him. On the contrary, such answers formed an essential feature of all the older modes of trial, from the Saxon ordeal and Norman combat to the more popular compurgation or wager of law, which, although obsolescent in the sixteenth century, was not finally abolished until 1833. So, also, in the State Trials held before Parliament or the Council, and in various other inquiries in which it was thought expedient, the accused was, in general, not only put upon oath, but rigorously interrogated as well, instances of the latter practice occurring as early as 1388 (*R.* v. *Brambre,* 1 How. St. Tr. 114), down to as late as 1702 (*R.* v *Baynton,* 14 How. St. Tr. 621-5). In jury trials, whether civil or criminal, it is true that, although the defendant was freely questioned, no oath was administered to him, but this arose from no consideration of tenderness but, on the contrary, because a denial on oath, which in the earlier forms of trial used to be conclusive in the defendant's favour, came to be regarded as too easy and decisive a method of self-exoneration to be permitted here—he was to be "tried" by the jury's oath, and not by his own. Similarly, under the statutes of Philip and Mary, which directed the compulsory examination of the accused to be taken before magistrates, he was not put upon oath because this would, even in those days, have been thought to give his statement an undue solemnity and weight. That the opportunity of clearing oneself on oath was, indeed, regarded rather as a privilege than a burden until at least the end of the six-

teenth century, seems clear, not only from the tenacity with which compurgation as a form of trial was clung to as against the innovation of the jury, but also from the proceedings in a famous case in 1590, where as an exceptional concession, in a jury trial, an oath was tendered to the defendant: "We offer you that favour which never any indicted of felony had before—swear that you did it not, and it shall suffice" (*R.* v. *Udal,* 1 How. St. Tr. 1289; *post,* 450). How, then, came the modern and opposite doctrine to obtain? The answer is to be sought in the long struggle of the civil courts to restrict the usurpations of the spiritual, a struggle the first stage of which was marked by the statute *De Articuli Cleri* of Ed. II., forbidding laymen to take oaths in ecclesiastical courts except in matrimonial and testamentary causes, and the last stage by the Act 13 Car. II. c. 12, s. 4, forbidding ecclesiastics to tender any person any oath (the notorious "*ex officio*" or other) whereby he should be obliged to accuse himself of any crime, or be exposed to any penalty whatsoever. It was in resisting such an oath in 1590 that the maxim *nemo tenetur prodere seipsum* was in terms first put forward (*Cullier* v. *Cullier,* Cro. Eliz. 201). This protection, it is to be observed, was of purely statutory origin, and was aimed not against self-crimination *per se,* but against its oppressive exaction by the Church. For some time, indeed, it appears to have amounted to a mere claim as to the burden of proof, *i.e.,* that due presentment on oath should first be made by the accuser, before the accused was even called upon to answer (*R.* v. *Udal, sup.; R.* v. *Hunt,* 1591, 1 How. St. Tr. 262; *R.* v. *Garnet,* 1606, 2 *id.* 244; *R.* v. *Lilburn,* 1637-45, 3 *id.* 315), a safeguard all the more valuable since the presumption was not then, as now, in favour of, but against, the innocence of the accused (Steph. 1 Hist. Cr. Law, 354-55). Thus both Udal and Garnet, when before the Privy Council, refuse to answer because of the absence of this preliminary proof, but at their trials, such an objection having then no application, they answer or not as they think fit, claiming no privilege. Later on, in the reaction against the tyranny of the Star Chamber and High Commission Courts (abolished 1641), the claim is no longer confined to ecclesiastical tribunals, stages of procedure, or, as some held, capital charges, but becomes general, that no one shall be bound to criminate himself in any court, or at any stage of any trial (*R.* v. *Fitzpatrick,* 1631, 3 How. St. Tr. 420; *R.* v. *Twelve Bishops,* 1641, 4 *id.* 76; *King Charles' Trial,* 1649, 4 *id.* 1102; *R.* v. *Scroop,* 1660, 5 *id.* 103; for an explanation of the equity cases which might seem to establish an earlier date for the privilege, see 15 Harv. L. Rev. 631). Moreover, the privilege, at first claimed only by defendants, is gradually conceded to mere witnesses (*King Charles' Trial sup.; R.* v. *Reading,* 1679, 7 How. St. Tr. 296; *R.* v. *Shaftesbury,* 1681, 8 *id.* 817). Although, however, the claim when definitely made was, at this stage, generally allowed, yet when not so made, the judges still continued for some years longer to press and question the accused (*R.* v. *Swendsen,* 1702, 14 *id.* 580-581; *R.* v. *Baynton, id.* 621-5). Finally, influenced perhaps by the now prominent rule as to the incompetency of parties as witnesses (*post,* 449-50), this, too, ceases, and henceforth the rule assumes its modern shape. With regard to *compulsion to answer,* it may be observed that although the Prerogative Courts extorted replies even by torture, traces of coercion in the common law courts are rare. Thus, for his refusal to answer before the Council, Udal suffers imprisonment, while for his refusal to answer at the

trial, the Court merely warns the jury: "This argueth that if he were not guilty he would clear himself" (1 How. St. Tr. 1282). [Stephen, 1 Jur. Soc. Pap. 456; *id.* 1 Hist. Cr. L. 354-5, 440-1; Wigmore, s. 2250; *id.* 5 Harv. L. Rev. 71; and 15 *id.* 610; 7 Law. Mag. (1881), 133; and see 18 Cr. L. Mag. (Am.) 535-51.]

Scope of the Rule. The witness is protected both from answering questions, and producing documents (*Spokes* v. *Grosvenor Hotel,* 1897, 2 Q.B. 124); and as to crimes, penalties, and forfeitures cognisable not only by English but foreign law, provided the foreign law be clearly proved or admitted, for if there is no evidence on the subject, an answer may be compelled (*U. S.* v. *McRae,* L.R. 3 Ch. App. 79; *contra, Re Atherton,* 1912, 2 K.B. 251, seems not supportable). And the rule applies to questions not only as to direct criminal acts, but as to perfectly innocent matters forming merely links in the chain of proof (*Re Genese, post,* 203; Best, s. 127).

In the case of *crimes,* the protection has been accorded to questions as to the witness's presence at a duel (*R.* v. *Handcock,* Ir. Cir. Rep. 329), or his commission of bigamy (*Harvey* v. *Lovekin,* 10 P.D. 122), libel (*inf.*), or maintenance (*Alabaster* v. *Harness,* 70 L.T. 375); in the case of *penalties,* as to pound-breach (*Jones* v. *Jones,* 22 Q.B.D. 425), or fraudulent removal of goods by a tenant (*Hobbs* v. *Hudson,* 25 Q.B.D. 232); and in the case of *forfeiture,* as to breach of covenant to take beer from a particular brewery (*Seaward* v. *Dennington,* 44 W.R. 696), or to insure against fire (Bray, 337), or not to sublet without license (*Mexborough* v. *Whitwood,* 1897, 2 Q.B. 111). Moreover, in private examinations under the Bankruptcy Act, 1914, s. 25, witnesses, other than the debtor, will be protected from answering questions likely to prejudice them in actions connected with the bankruptcy (*Re Desportes,* 68 L.T. 233; *Re Franks,* 1892, 1 Q.B. 646); and the same principle has been applied in inquiries before the chief clerk under an administration decree (*Venables* v. *Sweitzer,* L.R. 16 Eq. 76).

But a witness cannot object to answer questions merely incriminating co-defendants or others (*Kelly* v. *Colhoun,* 1899, 2 I. R. 199; *R.* v. *Armagh,* 18 Ir. L.T.R. 2); nor to produce a *public* document in his custody on the ground of crimination (*Bradshaw* v *Murphy,* 7 C. & P. 612); nor does any privilege exist as to answers tending merely to establish a debt, or to subject to civil actions not in respect of a penalty or forfeiture (46 Geo. III. c. 37)—*e.g.* those involving liquidated damages as distinguished from penalty (*Adams* v. *Batley,* 18 Q.B.D. 625); or proceedings to obtain an order which if disobeyed might entail a penalty (*Derby Corpn.* v. *Derbyshire C.C.,* 1897, A.C. 550); or a determination of estate by conditional limitation as distinguished from forfeiture (*Pye* v. *Butterfield,* 5 B. & S. 829; *Miller* v. *Waterford,* 1904, 2 I. R. 421; Bray, 334-336).

Oath of Witness Necessary but not Conclusive. A witness cannot refuse to go into the box on the ground that he might criminate himself; he can only claim the privilege after he is sworn and the question put (*Boyle* v. *Wiseman,* 10 Ex. 647). And he must pledge his oath that he honestly believes the answer will or may tend to criminate him (*Webb* v. *East,* 5 Ex. D. 108; *Lamb* v. *Munster,* 10 Q.B.D. 110; *Kelly* v. *Colhoun, sup.*); though even this does not necessarily suffice; for the Court is entitled to see, from the circumstances of the case and the nature of the evidence the witness is called to

give, that there is reasonable ground to apprehend danger from his being compelled to answer; although, if such danger is once made apparent, great latitude should be allowed to the witness in judging for himself of the effect of any particular question (*R.* v. *Boyes,* 1 B. & S. 311; *Re Reynolds,* 20 Ch. D. 294; *Lamb* v. *Munster, sup.; Re Genese,* 3 Morrell's Bky. Rep. 223, C.A.; *National Assocn.* v. *Smithies,* 1906, A.C. 434, 438).

Where the question calls for direct admission of a *corpus delicti,* or an act reasonably construable as such, the oath of the witness that he believes the answer would or might tend to criminate him, will generally be accepted without more—*e.g.* in an action for publishing an indictable libel, where the defendant is asked whether he published the libel (*Lamb* v. *Munster, sup.;* though *aliter* if the libel is not indictable, *M'Loughlin* v. *Dwyer,* Ir. R. 9 C.L. 170; or the discovery is sought from the printer, &c., of the newspaper, *post,* 203); so, as to whether the defendant had not raised a weir to the height of eighteen inches across a salmon river, as such an act might not unreasonably be construed to amount to a criminal obstruction under 5 & 6 Vict. c. 106, s. 63 (*Bradley* v. *Clayton,* 26 L.R.Ir. 405). But, if there is no reasonable probability of proceedings being taken, an answer will be compelled—*e.g.* where the witness was technically liable to an impeachment by the House of Commons, although he had already been pardoned at law, or obtained a certificate of indemnity from a Royal Commission (*R.* v. *Boyes, sup.; Ex. p. Fernandez,* 10 C.B.N.S. 3), or was liable to ecclesiastical censures in respect of adultery (*Evans* v. *E.,* 1904, P. 378; though, in 1827, a question as to incest was disallowed, *Cundell* v. *Pratt,* 1 Moo. & Mal. 108, and see now the Incest Act, 1908; and as to questions respecting adultery in divorce cases, *post,* 216). Where the question relates to a perfectly *innocent act,* involving danger only as a link in the chain of proof, the witness must satisfy the Court, by facts outside the question, that the answer would or might tend to criminate him (*Re Genese, sup.*). While, where the testimony would not in fact incriminate the witness, or the objection is not made *bonâ fide* for his own protection, an answer will be compelled (*R.* v. *Armagh,* 18 Ir. L.T.R. 2, where, on a charge against a publican for selling liquor during prohibited hours, the witness to whom it was sold was compelled to testify to the transaction).

Claim must be Bonâ Fide. The Court must also be satisfied that the claim is made genuinely for the protection of the witness, and not for ulterior purposes (*R.* v. *Armagh, sup.; Re Reynolds, sup.,* where a witness, having declined to answer whether he had, as trustee, executed a post-nuptial settlement made by a bankrupt, on the ground that he might be charged with conspiracy to defeat the latter's creditors, the Court disallowed the objection, considering it a mere device to stifle inquiry). Moreover, the claim may be made *at any stage* of the proceedings; and, when allowed, protects both future and past answers (*R.* v. *Garbett,* I Den. C.C. 236).

Privilege Ceases with the Liability. If the time for proceeding has expired (*Roberts* v *Allatt,* Moo. & Malk. 192; *Dover* v. *Maestaer,* 5 Esp. 90; *A.-G.* v. *Cunard,* 4 T.L.R. 177); or the penalty of forfeiture has been waived; or the offence has been pardoned (*R.* v. *Boyes, sup.;* even though under the Corrupt Practices Acts actions for penalties are still pending against him, *R.* v. *Kinglake,* 1 Cox, 499); or the witness has already been convicted or acquitted (*Re Genese, sup.*);—the privilege will cease.

EXCEPTIONS. By Statute. Under the *Criminal Eidence Act,* 1898, s. 1, sub-s. (*e*) : A person charged and being a witness in pursuance of this Act may be asked any question in cross-examination, notwithstanding that it would tend to criminate him as to *the offence charged;* but by sub-s. (*f*) he shall not be asked nor required to answer questions tending to show that he has committed *other offences,* except under the conditions stated, *post,* 455-5. As to when the wife or husband of the accused is compellable to give evidence against the latter, see *post,* 455-6.

Under the *Bankruptcy Acts,* 1883, s. 17, and 1914, s. 15, sub-ss. 1, 8, the debtor is a competent witness to prove even the petitioning creditor's debt, and may be compelled to produce his books and documents for that purpose (*Re Haes,* 1902, 1 K.B. 98). Moreover, he cannot refuse to answer questions touching his conduct, dealings, or property on the ground of crimination (*Re Atherton,* 1912, 2 K.B. 251) ; and, subject to the statutory qualifications below, his answers are evidence against him in subsequent criminal proceedings (*Re A Solicitor,* 25 Q.B.D. 17; *R.* v. *Erdheim,* 1896, 2 Q.B. 260, where, though the bankrupt's depositions were held inadmissible, parol evidence of his statements was received, *post,* 509, 569) ; so, under former Bankruptcy Acts (*Exp. Schofield,* 6 Ch. D. 230; *R.* v. *Hillam,* 12 Cox, 174; *R.* v. *Cherry,* 12 Cox, 32), under the Irish Bankruptcy Act, 1857, s. 308 (*Re Shanahan,* 46 Ir. L.T.R. 254, C.A.), and under the Companies (Consolidation) Act, 1908, s. 175. But this does not apply to other witnesses in a bankruptcy (*Re Genese, sup.; Exp. Schofield, sup.; Re Desportes,* 68 L.T. 233). As to questions to judgment debtors, see Ann. Pr. Notes to O. 42, r. 32.

By the *Larceny Act,* 1916, s. 43 (2), no person shall be liable to conviction of any offence against ss. 6, 7 (1), 20-22 of this Act [relating to larceny of wills or documents of title to land, or to conversion by donees of powers of attorney, directors or officers of companies, bailees, trustees, or factors] upon any evidence whatever in respect of any act done by him, if at any time previously to his being charged with such offence, he has *first disclosed such act on oath* in consequence of any *compulsory* process of any court of law, or equity, in any action, suit, or proceeding which has been *bonâ fide* instituted by any person aggrieved. [The word "disclosed" here refers exclusively to that which was not before known, *R.* v. *Skeen,* 8 Cox, 143; and mere hearsay or rumour that the alleged offence had been committed is not admissible to prove that it was before known, *R.* v. *Gunnell, ante,* 86. But disclosure in cross-examination, without objection, is not 'compulsory process' (*R.* v. *Noel,* 1914, 3 K.B. 848; *R.* v. *Mirams,* 55 L. Jo. 115)]. The Bankruptcy Act, 1890, s. 27, sub-ss. 1-2, repealed so much of s. 85 of the Larceny Act, 1861, as relieved a witness, compulsorily examined in *bankruptcy,* from liability to conviction for the misdemeanours mentioned in ss. 75-84 of the latter Act, and substituted a narrower protection which in its turn was repealed, but substantially re-enacted, by the Bankruptcy Act, 1914, s. 166 of which is as follows:—"A statement or admission made by any person in any compulsory examination or deposition before any Court on the hearing of any matter in bankruptcy shall not be admissible as evidence against that person in respect of any of the misdemeanours referred to in s. 85 of the Larceny Act, 1861 (which section relates to frauds by agents, bankers and factors)." This does not, however, exempt admissions made by the debtor in his statement of affairs

(*R.* v. *Pike,* 1902, 1 K. B. 552). The Larceny Act, 1916, s. 43 (3), which does not repeal s. 166 of the Bankruptcy Act, 1914, just quoted, provides, also, that: "In any proceeding in respect of any offence against ss. 6, 7 (1), 20-22 (see *sup.*), a statement or admission made by any person in any compulsory examination or deposition before any Court on the hearing of any matter in bankruptcy shall not be admissible against that person."

So, discovery of the printer, publisher or proprietor of any newspaper in which a libel has appeared, may be compelled under 6 & 7 Will. IV. c. 76, 32 & 33 Vict. c. 24, and 33 & 34 Vict. c. 99; such discovery only to be used in the proceeding in which it is obtained. And under the *Gaming Houses Acts,* 8 & 9 Vict. c. 109, s. 9, and 17 & 18 Vict. c. 38, ss. 5 & 6; the *Land Transfer Act,* 1875, s. 103; the *Corrupt and Illegal Practices Prevention Act,* 1883, s. 59 *cp. R.* v. *Leatham,* 8 Cox, 408); the *Explosive Substances Act,* 1883, s. 6; the *Merchandise Marks Act,* 1887, s. 19, and several other statutes, witnesses may also be compelled to answer criminating questions, subject to various degrees of statutory protection from the consequences of their admissions.

By Contract and Conduct. Witnesses have also, in a few cases, been held disentitled to the privilege of refusing to answer in respect of penalties or forfeiture, but not of crime, by their own contract or conduct (Bray, 336-340).

(5) **QUESTIONS AS TO ADULTERY IN DIVORCE CASES.** "In proceedings instituted in consequence of adultery, the parties and their husbands and wives are competent witnesses, *provided* that no witness in any proceeding, whether a party to the suit or not, shall be liable to be asked or bound to answer any question tending to show that he, or she, has been guilty of adultery, unless such witness has already given evidence in the same proceeding in disproof of his or her alleged adultery" (32 & 33 Vict. c. 68, s. 3).

Scope of Rule. This section refers to proceedings instituted, in consequence of adultery, in the Divorce Division, and not to bastardy cases (*Nottingham Guardians* v. *Tomkinson,* 4 C.P.D. 343; *Re Walker,* 53 L.T. 660; *Burnaby* v. *Baillie,* 42 Ch. D. 282; *ante,* 185); and the proviso is confined to any *such* proceeding, and does not protect the witness from answering as to his adultery in *nullity, legitimacy,* or *ordinary* cases [*M.* v *D.,* 10 P. D. 175; Steph. art. 109 *n; R.* v. *Orton,* cited Steph. Illust. to art. 129; *Evans* v. *E.,* 1904, P. 378, not following *Redfern* v *R.,* 1891, P. 139, 147-8; *contra* as to nullity with defence of adultery, *S.* v. *S.,* 1907, P. 224, *sed qu.*], nor as to intimacy before marriage (*Westcott* v. *W.,* 1908, Times, March 6; *Ruck* v. *R.,* 1911, P. 90).

The rule protects from liability to be asked (*Butterworth* v. *B.,* 1896, Times, June 17), or compulsion to answer, questions in the witness-box, whether in chief or on cross-examination; whether the act suggested be pleaded or not (*Betts* v. *B.,* 33 T.L.R. 200; *Hensley* v. *H.,* 36 T.L.R. 288, not following *Hall* v. *H.,* 25 T.L.R. 524, *contra*); and whether put directly to prove the issue, or collaterally to impeach credit (*id.; Hebblethwaite* v. *H.,* L.R. 2 P.D. 29; *Babbage* v. *B., id.* 222); as well as from discovery by affidavit or interrogatories (*Redfern* v. *R., sup.; Bass* v. *B.,* 1915, P. 17, C.A.). In *Smith* v. *S.,* 1890, Times, Oct. 28, Butt, J., indeed, rejected an admission of adultery which had already been made without objection in answer to interrogatories by a respondent who did not appear; but in *Hallam* v. *H.,* 20 TL.R. 34, and *Purgold* v. *P.,* 1903, Times, Oct. 29, admissions of adultery obtained from a respondent by the solicitor's clerk when serving the petition were received, though the procedure was

strongly condemned; and, generally, where the witness is willing to give evidence on the subject, the testimony will be received (*Hebblethwaite* v. *H., sup.; Long* v. *L.*, 15 P.D. 218). Moreover, on a plea of connivance or condonation, a wife may be cross-examined as to the fact, time, and circumstances of the adultery where she has either proved it in chief (*Ruck* v. *R., sup.*), or even, it seems; been asked no question on the subject (*Dennys* v. *D.*, 107 L.T. 591); though, where she did not, in chief, either admit or deny the adultery, the Court restricted her cross-examination to the bare circumstances under which she met the co-respondent (*Craston* v. *C.*, 34 T.L.R. 165). An admission as to one act, however, will not, in general, let in questions as to others [*Bell* v. *B.*, 86 L.T. Jo. 448; *Davidson* v. *D.*, 1896, Times, Dec. 10; though *cp. Gwynne-Vaughan* v. *G.-V.*, 1894, Times, Ap. 17].

Where the witness has *denied* the adultery (*i.e.* that charged in the petition, *Hall* v. *H.*, 25 T.L.R. 524; *Bass* v. *B., sup.*), the questions are admissible; so, where he had denied in chief *some* of the acts alleged in the petition, but had not been asked as to others, it was held that he might be cross-examined as to all that were included in the pleadings (*Brown* v. *B.*, L.R. 3 P. & D. 198; *Allen* v. *A.*, 1894, P. 248, *Lewis* v. *L.*, 1912, P. 19), but not as to others not so included unless there was also a general charge of adultery (*Brown* v. *B.*, 1915, P. 83).

CHAPTER XVII.

HEARSAY.

Oral or written statements made by persons not called as witnesses are inadmissible to prove the *truth* of the matters stated, except in the cases hereinafter mentioned.

[Tay. ss. 567-606; Best, ss. 29-30, 492-5; Steph. art. 14; Ros. N.P. 18th ed. 44-61; Ros. Cr. Ev. 13th ed., 23-25; Gulson on Proof, ss. 186-98, 280-93, 349-67; 5 L.Q. Rev. 264-274; 31 *id.* 230-1; Wigmore, Ev. ss. 1361-3; 26 Harv. L. Rev. 146-160; Chamberlayne, Ev. ss. 2698-2761].

Original Evidence and Hearsay distinguished. Statements by non-witnesses may, as we have seen (*ante,* 5-6), be either original evidence—*i.e.* where the statement is in issue, or relevant, independent of its truth or falsity; or hearsay (derivative or second-hand evidence)—*i.e.* where it is used as an assertion to prove the truth of the matter stated,—the test being the purpose for which it is tendered (*cp.* 31 L.Q. Rev. 230-1.)

Original Evidence. Forms of. Under this head may be classed the various declarations hitherto considered—viz. statements which are part of the *res gesta,* whether actually constituting a fact in issue, as a libel or contract, or accompanying and explaining one, as the cry of the mob during a riot; or expressing knowledge, intent, or mental or bodily feeling (*ante,* 56-65); statements amounting to acts of ownership, as leases, licenses, and grants,—the operative parts being original evidence, but the recitals hearsay and inadmissible except against parties (*ante,* 111-3; *A.-G.* v. *Stephens, ante,* 130; *Slaney* v. *Wade, post,* 317); complaints in cases of rape, (*ante,* 113-6); statements constituting motive (*ante,* 139), conveying notice (*ante,* 145); showing good or bad faith, malice and the like (*ante,* 149-154), contradicting or corroborating the testimony of witnesses (*post* 480, 488). To which may be added: conversations and documents admitted to refresh memory or fix a date (*R.* v. *Richardson,* 1 Cox, 361; as to what documents may be used for this purpose, see *post,* 469-71); and inquiries and answers tendered to the judge to show reasonable search for a lost document, or an absent witness (*R.* v. *Braintree,* 1 E. & E. 51; *Wyatt* v. *Bateman,* 7 C. & P. 586; *post,* 225).

Conditions of Admissibility. The fact that a statement is tendered merely as original or circumstantial evidence, *i.e.* no inference being invited as to its truth or falsity, is not, as is sometimes supposed, conclusive of its admissibility; for, as we have seen, the requirements of the particular heading under which it is offered have also to be fulfilled (*ante,* 60, 103).

Hearsay: a wide and narrow meaning. The term "hearsay," though in its usual and narrow sense confined to unsworn statements used to prove

the *truth* of the facts declared, is by some judges and text-writers applied in a wide sense to *all* statements by unexamined persons for whatever purpose tendered—*i.e.* as including the various declarations referred to above as "original" evidence. Thus, declarations of intention by a testator prior to the execution of his will, though admissible merely to show his state of mind at the time, and not the truth of any of the matters stated, are often loosely referred to as "exceptions to the hearsay rule" (*Sugden* v. *St. Leonards,* 1 P.D. pp. 240-2; *Atkinson* v. *Morris,* 1897, P. p. 47); they are, however, only exceptions to the rule when the term hearsay is defined in the wide and general sense above indicated. Such a definition, it has been remarked, can only save the maxim "Hearsay is no evidence" from the charge of falsehood by exceptions so numerous as to make nonsense of it (Steph. Dig. Note viii.).

Testimony based on hearsay. Not only are the unsworn statements of third persons inadmissible under the present rule, but also the sworn testimony of witnesses when it is based thereon, and not upon the witness's own *personal knowledge* and observation, as when he purports to testify directly to his own age, place of birth, legitimacy, or other facts ascertained merely by inquiry from others (*R.* v. *Rishworth, &c., post,* 466-7; *R.* v. *Saunders, post,* 225).

Conduct as hearsay. It is sometimes said that *acts* may be as completely hearsay as *statements,* the illustration given being that if A. by his conduct treat B. as sane, it is equivalent to A.'s making an oral assertion to that effect. But A's assertion is here really excluded, not because it is hearsay (for it would be equally inadmissible, except from an expert, if delivered on oath), but because it is opinion evidence upon a subject on which such evidence is not receivable. In *Wright* v. *Tatham,* 7 A. and E. 313, where this doctrine was first authoritatively propounded, Parke B. gives various illustrations of conduct by third persons, tendered to prove the fact in issue, *e.g.* payment of a policy by underwriters as proof that the loss insured had happened; the conduct of the family or relations of a testator taking the same precautions in his absence as if he were a lunatic; his election in his absence to some high and responsible office; the conduct of a physician who permitted a will to be executed by a sick person; the conduct of a deceased captain, on a question of sea-worthiness, who after examining every part of a vessel, embarked in it with his family: all of which, when deliberately considered, are, he remarks, mere instances of hearsay evidence—mere statements not on oath, but implied in, or vouched by, the actual conduct of persons by whose acts the litigant parties are not to be bound (pp. 385-8). This view is adopted by Tay. ss. 571-5; by Gulson on Proof, ss. 193-6, 361-7; and apparently by Sir J. Stephen who, in the Appendix to his Digest remarks: "Baron Parke's illustrations clearly prove that in some cases the hearsay rule excludes the proof of matter which, but for it, would be regarded not only as relevant to particular facts but as good grounds for believing in their existence" (Note viii.). It is to be observed, however, that in the text of the Digest, the rule excluding hearsay is strictly confined to statements and that conduct is not shut out thereby (art. 14), while in the Indian Ev. Act, conduct does not include statements (s. 8). Prof. Wigmore treats this topic at great length, but his various pronouncements thereon are difficult to recon-

cile. Thus, while in s. 459 he admits conduct and states that 'the hearsay rule only excludes deliberate *utterances* affirming a fact,' in s. 267 *c* he asserts that 'conduct evidence, as supporting an inference of the person's belief, and thus of the fact believed, is in general deemed inadmissible as being open to construction as assertion and therefore as mere hearsay,' adding that 'whatever instances of opposite tendency may be noticed in the following sections and however well grounded they may be in a given case, they must be regarded as casual and unusual.' He then cites *innumerable* instances of this 'opposite tendency' *i.e* admitting conduct (ss. 267-9; 459-64); while the *only* case cited in support of the supposed rule excluding it, is *Wright* v. *Tatham, sup.* (see 26 Harv. L. Rev. 148-9). Mr. Chamberlayne, who describes conduct in this connection as 'implied hearsay," contends that if the sole relevancy of a fact consists in the assertion which it implies, it is inadmissible as hearsay, but that if it be relevant spite of its assertive effect, it is admissible (ss. 1900, 2706). This, however, is really to make relevancy and not hearsay the test. In England, the doctrine of *Wright* v. *Tatham,* on this point, has apparently never been followed, acts of treatment being admitted or excluded on grounds of relevancy only and not of hearsay (*ante,* 116-7; 31 Law Quart. Rev. 230). Indeed, that assertion by conduct is not convertible, as regards admissibility, with assertion by statement, is shown in many cases, *e.g.* acting in a capacity or relationship is admissible in a party's own favour, while his mere declaration that he was entitled to act would not be (*ante,* 109-11; *cp. Watts* v. *Lyons, ante,* 134); so, the act of attestation may be proved, but not declarations of having attested (*post,* 277); and what is publicly done by the tenants throughout a district is receivable in proof of an agricultural custom, though their statements, even on oath, of what they think the custom is are not (*Tucker* v. *Linger,* 8 App. Cas. 508). Again, in legitimacy and allied cases, though a bare assertion by the parent that a child is illegitimate would be excluded, (*Legge* v. *Edmonds, ante,* 77), yet the same assertion regarded as an item of conduct and so affording merely presumptive evidence of illegitimacy is receivable (see *Aylesford Peerage, &c., ante,* 77).

Verbal Facts and their Particulars. In some cases a verbal act may be admissible as original evidence, although its *particulars* may be excluded either as hearsay, or because their narration would be immaterial and involve a mere waste of time. Thus, though the fact that the prosecutor made a *communication* to the police, in consequence of which they took certain steps, is allowed to be proved, yet what was actually said is excluded as hearsay in a very dangerous form (*R.* v. *Wilkins,* 4 Cox, 92; *R.* v. *Wainwright,* 13 Cox, 171); so, as to *inquiries* by the police (*R.* v. *Saunders, post,* 225). And, in a libel case, though the fact that a previous *dispute* occurred between the parties on a matter unconnected with the libel may be proved, yet the details will be excluded as irrelevant (Steph. art. 9, illus. *a*; Wigmore Ev. s. 396). On the other hand, both the fact and the particulars of a prior similar *charge* preferred by the libeller, are admissible to show his *bona fides* (*Finden* v. *Westlake, ante,* 156); so, in case of rape, the fact and the particulars of a *complaint* are now admissible, not to prove the matters stated, but as original evidence to corroborate the testimony of the prosecutrix and negative consent (*ante,* 113). And, to show motive for a murder, both the

fact that the deceased had *testified* against the accused in a former trial, and the details of his testimony, may be received (*R.* v. *Buckley, ante,* 139), since the nature of the deceased's evidence would show the adequacy of the prisoner's motive. As to the fact and particulars of a *consultation,* see *Shilling* v. *Accidental Co., ante,* 153.

Principle of the Exclusion of Hearsay. No single principle can be assigned as having operated to exclude hearsay generally, or from any ascertainable date. For several centuries both admission and exclusion flourished incongruously side by side, juries being allowed to act upon hearsay as part of their local 'knowledge,' while witnesses were debarred from repeating it because it was not 'testimony,' (*infra,* History of the rule). Later, when exclusion in both cases had become the rule, the principle invoked was either the convenient and all-embracing 'Best-Evidence' idea (*ante,* 45-8), or less often the sort of privity implied in the maxim *res inter alios acta, or dicta* (see *e.g. Doe* v. *Tatham,* 7 A. & E., 385-8, *per* Parke, B.; Steph. Dig, Note viii.; Barrows, 14 Am. L. Rev. 353-6). In more recent times, rejection, even where such evidence was the 'best' obtainable, has been based on its relative untrustworthiness for judicial purposes, owing to (1) the irresponsibility of the original declarant, whose statements were made neither on oath, nor subject to cross-examination; (2) the depreciation of truth in the process of repetition; and (3) the opportunities for fraud its admission would open; to which are sometimes added (4) the tendency of such evidence to protract legal inquiries, and (5) to encourage the substitution of weaker for stronger proofs [Tay. s. 570; Best, ss. 492-5; for a criticism of these reasons see 5 L. Q. Rev. 265-74]. The absence of *an oath* and of *cross-examination,* however, appear to be the only essential objections; even the production of the witness being valuable mainly as a means of ensuring cross-examination, and only secondarily as affording an opportunity of observing demeanour (Wigmore, Ev. s. 1363). The latter advantage, indeed, is in many cases waived without entailing the rejection of the evidence (*id.* s. 1365; see Depositions, &c., *post,* chaps. xxxvii., xli.).

Some writers, it should be noticed, regard hearsay as excluded on the ground of *irrelevancy* (Steph. art. 14, and Note viii; Gulson, s. 350; Wigmore, Ev. s. 475). Such evidence, however, cannot truly be called irrelevant. A belief in hearsay is often regarded as instinctive (*ante,* 3); at all events it is universally sanctioned by experience, since nine-tenths of the world's business is conducted on its basis; and the fact that relaxations of the rule excluding it are constantly sanctioned by Statute is significant both of its logical and legal value. It would be more correct therefore to say that all hearsay connected with the issue is, and must to some extent be, 'relevant,' whether in law it be admissible or not (5 L.Q. Rev. p. 266). The terms relevant and irrelevant, however, appear to be misapplied in this connection. When a statement is used merely as a *fact,* without reference to its truth or falsity (*i.e.* as original evidence) it may properly be described as relevant or irrelevant to the issue (*ante,* 5-6). But when it is tendered to prove the *truth* of the matter stated, different considerations apply. For, though a statement is a fact, it is one of a peculiar and two-fold nature, being itself the statement of a fact, and the relevancy of such latter fact is governed by the same rules, whether it be stated on oath or not. Such statement, then, being

one which, if made by a witness, would be perfectly admissible, is when not so made, excluded because it is wanting in the sanction and the tests which apply to sworn testimony, and admitted only when, in respect of the persons making it, or of the circumstances under which it was made, there is some security for its accuracy, which countervails the absence of those safeguards. The doubt and suspicion attending it are a doubt and suspicion attaching to its *accuracy,* and are wholly distinct from the reasons excluding facts as not tending to prove the matter in issue, which are based upon logical *inference.* The rule of exclusion, then, being a different rule, founded on different reasons, and subject to exceptions which are related to the reason of that rule and not to the reason of the rules as to relevancy, it is only by an arbitrary use of the word 'relevant' that the two classes of evidence can be included in the same category [20 Sol. Jo. 906; 5 Law Q. Rev. 265, 266; *ante,* 5-6]. Sir J. Stephen seems, indeed, to some extent to have recognized this, for while in the Indian Evidence Act he adopted a single standard of relevancy, *i e.* relevancy to the issue, to which all statements, for whatever purpose tendered, were made to conform, in the Digest he adopts a double one, *i.e.* (1) relevancy to the issue (art. 2); and (2) relevancy to the truth of the matter stated (art. 14). But this distinction is not consistently carried out, for while statements by non-witnesses, tendered to prove the truth of the matter asserted, are treated in general as 'irrelevant,' or by exception as 'relevant,' statements by witnesses, tendered for the same purpose, are admitted not as 'relevant' facts, but under the contrasted head of Proof (art. 61; *ante,* 51-2). In other words, though he expresses *hearsay* in terms of relevancy, he stops short at so expressing *testimony.* The reason apparently is, that having defined testimony as 'evidence,' but statements out of court as 'facts,' and therefore not 'evidence,' the two could not well be placed in the same category (see also 5th ed., 1899, Note viii *n,* where this point is referred to by the editors). Prof. Wigmore, however, not being similarly hampered, goes to the full length here, remarking that, in theory, testimonial qualifications *do* involve a question of relevancy, and may, although it is not usual or necessary, be expressed in terms thereof, *e.g.,* in the following proposition: "An assertion, when made under the conditions prescribed for the reception of oral testimony, is relevant to the truth of the matter asserted" (s. 475). According to this test, the sworn testimony of persons interested in the suit would have been 'irrelevant' in England in 1832, but 'relevant' in 1833. But this merely tends to confuse relevancy, which is a natural relation, based on logic and experience, with admissibility, which is an arbitrary and artificial one based on law and liable to vary at different times and in different jurisdictions (*ante,* 49-54). Discarding the term 'relevancy,' then, as here applied, the true view seems to be that hearsay is, in the vast majority of instances, credible rather than the reverse, but that on grounds of caution, it is only admitted as legal evidence in excepted cases and in its more cogent forms.

History of the Rule. *The Jury.* Originally, and so long as the jury acted both as witnesses and triers (*i.e.* from about the Conquest to the eighteenth century, though Mr. Best gives the period as somewhat less, s. 119), the rule as to them was to admit and not to exclude hearsay evidence. Being summoned partly from the hundred or ward involved, and wholly *de vicineto,*

they were expected either to have personal knowledge of the facts, or at least to get informed *out of court* by those who had, an interval between empanelment and trial being often allowed for that purpose. In this way documents, formal or informal, local and family tradition, and unsworn statements from fellow jurors, parties or neighbours, were necessarily and habitually received. Even in the jury-room, it seems private information and papers, provided these were furnished by one of themselves and not by a party, might be considered, together with such sealed documents as were formally in issue in the case, though not apparently, unless by consent, those which were *un*sealed. This practice of the jury to base their verdicts upon private knowledge or outside information of which the Court might know nothing, received express judicial sanction as late as 1670 (*R.* v. *Bushell,* Vaughan, 135), and traces of it are said to have lingered for nearly a century longer (Thayer, Pr. Tr. Ev. 169). Similarly, *in court,* and under the guise of evidence, they might listen to and act upon unsworn narratives of fact both from the counsel and the litigants, while informal documents which would now be rejected were freely shown to them by both sides. Laxity in court, however, was somewhat earlier curtailed than laxity outside. Thus, in 1601, the judges already considered it irregular for one of their colleagues to read a letter from a bishop in proof of a certain fact (*R.* v. *Shearfield,* 3 How. St. Tr. 536); afterwards in 1645, it is laid down that the allegations of counsel are no longer to be taken as evidence (Style's Pr. Reg. 171); while, in 1674, a certificate of merchants tendered to establish a custom is further rejected, the Court requiring their sworn testimony on the subject (*Pickering* v. *Barkley,* 12 Vin. Abr. 175). *The Witnesses.* Turning to the witnesses, the matter is more obscure, but as to them a stricter rule appears always to have been recognized, if not always acted upon. Thus, while the jury might found their verdicts on what they "knew" from all sorts of unauthenticated sources, the witnesses could narrate only what they had "seen and heard" directly, and not at second hand. This qualification applied not only to the early transaction witnesses, *i.e.* those pre-appointed to attest deeds, sales, &c., whose existence ante-dates jury trial by several centuries, and who afterwards, until about 1500, were summoned with, and testified privately to, the jury—but to the "casual" class as well, *i.e.* witnesses in the modern sense, who testified publicly to the jury in court, but who are not heard of until after 1400. For quite another century, however, various causes, chief among which seems to have been a fear lest this informal giving of evidence might be construed as "maintenance," conspired to keep the latter body a rare and subordinate figure in courts of justice; but from 1500 onward the "casual" witness, into which the pre-appointed deponent began gradually to merge, becomes an increasingly important factor, and one upon which the jury learn to rely more and more. So long, indeed, as testimony was given privately in the jury-room, little headway could be expected for any restrictive principle; but with evidence tendered openly in court it was different, for here the judges controlled. Accordingly, we find that in 1441 a witness having stated to the Court in proof of a certain fact that he was "so informed," the evidence was rejected on the ground that this was not testifying (Y.B. 20 Hen. VI. 20, 16). A long interval, however, was still to elapse between these occasional enforcements and the final rule. Indeed from about 1500 to 1650 the reports

show that although hearsay statements from witnesses are often objected to by prisoners and sometimes characterized by the Court as worthless or insufficient, their admission is rather the rule than the exception both in civil and criminal proceedings. Thus, in 1541, of three witnesses to a will, two depose upon the reports of others and only one of his own knowledge (*Rolfe* v. *Hampden, Dyer,* 53 *b*); in 1553, and several times later, one accuser is allowed to repeat the hearsay charges of another (*R.* v. *Thomas, id.* 99*b*; *R.* v. *Hawkins,* 3 How. St. Tr. 921; *R.* v. *Laud,* 4 *id.* 383); while, in 1603, hearsay accusations are held sufficient, provided only that they are corroborated (*R.* v. *Raleigh,* Jardine's Cr. Tr. 427). Mr. Best, indeed, attributes the special laxity in this respect in treason trials, to direct Crown influence (ss. 114-15). As, however, the proportion of sworn testimony in jury trials increased, so both its quantity and quality came to be more critically canvassed, until, in 1670, the very year in which Bushell's Case is deciding that hearsay may validly be furnished to the jury out of court, Sir Matthew Hale lays it down definitely that hearsay from a witness is inadmissible as direct evidence, although (contrary to the present rule, *post,* chap. xli.) it might still come in indirectly as corroboration, *i.e.* that the witness having said the same thing out of court was thus constant to himself (*Lutterell* v. *Reynell,* 1 Mod. 282; *R.* v. *Knox,* 7 How. St. Tr. 790; *R.* v. *Russell,* 9 *id.* 613; see Corroboration, *post,* chap. xli.). The next step in the evolution of the rule is shown in 1716, when the exclusion of hearsay is apparently for the first time put, not alone upon the old ground that the original speaker was not upon oath, but also upon the more modern one, that the other side had no opportunity of cross-examination (2 Hawkins, Pl. Cr. 596-7). Henceforth, with a few occasional lapses in practice, the rule is finally accepted in its present shape, and the only question is as to the existence or extent of its various exceptions.

History of the Exceptions. Amongst the miscellaneous mass of hearsay material furnished to the jury, in or out of court, certain well-defined classes seem from the earliest times to have acquired a recognized value and admissibility, *e.g.* family tradition in cases of pedigree; entries in ancient registers as to public rights; and dying declarations in cases of homicide. Such declarations were received as independent evidence long before any general rule against hearsay existed; and when that rule came at length to be established, they survived as well-settled "exceptions" thereto. The history of these exceptions in detail will be noticed under their respective headings.

[Wigmore, Ev. s. 1364; Thayer, Pr. Tr. Ev. 90-136, 157-9, 498-501, 518-23; 1 Poll. & Mait. Hist. Eng. Law, 622, 625; Bigelow, The Old Jury, Mass. Hist. Soc. Ap. 1916, 310-27; Best, ss. 114-7; Salmond, Essays, 81-87.]

Scope of the Rule. The rule against hearsay excludes, in general, all statements, oral or written, the probative force of which depends either *wholly or in part* on the credit of an unexamined person, notwithstanding that such statements may possess an independent evidentiary value derived from the circumstances under which they were made; and notwithstanding that no better evidence of the facts stated is to be obtained (Tay. s. 570; Chamberlayne's Best, s. 492*n*).

EXAMPLES

Receipts. A. sues B. to recover money paid by A., on B.'s behalf, to C.—C.'s receipt for the money is not *per se* admissible against B. to prove the payment (*Carmarthen Ry.* v. *Manchester Ry.*, *ante*, 66; *aliter* as part of the *res gestæ*).

Answers to Inquiries. In an action between A. and B., to prove that C., a debtor, was abroad at a certain time, a statement that he was so, made by C.'s servant in answer to inquiries at his house, is inadmissible (*Robinson* v. *Markis*, 2 Moo. & Rob. 375; *aliter* as original evidence of an unsuccessful search for C., *Wyatt* v. *Bateman*, *ante*, 218. So, on a charge against A. of obtaining money by falsely pretending to carry on business at a certain shop, a constable having been asked by the prosecution, "Did you make any inquiries as to whether any trade had been done at A.'s shop?"—"I did."—"Did you as a result of such inquiries find that any had been done?"—"I did not"; this evidence was held inadmissible, as embodying mere hearsay information derived from A.'s neighbours (*R.* v. *Saunders*, 1899, 1 Q.B. 490, C.C.R). So, on a murder trial, a police inspector called by the prosecution was not allowed, even on cross-examination, to state the result of his inquiry at lunatic asylums, &c., as to the insanity of the prisoner's relatives (*R.* v. *Devereux*, 1905, Times, July 28). *Cp. R.* v. *Wilkins*, *ante*, 220. But answers to, and the reault of, inquiries made at the *instance of a party* may be evidence against him as admissions or confessions, see *post*, 252, 270.

Statements by Agents. To prove that B. ordered certain goods from A.; evidence that a man came with a cart having B.'s name painted on it, and took the goods away, saying B. was his master, and had ordered them, is inadmissible [*Everest* v. *Wood*, *ante*, 97. The names and addresses of owners must by statute be painted on carts used on public roads (Highway Act, 1835, s. 76; so, also, in Ireland, *McBride* v. *McGovern*, 1906, 2 I.R. 181). As to cabs, see *King* v. *London Cab Co.*, 23 Q.B.D. 281; as to names on shops, see *Ward* v. *Cox*, 15 L.T. 515; and those on licensed premises, *Nash* v. *Stokvis*, Times, 1898, Oct. 29, and Nov. 2. In America, the name and port painted on a ship pursuant to statute are *prima facie* evidence of the truth of those facts on the presumption that the law has been complied with, *Stearns* v. *Doe*, 73 Mass. 482; *cp. Joyce* v. *Capel*, *&c.*, *ante*, 97, 352].

A. sues B. to recover goods distrained on by the latter, and, to show that C. and not B. is his landlord, proves that he has always paid his rent to C. B., in rebuttal, tenders accounts of such rents rendered to him by C., in which C. describes himself as B.'s agent. These accounts are inadmissible, C. being alive and capable of being called (*Spargo* v. *Brown*, 9 B. & C. 935; *aliter* if C. had been identified in interest with A. (*id.*); or had been dead (*post*, chap. xxiii.). C.'s receipts for A.'s rent would also be inadmissible as evidence for A. against B., unless C. were proved, or admitted, to be B.'s agent; though they might be used to refresh memory if A. or C. were a witness (*Carmarthern Ry.* v. *Manchester Ry.*, *sup.*; *Hiscox* v. *Batchellor*, 15 L.T. 542-3)].

Statements by Parents as to Age, Birth, &c. of Children. In an action against A. for goods sold, to which A. pleads infancy, an affidavit by A.'s father (deceased) stating the date of A.'s birth, and made in a former action to which the plaintiff was not a party, is inadmissible as evidence for A. to prove his age [*Haines* v. *Guthrie*, 13 Q.B.D. 818; *aliter* on questions of *pedigree* (*post*, 313), and in India, declarations by relatives have been received to prove the age of the insured in an action against the company, the contract allowing resort to non-admissible evidence (*Oriental Co.* v. *Surat*, I.L.R. 20 Bomb. 99, 103]. So, to prove the date of A.'s *birth*, an entry of that fact in a register of *baptisms* is inadmissible, though *aliter* as to an entry in a register of births (*post*, chap. xxx).

Letters in Party's Possession. A., a post-office official, is charged with secreting a letter containing a bill of exchange. The letter states that the bill is enclosed. The contents of the letter, though they may be read against A. as having been found in his possession (*post*, 257), are not admissible to prove that the bill was enclosed (*R.* v. *Plumer*, *ante*, 82; *cp. Perkins* v. *Vaughan*, *ante*, 74, and *A.-G.* v. *Stephens*, *ante*, 130).

Death-bed Declarations. The question being whether A. murdered B.;—a death-bed confession made by C. (deceased) that he, and not A., had committed the murder, is inadmissible (*R.* v. *Gray*, Ir. Cir, Rep, 76, 76, cited *post*, 275).

The question being whether a certain deed was forged;—a statement made by an attesting witness (deceased) that it was forged, or even a death-bed confession that he had forged it, is inadmiasible (*Stobart* v. *Dryden*, 1 M. & W. 615; as to the grounds of this decision see fully *post*, 277).

To prove the place of settlement of A., a pauper,—evidence of declarations by A. as to where he was settled, made on his death-bed, is inadmissible (Tay. s. 714); so, as to declarations made *ex parte* on oath before two magistrates by A., who at the date of the hearing had absconded (*R.* v. *Nuncham Courtney*, 1 East, 373; *R.* v. *Ferry Frystone*,

2 East, 54; *R.* v. *Abergwilly*, *id.* 63; Tay. ss. 568, 646*n*, in the earlier case of *R.* v. *Eriswell*, 3 T.R. 707, 712, the evidence, having been received below, was admitted on appeal, the Court being equally divided on the point). And the declarations of a deceased father as to the birth-place of his child, are not evidence of that fact in a settlement case (*R.* v. *Erith*, 8 East, 539; see as to this case *post*, 313; Tay. s. 645; nor is the statement on oath of a witness in such a case admissible to prove the date, or place, of his own birth, or the fact of his illegitimacy, being necessarily founded on hearsay (*R.* v. *Rishworth*, 2 Q.B. 476).

[For further examples of hearsay evidence see the various declarations excluded, or admitted by exception, under chaps. xviii.-xxxiv.]

CHAPTER XVIII.

EXCEPTIONS TO THE HEARSAY RULE.

THE rule excluding hearsay is subject to three main classes of exceptions: (i) Admissions; statements made in the presence of a party; and confessions; (ii) Statements made by persons since deceased; and (iii) Statements contained in public documents. Hearsay, when falling within these exceptions, is admissible, although direct testimony to the same facts might also be obtained.

Interlocutory Proceedings. To the above it may be added that, on a summons for directions, the judge may order any particular fact to be proved at the trial by statement on oath of information and belief (O. 30, r. 7; *post,* chap. xli.); and on interlocutory applications similar evidence may within certain limits, also be received (O. 38, r. 3; *post,* chap. xli.). So, in taking accounts, the judge may direct that the account-books shall be taken as *primâ facie* evidence of their truth, the parties being at liberty to take such objections as they may be advised (O. 33, r. 3). And in conveyancing matters hearsay and other inadmissible forms are allowable (Williams, V. & P. 96-128).

Spurious Exceptions. Statements which are part of the *res gestæ* (*ante,* 60), expressions of mental or bodily feeling (*ante,* 61-2, 218), ancient documents probative of ancient possession (*ante,* 112), and admissions by conduct (*ante,* 116), are sometimes said to form further exceptions to the rule; but since, according to the better opinion, these are receivable merely as presumptive evidence, and not to prove the truth of the matter stated, they are not exceptions to the hearsay rule in its usual and narrow sense, but only in the wide and general one explained *ante,* 218-9. Attestations by subscribing witnesses are classed by Professor Wigmore as a further example (Ev. s. 1505); but in this country, *Stobart* v. *Dryden, post,* 277, is conclusive that these are to be regarded as presumptive evidence merely, and not as hearsay admitted by exception (Tay. s. 569). It has also been said that declarations by persons as to their own marriage are admissible to prove that fact by exception to the hearsay rule, whether the declarants be living or dead, and whether the case be one of pedigree or not (Wills. Ev. 2nd ed. 206-9). But this is incorrect. As bare assertions, severed from conduct, they are pure hearsay and inadmissible; although when tendered not to prove the truth of the declarations, but merely as part of the *res gestæ, i.e.* as original evidence, they may be received without objection. (Dysart Peerage, 6 App. Cas. 501-3; *ante,* 77-8). Sir J. Stephen treats Testimony given in former proceedings (art. 32; see *post,* 436-40), and also Judgments (arts. 14, 39-47; *post,* chap. xxxvi.), as exceptions to the Hearsay rule. This, however, is unusual.

ADMISSIONS

In civil cases, statements made out of court by a party to the proceedings, or by a person connected with him in any of the ways mentioned in chap xix., are admissible *against,* but *not in favour of,* such party, to prove the truth of the facts stated (*a*).

[Tay. ss. 723-861; Best, ss. 518-31; Ros. N.P. 61-79; Steph. arts. 15-20; Whart. ss. 1075-1135; Wigmore, ss. 1048-66; Gulson, ss. 283-4, 439-45, 461-88. As to criminal cases, see *post,* 263. Admissions bind the Crown as well as ordinary parties (*Irish Society* v. *Derry,* 12 C. & F. 641); and acts and declarations in the nature of admissions may, of course, be receivable against a party as original evidence, *e.g.* when amounting to a contract or representation (Ros. N.P. 66-7); or when furnishing circumstantial proof of the fact in issue (see *ante,* Admissions by Conduct, 116)].

Principle. *Self-harming statements.* It is sometimes said (1) that a party's admissions are receivable against him as a *waiver of proof* (Tay. s. 723; Powell, 7th ed. 203). This, however, can only apply to admissions voluntarily made with a view to the trial (*ante,* 18), not to those used as evidence, for the latter usually consist of casual statements made before litigation was contemplated, which are not conclusive, but which the jury are at liberty to accept or reject, either wholly or in part, as they see fit. (2) A second ground suggested is that the declarations, being against interest, are probably true (Tay. s. 723). This, however, seems equally unsatisfactory since statements made against interest are not, by English law, receivable *per se,* but only if the declarant be dead; and, moreover, statements by a party are receivable against him even though, when made, they were, in fact, *in* his interest. Thus, if A. states that B. owes him a debt, and A. afterwards sues C. for the same debt, this statement, though *in* A.'s interest when made, may be proved against him by C. as an admission (*cp. Lucas* v. *Delacour, post,* 245); while conversely, a statement by A., though against his interest when made, would not be receivable if tendered in his own favour. (3) A third and more specious ground sometimes advanced is that furnished by the analogy of contradictory statements by witnesses, *i.e.* that admissions are receivable against a party not as evidence of their truth, and so as exceptions to the hearsay rule, but merely as being inconsistent with, and so discrediting, the case afterwards set up (Wigmore, ss. 1048-51). This condition that admissions to be receivable, must be "unfavourable to the conclusion contended for by the party" was also adopted in Stephen's Digest, 1st ed., art. 15, but was abandoned in later editions in consequence of a criticism in 20 Sol. Jo. 894. Although, however, this is the usual reason for tendering them, it is by no means an essential one, since a party is entitled to prove any material fact by his opponent's declaration, even though such fact be not necessarily inconsistent with the latter's case. Mr. Gulson, while allowing that admissions are evidence of the truth of the facts admitted, considers them not to be exceptions to the hearsay rule, because the inference of truth involved is independent of the personal credibility of the declarant, but regards them rather as relevant facts, evidentiary of the facts admitted. This view would narrow the meaning of hearsay, which is commonly held to cover admissions (*ante,* 218), and enlarge that of relevancy, by including in the latter matters whose admissibility

is not determined by logical inference [ss. 261, 283-4, 439-42, 461-88]. (5) The most generally accepted ground of reception appears to be that a party's declarations, whether for or against his interest when made, may always be taken to be true *as against himself* [*Slatterie* v. *Pooley*, 6 M. & W. 664, *per* Parke B.,—"Whatever a party says is evidence against himself . . . what a party himself admits to be true may be presumed to be so"; *per* Lord Abinger, C.B.—"A party's own statements are in all cases *admissible* against himself"; *Darby* v. *Ouseley*, 1 H. & N., 1, 5, *per* Pollock, C.B.,—"If a party has chosen to talk about a particular matter, his statement is evidence against himself"; see also *R.* v. *Turner*, 1910, 1 K. B. 346; and 20 Sol. Jo. 894].

Subject to certain exceptions, the general rule then, both in civil and criminal cases, is that any relevant statement made by a party is evidence against himself (*R.* v. *Erdheim*, *ante*, 215; *post*, 263). The weight of the declaration is, of course, a totally different matter; this may vary with the circumstances (*post*, 217), and will, no doubt, be greater if against interest at the time, than the contrary.

Self-serving statements. Shop-books. No presumption of truth arises with regard to the declarations of a party or his agents when tendered as evidence *in his own favour*, otherwise every man if he were in a difficulty, or in view of one, might make declarations to suit his own case [*R.* v. *Hardy*, 24 How. St. Tr. 1093-4, *per* Eyre, C.B.; *R.* v. *Petcherini*, 7 Cox, 82-3; *R.* v. *Haines*, 1 F. & F. 86; *Brockelbank* v. *Thompson*, 1903, 2 Ch. 344, 352; Best, s. 519; Chamberlayne Ev. ss. 2734-6, 2757; *ante*, 63]. *History.* Prior to about 1600, there seems to have been no general exclusion of a party's extra-judicial statements as evidence for himself. As we have seen, the jury might listen to the litigants, either in or out of court, as well as to all others who knew the facts. One class of such statements, *i.e.* tradesmen's shop-books, was in particular liable to be used against both fellow tradesmen and customers, and this whether the entries were made by the tradesman himself, or by his clerks, and whether the writer was living or dead (Thayer, Cas. Ev. 2nd ed. 509-15, 576). From about the above date, however, two influences operated to curtail this laxity. The first was the general rule that parties to a suit were incompetent to testify on their own behalf, a rule which, though not obtaining in earlier modes of trial, is thought always to have prevailed in jury-trials (*post*, 450), and was at all events recognized as settled law as early as 1582 (Dymoke's Case, Savile, 34, pl. 81). There is no doubt that this rule, though applying only to the parties' sworn statements, emphasized the need for, if it did not originate, the rejection of their unsworn assertions; indeed, in this connection, both classes appear to have been treated on the same footing: "No man can be a witness for himself, but he is the best witness that can be against himself" (Gilbert, Ev. 1st ed. 122); so, a copy of a document made by a party was rejected because of his incompetency to testify (*Fisher* v. *Samuda*, 1 Camp. 192-3). The second influence was the statute, 7 Jac. I. c. 12, passed 'to avoid the double payment of debts,' which applied specifically to *shop-books*, and which, after reciting that entries in such books often remained uncancelled although the debts had been paid, provided that, unless where a bill of debt existed, such books should not be admissible against a customer after the lapse of a year. It left untouched, however, their admissibility as

against fellow merchants and tradesmen. Of this Act, Lord Hardwicke remarked: "There was an opinion growing up that after a certain length of time a man's own shop-books should be evidence for him after the year; to prevent which was that Act made, as I have been informed by Lord Raymond upon consulting him (*Glynn* v. *Bk. of England,* 1750, 2 Ves. sen., 43). Lord Holt held that although the statute says a shop-book shall not be evidence after the year, &c., yet it is not of itself evidence within the year (*Pitman* v. *Maddox,* 1699, Salk, 690). This Act, though it has for long remained a dead letter, is still law, having been made perpetual by the St. L. Rev. Act, 1863 (26 & 27 Vict. c. 125; *cp.* Tay, s. 709). An instance of shop-books being admitted after the above Act occurs in 1639 (*Bourn* v. *Debest,* Tothill, 90); and as late as 1744 and 1798 there are dicta implying their admissibility at those dates respectively (*Omychund* v. *Barker,* 1 Atk. 21, 48; *Sikes* v. *Marshal,* 2 Esp. 705). In the main, however, and notwithstanding the above statutory recognition, the higher Courts, applying the doctrine that "*a man cannot make evidence for himself,*" began very soon to exclude the declarations of parties in their own favour, whether generally, or in the specific form of shop-books [1661, *Crouch* v. *Drury,* 1 Keble, 27; 1694, *Smart* v. *Williams,* Comb. 247, 249; 1698, *Anon.,* 1 Ld. Ray. 745; 1699, *Pitman* v. *Maddox, id.* 732; 1750, *Glynn* v. *Bank of England,* 2 Ves. S. 37, 39, 42-3; 1750, *Lefebure* v. *Worden id.* 54; 1795, *Digby* v. *Steadman,* 1 Esp. 329; 1818, *R.* v. *Debenham,* 2 B. & Ad. 145; 1819, *Marriage* v. *Lawrence,* 3 B. & Ald. 142; 1827, *A.-G.* v. *Warwick,* 4 Russ, 222; 1846, *Waterford* v. *Price,* 9 Ir. L.R. 310; 1849, *Smyth* v. *Anderson, post,* 235]; though where the entries were made not by the party himself, but by his clerk, their admissibility appears to have survived until the beginning of the eighteenth century, provided always that they were supplemented by the clerk's oath (*Lefebure* v. *Worden, Digby* v. *Stedman* and *Pitman* v. *Maddox, sup.;* Thayer, Cas. Ev., 2nd ed., 509, 576). [Thayer, *sup ;* Wigmore, s. 1518; Tay., ss. 709-15. As to entries made, in the course of duty, by *deceased* clerks, whether in the books of parties, or strangers, see *post,* chap. xxiv.].

Exceptions. The exclusion of self-serving statements as evidence of the truth of the facts stated, is subject to certain exceptions, *e.g.,* if they are made in the presence of the opponent, and not denied by him, they are evidence for this purpose (*post* chap. xxii.); so, also, in the case of *taking accounts* (*ante,* 227); or where the entries are of a *public* nature (*post,* Public Registers and Corporation Books, and shop-books and other contemporaneous writings may, of course, always be used, not strictly as evidence, but to *refresh memory* (*post,* 469). So, where they are tendered not to establish the truth of the declarations, but merely as original, circumstantial evidence, they are frequently receivable in a party's own favour, *e.g.* as part of the *res gesta,* or as acts of ownership, or as showing good faith.

When and to whom Admissions may be made. (*b*) When a party sues, or is sued, *personally,* any admission made by him on a former occasion, even while a minor (*O'Neill* v. *Read,* 7 Ir. L.R. 434; *cp. post,* 238), or sustaining a representative character (*Beasley* v. *McGrath,* 2 Sch. & Lef. 34; *Stanton* v. *Percival,* 5 H.L.C. 257), may be given in evidence against him; but when sued or suing as a *representative,* his principal cannot be prejudiced by his admissions made before sustaining, or after he has ceased to

sustain, that character (*New's Trustee* v. *Hunting,* 1897, 1 Q.B. p. 611, affd. 1897, 2 Q.B. 19; see *post,* 237, 246, 253).

It is, in general, immaterial to *whom* the admission was made. Thus, an admission made to a stranger is as receivable as one made to an opponent. So, private memoranda, never communicated to the opposite side, or to third persons, are evidence against a party (*Bruce* v. *Garden,* 17 W.R. 990; Whart. s. 1123); as are admissions made to himself in mere soliloquy (*R.* v. *Simons,* 6 C. & P. 540). Even an admission made in confidence to a legal adviser, or perhaps to a wife, is receivable if proved by a third party (*ante,* 200-201). On the other hand, a solicitor's admission in order to bind his client must have been made to the opposite party (*post,* 249), and an admission to support an account stated, to the creditor or his agent (Tay. s. 799; *contra,* Best, s. 528). So, an acknowledgment of debt made to a third person, neither agent of, nor privy to, the creditor, will not defeat the Statute of Limitations, since it is not evidence of a promise of which he could take advantage (*Stamford Co.* v. *Smith,* 1892, 1 Q.B. 765; *Rogers* v *Quinn,* 26 L.R.Ir. 136; but *cp. Re Emmett,* 95 L.T. 755).

Circumstances of the Admission. (*c*) As the weight of an admission depends on the circumstances under which it was made, these circumstances may always be proved to impeach or enhance its credibility. Thus, the admission (unless amounting to an estoppel) may be shown by the party against whom it is tendered to be untrue; or to have been made under a mistake of law or fact; or to have been uttered in ignorance, levity or an abnormal condition of mind. Thus an admission made by a party when drunk is not of such weight as one made when sober, but it is still admissible (*R.* v. *Hedges,* 3 Cr. App. R. 262). On the other hand, the weight of the admission increases with the knowledge and deliberation of the speaker, or the solemnity of the occasion on which it was made [Tay. ss. 854-861; Best, ss. 529-530; Whart. ss. 1078-1080].

Conditional Admissions. Admissions made conditionally are receivable if the condition has been fulfilled, but not otherwise (*Holdsworth* v. *Dimsdale,* 19 W.R. 798; *Vandeleur* v. *Glynn,* 1905, 1 I.R. 483, 506-7, 530). Nor will an admission made upon one hypothesis of fact bind a party upon a different one (*Powell* v. *M'Glynn,* 1902, 2 I.R. 154, cited, *post,* 236).

Offers "Without Prejudice." Offers of compromise made expressly or impliedly "without prejudice" cannot be given in evidence against a party as admissions; the law, on grounds of public policy, protecting negotiations *bonâ fide* entered into for the settlement of disputes [Tay. ss. 774, 795-797; Ros. N.P. 62; Steph. art. 20; 50 Sol. Jo. 372]. Thus, a letter marked "without prejudice" protects *subsequent* (*Paddock* v. *Forrester,* 3 M. & G. 903; *Re Harris,* 44 L.J. Bky. 33), and even *previous* (*Peacock* v. *Harper,* 26 W.R. 109; *Oliver* v. *Nautilus Co.*, 1903, 2 K.B. 639, C.A.), letters in the same correspondence. Moreover, it is now settled that such letters cannot, without the consent of both parties, be read on a question of costs in order to show willingness to settle; although the mere fact and date of such letters or negotiations, as distinguished from their contents, may sometimes be received to explain delay (*Walker* v. *Wilsher,* 23 Q.B.D. 335, C.A.; *cp. Re Jessop,* 45 L.Jo. 326, *per* Cozens Hardy, M.R.). Such letters, however, are only protected when there was a dispute or negotiation depending between

the parties, and the letters were *bonâ fide* written with a view to its compromise (*Re Daintrey, Exp. Holt,* 1893, 2 Q.B. 116; *Grace* v. *Baynton,* 21 Sol. Jo. 631). Thus, a letter "without prejudice" or "private and confidential" which contains a threat against the recipient if the offer be not accepted, is admissible to prove such threat (*id.; Kurtz* v. *Spence,* 58 L.T. 438; *Watt* v. *W.,* 1905, A.C. 115, cited *ante,* 142; *Kitcat* v. *Sharp,* 48 L. T. 64). So, where the alternative to acceptance was the committal of an act of bankruptcy, the letter was admitted to prove such act (*Re Daintrey, sup.*). And independent facts admitted during negotiations for a settlement are receivable (*Waldridge* v. *Kennison,* 1 Esp. 143); as are offers without prejudice, if the offer has been accepted (*Re River Steamer Co*, L.R. 6 Ch. 822; *Walker* v. *Wilsher, sup.; Re Leite,* 72 L.T. Jo. 97), or the protected condition fulfilled (*Holdsworth* v. *Dimsdale, sup.*). But a notice, 'without prejudice,' to annul a sale failing acceptance of a given condition, is void (*Re Weston,* 1907, 1 Ch. 244; *c.p.* 122 L.T.Jo. 504). Where A. sued B. and C. on a contract, and before the hearing had them arrested on a criminal charge connected therewith, and B. had during the remand written to A. offering "without prejudice" to give evidence for him against C. "in any case after this case is over," and B. and C., on being acquitted, counterclaimed in the original action for damages for malicious prosecution;—it was held by Charles, J., that the letter was admissible against B. on cross-examination. In the same case a criminal libel written "without prejudice" was also received (97 L.T.Jo. 265; *cp. Stretton* v. *Stubbs,* 1905, Times, Feb. 28, C.A.). And the protection applies only in the same action (*Stretton* v. *Stubbs, sup.*), and between the same parties, and not between them and third persons (*Teign Valley Co.* v. *Woodcock,* 1899, Times, July 22).

Admissions under Compulsion. In civil cases, admissions obtained under compulsion are evidence against a party, provided the compulsion was legal and not illegal. Testimony given as a witness, or by answer to interrogatories, comes under the former head and is admissible against him in subsequent proceedings, though the parties are different (*Ashmore* v *Hardy,* 7 C. & P. 501), or the questions might have been objected to (*Smith* v. *Beadnell,* 1 Camp. 30), or the answers, when given, were irrelevant (*Stockfleth* v. *De Tastet,* 4 Camp. 10), or only partly noted down (*Milward* v. *Forbes,* 4 Esp. 171), or the witness was prevented from fully explaining (*Collett* v. *Keith, id.* 212). As to answers in bankruptcy, see *ante,* 202-3. [Tay. ss. 798-799; Ros. N.P. 63.]

Whole Statement must be taken, including Hearsay and Opinion. (*d*) When an admission is tendered against a party, he is entitled to have proved, as part of his adversary's case, so much of the whole statement, document, or correspondence containing, or referred to in, the admission, as is necessary to explain the admission, and although such other parts may be favourable to himself (*Thomson* v. *Austen,* 2 Dowl. & Ry. 361; *Fletcher* v. *Froggatt* 2 C. & P. 569; *Cobbett* v. *Grey,* 19 L.J. Ex. 137; *R.* v. *Gray,* 6 Cr. App. R. 242); but the jury may attach different degrees of credit to the different parts (*Smith* v. *Blandy,* Ry. & M. 259). And "Any party may, at the trial of a cause, matter or issue, use in evidence any one or more of the answers or any part of an answer of the opposite party to interrogatories without putting in the others or the whole of such answer: Provided always, that in such case

the *judge* may look at the whole of the answers, and if he shall be of opinion that any others of them are so connected with those put in that the last-mentioned answers ought not to be used without them, he may direct them to be put in" (O. 31, r. 24; this applies to all other facts or answers that are fairly connected in sense or substance with the original ones, *Lyell* v. *Kennedy,* 27 Ch. D. 1, 15, 29; *post,* 499-500). *Distinct* matters, however, though relevant to the case, cannot be so introduced (*Prince* v. *Samo,* 7 A. & E. 627; *Davies* v. *Morgan,* 1 Cr. & J. 587). [Tay. ss. 725-736, 738; Ros. N.P. 79, 182-183; Steph. Note ix.].

An admission is receivable, although its weight may be slight, which is founded on *hearsay* (*Re Perton,* and *R.* v. *Turner, post,* 236); or consists merely of the declarant's *opinion or belief* (*Doe* v. *Steel,* 3 Camp. 115); but where the admission is a mere inference from facts not personally known to the declarant, the Court may disregard the inference and look to the facts (*Bulley* v. *B.,* L.R. 9 Ch. 739); and a bare statement that a party "is informed," without the addition of his belief in the information, will not amount to an admission (1 Daniel's Ch. Pr. 7th ed. 492; Tay. s. 737; *Trimlestown* v. *Kemmis,* 9 C. & F. p. 780; *Roe* v. *Ferrars,* 2 B. & P. 542, 548). As to statements by an agent containing hearsay or opinions, see *The Actæon,* 1 Spinks, E. & A. 176; *The Solway, post,* 251.

Matters Provable by Admission. *Law and Fact.* Admissions are receivable to prove matters of *law,* or mixed law and fact, though (unless amounting to estoppels) these are generally of little weight, being necessarily founded on mere opinion. Thus, a defendant's admission that his trade was a *Nuisance* has been received (*R.* v. *Neville,* 1 Peake, 91; this was disapproved by Ld. Campbell in *R.* v. *Fairie,* 8 E. & B. 486, 490); so, a prisoner's admission of a former valid marriage is some, though not sufficient, evidence to support a conviction for *Bigamy* (*R.* v. *Flaherty,* 2 C. & K. 782; *R.* v. *Savage,* 13 Cox, 178; *R.* v. *Lindsay,* 66 J.P. 505; see *R.* v. *Naguib,* 1917, 1 K.B. 359; in *R.* v. *Newton,* 2 Moo. & R. 503, and *R.* v. *Simmonsto,* 1 C. & K. 164, Wightman & Cresswell, JJ., had held it sufficient); so, as to an admission that the building in which the ceremony took place was a R.C. Church (*R.* v. *Lindsay, sup.*); and his admission that he was a bigamist has been held some evidence of every ingredient of that offence (*R.* v. *Johnson,* 103 L.T.J., 109, Ir. C.C.R.). But where the bigamy rests upon the validity of a foreign marriage, this must be proved by expert evidence whether raised by the prosecution or defence [*R.* v. *Naguib, sup.,* following *R.* v. *Savage* and *R.* v. *Lindsay, sup.; cp. ante,* 110; *post,* chap. xxxv. (General Reputation), and chap. xlviii. (Presumptions as to Marriage)]. In *R.* v *Philp,* 1 Moo. C.C. 263, however, a prisoner's admission of the prosecutor's *Title* to property was altogether rejected. Matters of *fact,* simply, may always be proved in this manner. Thus, a prisoner's admission of his own *Age,* is evidence of that fact, though necessarily founded on hearsay (*R.* v. *Turner, post,* 236); and a wife's admission of *Adultery,* though uncorroborated, has been held sufficient evidence, where considered trustworthy, upon which to grant a divorce (*Robinson* v. *R.,* 1 S. & T. 362; *Williams* v. *W.,* L.R. 1 P. & D. 29; *Chilcott* v. *C.,* 1904, Times, June 21; *Getty* v. *G.,* cited *ante,* 205-6; *Weinberg* v. *W.,* 27 T.L.R. 9; *Collins* v. *C.,* 33 *id.* 123; *post,* 487); though, if corroboration is available, it should be produced (*White* v. *W.,* 62 L.T. 663); so, an entry of the birth of an illegiti-

mate child made in a register of births by a guilty wife, being statutory proof, has been held not to require corroboration (*Brierley* v. *B.* 34 T.L.R. 458). Even privileged communications, when proved by third persons, are sometimes receivable as admissions (*ante,* 200-1).

Documents. Moreover, a party's admissions out of court, being primary evidence against him, are receivable to prove the *contents of documents,* without notice to produce, or accounting for the absence of, the originals, though here the chances of error are double instead of single (*Slatterie* v. *Pooley,* 6 M. & W. 664; *post,* 471, 477, 515, 531). This rule, it seems, applies to the contents of *records* as well as other documents (*Murray* v. *Gregory,* 5 Ex. 468, the case of an award; *Price* v. *Woodhouse,* 3 Ex. 616, the case of a copy of a decree; Ros. N.P. 64). Such admissions ought, however, in many cases to have no weight—*e.g.* where the party tendering them is himself withholding more satisfactory evidence, or where the admission assumes a degree of knowledge which the declarant is not likely to possess, as of the construction of a deed (Ros. N.P. 63). It seems also that the judge may direct the document itself to be produced (*Farrow* v. *Blomfield,* 1 F. & F. 653; *Boulter* v. *Peplow,* 9 C.B. 493). Although, however, the contents of a document may be established by admission, they cannot be *varied* or *contradicted* thereby (*Doe* v. *Webster,* 12 A. & E. 442; *post,* 575). Nor can the *execution* of documents, to the validity of which attestation is necessary, be so proved; nor, in some cases, even the execution of those to which attestation is not necessary (*post,* 523). Notice by a partner that the partnership has been dissolved, has, however, been held evidence of a dissolution by deed, where this was required (*Doe* v. *Miles,* 1 Stark. 181).

Ambiguous Admissions. In civil cases, where admitted facts are capable of two equally possible views, it is for the jury to decide between them (*Davey* v. *L. & S. W. Ry.,* 12 Q.B.D. 70, 76; *ante,* 10; and see *Powell* v. *McGlynn, post,* 236); but in criminal cases the court may quash a conviction founded solely on an equivocal confession (*post,* 269).

Form of the Admission. The form of the admission is, so far as its admissibility goes, generally immaterial. Thus, admissions are receivable which are contained in—*Affidavits* or *Answers to Interrogatories* in the same (O. 31, r. 24), or former, proceedings, without proof of signature or putting in the questions (*Fleet* v. *Perrins,* L.R. 3 Q.B. 536; in *Exp. Hall,* 19 Ch. D. p. 583, Jessel, M.R., remarked, "Any statement made by a man on oath may be used against him as an admission"); Declarations in *Wills* (*Re Hoyle,* 1893, 1 Ch. 84, C.A., where these were held a sufficient memo. under the Statute of Frauds); *Recitals and Descriptions in Deeds,* the former of which are generally conclusive between the parties in an action on the deed, but only *primâ facie* evidence against them in other cases (*Carpenter* v. *Buller,* 8 M. & W. 212; Tay. ss. 96-98, 858; Ros. N.P. 76); *Receipts,* whether on separate papers (*Lee* v. *L. & Y. Ry.,* 6 Ch. 527); or indorsed on deeds or negotiable securities (*Lampson* v. *Corke,* 5 B. & Ald. 606; *Graves* v. *Key,* 3 B. & Ad. 313); as to the effect of receipts, see *post,* 577, 588-9; *IOU's,* which even though unaddressed are evidence for the producer of an account stated, though not of money lent (*Fesenmayer* v. *Adcock,* 16 M. & W. 449); *Accounts Rendered; Bankers' Pass Books* (*post,* 376-7); *Maps and Surveys* (*post,* 239); *Cases for the Opinion of Counsel* (*Meath* v. *Winchester,* 3 Bing. N.C. 183);

sworn, but not old unsworn, *Inventories and Declarations by Executors,* which operate as an admission of assets (*Tay.* s. 860); as also *Probate Stamps* (*id.; post,* 432). Even statements in *Cancelled or Invalid Instruments* are receivable (*Breton* v. *Cope,* Pea. R. p. 44; *cp. Re Bowes, post,* 281; but not in *unstamped* ones, except in criminal cases: Stamp Act, 1891, s. 14). The inclusion or omission of a debt in a *Bankrupt's Statement* is evidence of the existence or non-existence of the debt as against himself, though it may not be against his trustee or creditors (*post,* 253; *Hart* v. *Newman,* 3 Camp. 13; *Nicholls* v. *Downes,* 1 M. & R. 13, where such an omission was held conclusive).

A *Judgment* is not, strictly speaking, an admission by the parties of the facts decided of which a *stranger* can take advantage; though indirectly it may sometimes have this effect (*post,* 427, 429-30); nor are *Pleadings* filed in former proceedings, unless sworn or otherwise clearly adopted by the party himself, for they are deemed merely to be the suggestions of counsel, and are frequently contradictory (*post,* 251, 435-6). As to admissions by *Conduct,* see *ante,* 116, 134, and *post,* 255-60.

EXAMPLES.

Admissible.	*Inadmissible.*
(*a*) A. sues B. for the price of goods sold; an entry in A.'s shop-books debiting C. and not B. with the goods is evidence *against* A. to disprove the debt (*Storr* v. *Scott,* 6 C. & P. 241).	(*a*) A. sues B. for the price of goods sold; an entry in A.'s shop-books, debiting B. with the goods, is not evidence *for* A. to prove the debt (*Smyth* v. *Anderson,* 7 C.B. 21; *ante,* 215-6. Nor may declarations by testators in their own favour be tendered by their executors, *ante,* 133; *post,* 240).
(*b*) A., when defending a suit as guardian for B., a minor, makes an affidavit of certain facts. This affidavit is evidence against A. of the facts sworn to, in a subsequent action against him personally (*Beasley* v. *Magrath,* 2 Sch. & Lef. 34).	(*b*) A. makes an admission of certain facts. Afterwards A. is appointed executor of B. In an action brought by him as such executor, his previous admission is not receivable (*Legge* v. *Edmonds,* 25 L.J. Ch. 125).
A. with the consent of B., his debtor, insures the latter's life for a sum exceeding the amount of the debt, and pays B.'s premiums. In a private memorandum, never shown to B., A. debits B. with the premiums so paid. On B.'s death these entries are receivable against A. as admissions that B.'s representative, and not A. is entitled to the surplus of the policy-moneys (*Bruce* v. *Garden,* 17 W.R. 990).	
(*c*) A. sues B. on a bill of exchange. B., during confidential negotiations for a settlement, admits the signature of the bill to be his. This is receivable against B., though the rest of the negotiations are not (*Waldridge* v. *Kennison,* 1 Esp. 143).	(*c*) A. sues B. on a bill of exchange. B., in a letter "without prejudice," had offered to pay the debt without costs, but A. had refused the offer. B.'s letter is not receivable against him as an admission of liability (*ante,* 231-2).
A. sues B. on a bill of exchange, of which B. had received no notice of dishonour. B. writes, "without prejudice," that he will waive A.'s omission to give notice, if A. will accept the debt without costs. A. accepts the offer, but B. makes default in payment. In a fresh action B.'s admission is receivable (*Holdsworth* v. *Dimsdale,* 19 W.R. 798).	A. sues B. for injuries by a runaway horse proved to be owned by B., but to have been driven by C., and gives evidence that B. admitted to A.'s daughter that the horse was his, and in reply to a remark by her that "she believed he had lent the horse to C.," had said, "Humph," adding that if she would take her father home from the hospital he, B., would pay all expenses. Held that B. was not liable, since (1) the fact that B. owned, and C.
A company sues B. for calls on certain shares. B. admits liability, but claims to	

Admissible.

he a nominee for C., to whom the shares belong and whom he joins as a third party. To prove C.'s ownership, B. tenders an agreement between the company and C., made "without prejudice," whereby certain proceedings are compromised and C. admits he owns the shares in question. Held receivable (*Teign Valley Co.* v. *Woodcock*, 1899, Times, July 22, *per* Darling, J., with some doubt).

(*d*) A., a solicitor, sues B. on a bill of costs. B. pleads a set-off for goods sold, and tenders a debtor and creditor account furnished by A., in which A. debited himself with the amount of the goods, but credited himself with his costs. The account is evidence for B. of the debit items, and for A. of the credit items, although no signed bill thereof had been delivered (*Harrison* v. *Turner*, 10 Q.B. 482; *Randle* v. *Blackburn*, 5 Taunt. 245; *Thomson* v. *Austen*, 5 Dowl. & Ry. 358).

A. sues B. for goods supplied in 1894 to C., the alleged partner of B., and gives in evidence a letter written by B. in 1893 to a third person, stating that "he had dissolved partnership with C. in 1892." This letter is strong evidence against B. that he was a partner with C. in 1892, and therefore (the presumption being that the partnership continued, *ante*, 88, 104) was also so in 1894; and slight evidence in B.'s favour that the partnership had ceased in 1892 (*Brown* v. *Wren*, 1895, 1 Q.B. 390; approved *Powell* v. *M'Glynn*, *sup.*, at p. 157).

A. is charged with delivering a seditious speech, and in his defence puts in a copy of a newspaper showing the resolution which he had proposed at the end of the meeting. The prosecution may put in the full report of A.'s speech contained in the same paper (*R.* v. *Cork Justices*, 15 Cox, 149).

So, comment by A., in a public address, upon part of the Queen's speech in Parliament, was held to let in the whole (*R.* v. *O'Connell*, Arm. & Trevor's Rep. p. 281).

The question being whether A. was an infant at the time of making a certain contract;—an admission by A. that he was so, is receivable against him, although necessarily founded on hearsay (*R.* v. *Walker*, 1 Cox, 99; *R.* v. *Simmonds*, 4 Cox, 277). So, a prisoner's admission that he was over sixteen, is sufficient evidence of that fact under the Prevention of Crime Act, 1908, s. 10 (*R.* v. *Turner*, 1910, 1 K.B. 346). And an admission by a party of his own illegitimacy, is evidence both against himself and his representatives (*Re Perton*, 53 L.T. 707; *post*, 309, 315).

Inadmissible.

drove, the horse, raised no presumption that C. was B.'s servant acting within the scope of his employment (*aliter* as to an omnibus, locomotive, or ship; *cp. ante*, 97, and *post*, 352); (2) the fact that, though such relationship was peculiarly within B.'s knowledge, he was not called to deny it, did not shift the burden of proving it from A.; and (3) that B.'s offer to pay having been made on the assumption that he was not liable as he had merely *lent* the horse to C., it could not be treated as an admission of liability on the basis of master and servant (*Powell* v. *M'Glynn*, 1902, 2 I.R. 154, C.A.; and see *Dowling* v. *Robinson*, *ante*, 97).

(*d*) A. sues B. for moneys collected by him as A.'s agent. B. pleads a set-off for payments made on A.'s account. Entries of receipts made by B. in his account-book are evidence for A.; but entries of payments distinct from, and unconnected with, the receipts, are not evidence for B. [*Reeve* v. *Whitmore*, 2 Drew. & Sm. 446, 450; *aliter* if a receipt and payment are mixed up in the same transaction, so that the one is merely a deduction from the other: *id.*; and *cp. post*, 280, 285-6].

A. sues B. for illegal distress, and to prove that B. authorised the distress, produces the warrant signed by B. The warrant recites certain facts as the grounds thereof. Though the warrant is admissible against B., the recitals are not so (*Davies* v. *Morgan*, 1 Cr. & J. 587).

A. sues B., his commanding officer, for false imprisonment, and to show malice proves statements made by B. against him at a regimental inquiry. Statements made by *other* officers thereat, held not admissible against B. to explain B.'s statements at the inquiry (*Dawkins* v. *Rokeby*, 4 F. & F. 806, 871).

The question being whether A. gave or lent money to B., and an admission made by B., on cross-examination in former proceedings, that he had been repeatedly insolvent, being proved against him;—a statement made by B. on re-examination, on the same occasion, that A. had given him the money;—held not admissible for B. in explanation of the admission, being upon a distinct matter (*Prince* v. *Samo*, 7 A. & E. 627).

CHAPTER XIX.

PERSONS WHOSE ADMISSIONS MAY BE EVIDENCE AGAINST A PARTY.

A PARTY to the proceedings may be affected by the admissions of those standing in the following relations to him:

(A) Nominal, Representative, and Real, Parties.

(B) Predecessors in title.

(C) Partners, joint-contractors, co-representatives, and associates.

(D) Agents and referees.

(E) Miscellaneous cases.

Admissions made by such persons may (unless amounting to estoppels) be contradicted or explained in the same way as those made by the party himself. The admissions of a party, however, are, as we have seen, generally receivable against himself *whenever* made, while those of others can only affect him when made during the *continuance of, and with reference to, the particular character or interest* entitling them to be proved (*ante*, 230-1).

(A) **NOMINAL, REPRESENTATIVE, AND REAL, PARTIES.** A nominal party may be affected by the admissions of a real party, who, though not named on the record, has a *substantial interest* in the result [Tay. ss. 756, 757; Ros. N.P. 67-68; Steph. art. 16]. But the admissions must have been made while the real party was actually interested; and, further, they are only receivable so far as his own interests, or the interests of those who claim through him, are concerned [Tay. s. 757; *cp. New's Trustee* v. *Hunting* cited *post*, 253].

Thus, the admissions of a *cestui que trust* are evidence against the trustee, in so far as their interests are identical (*Harrison* v. *Vallance*, 1 Bing. 45; *Doe* v. *Wainwright*, 8 A. & E. 691; *May* v. *Taylor*, 6 M. & G. 261); those of a debtor, against a person in whose hands he has placed money in trust to divide amongst certain creditors (*Robson* v. *Andrada*, 1 Stark. 372; *cp. post*, 253); those of a person interested in a deed who has placed it in the hands of a depositary for certain purposes, as against such depositary (*Harrison* v. *Vallance, sup.*); those of a shipowner against the master, in an action by the latter for freight (*Smith* v. *Lyon*, 3 Camp. 465); those of the persons interested in a policy, against the party in whose name the policy was effected (*Bell* v. *Ansley*, 16 East, 143); those of the indemnifying creditor,

against the sheriff (*Dowden* v. *Fowle*, 4 Camp. 38; *Proctor* v. *Lainson*, 7 C. & P. 629); those of ratepayers, against either the churchwardens and overseers in a settlement appeal (*R.* v. *Hardwick*, 11 East, 578, 586; *R.* v. *Whitley*, 1 M. & S. 636; *R.* v. *Woburn*, 10 East, 395; Tay. s. 752), or against a township on a question as to the non-repair of a bridge (*id.*; *R.* v. *Adderbury*, 5 Q.B. 187). But not those of devisee or heir, against executor or administrator (*Osgood* v. *Manhattan Co.*, 3 Cow. 62; *Dillard* v. *Dillard*, 2 Strobh. 89; *cp. Putnam* v. *Bates*, *inf.*); unless the latter are mere representatives of the former (*Kegan* v. *Grim*, 13 Pen. St. 508).

Conversely, the admissions of a representative, if made while sustaining that character, but not otherwise (*New's Trustee* v. *Hunting*, *post*, 253; *Legge* v. *Edmonds*, *post*, 245; *Fenwick* v. *Thornton*, *id.*; *Metters* v. *Brown*, 32 L.J. Ex. 138; *Fox* v. *Waters*, 12 A. & E. 43; *Stanton* v. *Percival*, 5 H.L.C. 257), are in general receivable against the principal; and this although the representative is a mere nominal party, or bare trustee, whose name is used only for purposes of form (*Moriarty* v. *L.C. & D. Ry.*, L.R. 5 Q.B. 314); [Steph. art. 16; Ros. N.P. 67; Tay. s. 765 (s. 741 is *contra*, *sed qu.*); Whart. ss. 1207-1213].

An *infant*, however, cannot bind himself by any admissions made in an action (O. 19, r. 13; Ann. Pr., Notes to O. 27, r. 11, and O. 32, r. 6); nor, generally, are the admissions of his *guardian* or *next friend* receivable against him, for, though named on the record, they are merely officers of the Court, appointed for the infant's protection [*Ingram* v. *Little*, 11 Q.B.D. 251; *Marshall* v. *Prince*, 6 B.W.C.C. 755, 758-9, C.A.; under O. 31, r. 29, however, both infants and their next friends and guardians *ad litem* are now subject to the ordinary rules as to interrogatories, inspection and production of documents]. The above rules apply also, probably, to *committees* of lunatics (*Stanton* v. *Percival*, *sup.*; *Ingram* v. *Little* *sup.*). So. the admissions of an *executor*, though receivable against legatees (see *Concha* v. *C.*, 11 App. Cas. 541, 553), are not so against the heir or devisee where the two characters are distinct (*Putnam* v. *Bates*, 3 Russ. 188; *Fordham* v. *Wallis*, 10 Hare, 217; *cp. Re Hollingshead*, 37 Ch. D. 651). And where A.'s name has been struck out of the record, and B.'s substituted, the admissions of A. while upon the record are not evidence against B. (*Armstrong* v. *Normandy*, 5 Ex. 409).

As to admissions of co-representatives *inter se*, see *post*, 242, 245; and as to those by persons joined as *third parties*, see *Teign Valley Co.* v. *Woodcock*, *ante*, 236.

(B) **PREDECESSORS IN TITLE.** (*a*) Statements by persons in possession of property, qualifying or affecting their title thereto, are receivable against a party claiming through them by title subsequent to the admission [Tay. ss. 90, 758, 787-794; Wigmore, Ev. ss. 1080-87]. Declaration by predecessors in title are not, of course, evidence *for* their successors (*Brocklebank* v. *Thompson*, 1903, 2 Ch. 344, 352; *Schwabacher* v. *Heimer*, *ante*, 133), unless receivable on other grounds, *e.g.* as parts of the *res gesta* (*ante*, 72-3), or as acts of ownership (*ante*, 111-2); or as declarations by deceased persons. As to the supposed exception in the case of deceased rectors, see *post*, 278.

Principle. The grounds upon which admissions are evidence against those in privity with the party making them, is that they are *identified in interest*

(*Woolway* v. *Rowe*, 1 A. & E. 114; see *ante*, 88); a principle which belongs, perhaps, more properly to the substantive law than to the law of evidence; (*cp.* Judgments, *post*, chap. xxxvi.).

The form of the admission is in general immaterial (*ante*, 234); thus old *Estate Maps*, produced from proper custody, are evidence against persons deriving title from the proprietor under whose direction they were made (*Craven* v. *Pridmore*, 18 T.L.R. 282; *M'Kenna* v. *Howth*, 27 Ir. L.T.R. 48; *Doe* v. *Lakin*, 7 C. & P. 481, 483; *Phillips* v. *Hudson*, *post*, 358, appears to be *contra, sed qu.* as to this case); as also are old *Accounts* rendered, or adopted, by the predecessor (*Foster* v. *Plumbers' Co.*, 44 Sol. Jo. 211).

Privity. The cases in this and the following article (Partners, &c., *post*, 242-6) are usually included under the head of privity, a term which denotes successive or mutual relationship to the same rights of property. Privies are of three classes: (1) privies in *blood*, as heir and ancestor; co-parceners; or co-heirs in gavelkind (*Weeks* v. *Birch*, 69 L.T. 759); but not father and child where latter sues under independent statutory title (*Tucker* v. *Oldbury* U.D.C. 1912, 2 K.B. 317, C.A.); (2) privies in *law*, as executor to testator, or administrator to intestate (sometimes called privies in representation); husbands suing or defending in right of their wives; lords by escheat; tenants by the curtesy, or in dower; (3) privies in *estate or interest*, as vendor and purchaser (*Melbourne Co.* v. *Brougham*, 7 App. Cas. 307); grantor and grantee; donor and donee; lessor and lessee; joint-tenants; or successive bishops, rectors, and vicars (*cp.* Judgments, *post*, 412-15).

The Rule is only co-extensive with the Identity. (*b*) Thus, admissions by a subordinate in title do not bind his superior, whose estate he has no right to alienate or encumber—*e.g.* those of an occupier, his landlord's title; nor, generally, those of a tenant for life, the title of the remainderman, or reversioner (*Scholes* v. *Chadwick*, 2 Moo. & Rob. 507; *R.* v. *Bliss*, 7 A. & E. 550; *Papendick* v. *Bridgwater*, 5 E. & B. 166; *Howe* v. *Malkin*, 40 L.T. 196; *Blandy-Jenkins* v. *Dunraven*, 1899, 2 Ch. 121; *cp.* declarations by deceased persons against proprietary interest, *post*, 279).

The receipts of a lessee of vicarial tithes have, however, been held evidence of a *modus* against the vicar (*Jones* v. *Carrington*, 1 C. & P. 329; *Illingworth* v. *Leigh*, 4 Gwill. 1615); and in an action to recover land, the admission of a tenant in possession will, from the peculiar nature of the proceedings, be received against one who defends as landlord (*Doe* v. *Litherland*, 4 A. & E. 784; see O. 12, rr. 25, 26; Tay. s. 789). As to when the acts of a tenant for life bind remaindermen, see *Re Hollingshead*, 37 Ch.D. 651; *Burrowes* v. *Clonbrock*, 27 L.R.I. 538, 549; *Hall* v. *Norfolk*, 1900, 2 Ch. 493; *Domvile* v. *Callwell*, 1907, 2 I.R. 617. So, the admissions of a tenant in tail are often receivable against the remainderman, because the former is regarded as representing the inheritance (Tay. s. 758).

A distinction, however, must be taken between the case of an assignee of land or other property, and that of an ordinary assignee of a *negotiable instrument*, the former having in general no title in law or equity unless his assignor had, while the latter may have a good title though his assignor had none. Accordingly, unless the plaintiff on a bill or note stands on the title of the former holder (*e.g.* by taking the bill overdue, or with notice, or without consideration) the declarations of such holder are not evidence against

him [Byles on Bills, 17th ed. p. 432; Tay. ss. 790-97; Wigmore Ev. ss. 1084-5].

The Declarations must qualify or affect the Title. (*c*) The declarations to be admissible must qualify or affect the predecessor's title, and not relate to independent matters (*Coole* v. *Braham,* 3 Ex. 183; *Ivat* v. *Finch,* 1 Taunt. 141; Whart. ss. 1168-1169).

And be made during the Continuance of the Interest. (*d*) They must also have been made while the predecessor was in possession of the property, status or interest, which entitled him to make them, and not after he had parted therewith (*Trimblestown* v. *Kemmis,* 9 C. & F. pp. 788-9; *Dysart Peerage,* 6 App. Cas. 489-499-501; Tay. s. 794; *cp. post,* 243-4).

EXAMPLES.

Admissible.

(*a*) A. sues B. to recover a watch which B. claims to retain as administrator of C., deceased; a declaration by C., that he had given the watch to A., is evidence against B. (*Smith* v. *Smith,* 3 Bing. N.C. 29; *Ivat* v. *Finch,* 1 Taunt. 141).

A. sues B. for trespass to land. A declaration by C., a former proprietor of A.'s estate, made while in possession, that C. had a right of common over, but no right to enclose, the land, is evidence for B., though C. was alive and might have been called (*Woolway* v. *Rowe,* 1 A. & E. 114).

A. as lessee of B., the lord of a manor, claims toll on all tin raised from a certain mine, his title thereto depending on the mine being situated under the waste of the manor;—a statement in an old lease, granted by a former lord of the manor, of the surface of adjoining lands, that the land over the mine was private property, and not waste of the manor, is evidence to negative A.'s claim (*Crease* v. *Barrett,* 1 C.M. & R. 919. And see *Doe* v. *Seaton,* 2 A. & E. 171).

A., the assignee of a bond, sues C., the obligor, in the name of B., the obligee. An admission by either B. or A. that the bond had been paid is evidence for C. (Steph. art. 16, *a & b*).

A. claims the adowson of a certain church, against B., the bishop of the diocese;—a case submitted by a former bishop to counsel, touching the right of presentation, and giving copies of entries in the parish books relating thereto, is evidence against B. (*Meath* v. *Winchester,* 3 Bing. N.C. 183; *Carr* v. *Mostyn,* 5 Ex. 69)

A. as heir to B., the purchaser of land, brings ejectment against D., as heir of C., B.'s widow (deceased), who had continued in possession for twenty years after B.'s death. A statement by C. that she held the land for life and after her death it would go to B.'s heirs, is admissible against D. [*Doe* v. *Pettett,* 5 B. & Ald. 223. It would also be admissible as a declara-

Inadmissible.

(*a*) In *Smith* v. *Smith, opposite,* a declaration by C. that the watch belonged to him C.), would not have been evidence *for* B. (120 L.T.Jo. 184; *op. Schwabacher* v. *Heimer, ante,* 133).

A. as a dependant of B., deceased, sues C., B.'s employer, under the Workman's Comp. Act 1906, for injuries by an accident to B.—A statement by B. as to the cause of the accident is not receivable against A. as an admission, since B. was not a party to the suit, and A. claimed under an independent statutory title and not through B. by derivation [*Tucker* v. *Oldbury,* U.D.C., 1912, 2 K.B. 317, C.A. The statements were also held inadmissible as declarations against interest (*post,* 282, or in course of duty (*post,* 289), or as part of the *res gesta* (*ante,* 83)].

In an action by A. against B., a deposition, in a prior suit to perpetuate testimony, made by a witness on behalf of C., a predecessor in title of B., and which had been sealed up by the examiners, but was now found unsealed;—held not admissible against B. in the absence of evidence *aliunde* of user or adoption of the deposition by C. or his successors (*Evans* v. *Merthyr Tydfil Council,* 1899, 1 Ch. 241, C.A.; *post,* 251, 257, 261).

(*b*) The question being whether A. had a right of common over a certain field belonging to B.;—a statement by C., B.'s tenant of the field, that A. had the right, is not receivable against B., though it would be against C. or those claiming through him (see *Papendick* v. *Bridgwater,* 5 E. and B. 166; *Blandy-Jenkins* v. *Dunraven, ante,* 129; *Scholes* v. *Chadwick,* 2 Moo. & Rob. 907; *R.* v. *Bliss,* 7 A. & E. 550).

A., the indorsee of a note, sues B., the maker. B.'s defence is that it was fraudulently indorsed to A. by C. without consideration. Letters from C. disclosing the fraud, held not admissible against A. [*Phillips* v. *Cole,* 10 A. & E. 106; *cp. Shaw* v. *Broom,* 4 D. & Ry. 730; *Beauchamp* v.

Admissible.

tion by a deceased person against her proprietary interest, *post*, 279].

(*d*) A. brings ejectment against C., the widow of B., and D., the son-in-law of C. It was proved that B. had been in possession of the lands for many years, and that afterwards C. and then D. had occupied them. An admission by C., though made when D. and not C. was in occupation, that she, C., had paid rent to A., held admissible against D. [*Hogg* v. *Norris*, 2 F. & F. 246. It was objected that as D. was in unexplained possession, the presumption was that he was owner in fee and that C.'s tenancy had ceased; it was held however by Erle, C.J., that the probability was that D. was C.'s under-tenant and that, if not, he would have had no difficulty in disproving it. In *Doe* v. *Murless*, 6 M. & S. 110, and *Doe* v. *Williams*, 6 B. & C. 41, it was said that where A. is shown to be tenant and, on his quitting, B. takes possession, it may be presumed in the absence of evidence that B. comes in as assignee of A.]

Inadmissible.

Parry, 1 B. & Ad. 89; *Pocock* v. *Billing*, 2 Bing. 269; and *Barough* v. *White*, 4 B. & C. 325, as explained in *Lee* v. *Harrison*, 5 L.J. Ch. (O.S.) 30. *Aliter*, if proof were given that A. had taken the note without consideration; or after it was due; or with knowledge of, or privity to, the fraud (*Lee* v. *Harrison*, *sup.*)].

(c) In an interpleader issue between a bill of sale holder as plaintiff, and an execution creditor as defendant, as to the right to a debtor's chattels, an admission by the debtor of a debt due to the bill of sale holder, held not evidence against the creditor, as it did not qualify or affect the debtor's title to the chattels; though the creditor might be considered as claiming under the debtor (*Coole* v. *Braham*, 3 Ex. 183). *Aliter* if it has qualified the title (*id.*; *cp. post*, 254).

(*d*) In an action by A., as mortgagee of B., to set aside a prior conveyance of the same property by B. to C. as being voluntary and void;—an admission by B. that A. had advanced money on the mortgage, is not evidence against C., being made after B. had parted with his interest (*Doe* v. *Webber*, 1 A. & E. 733; *Foster* v. *M'Mahon*, 11 Ir. Eq. R. 301; *Lalor* v. *L.*, 4 L.R.I. 678). So as to an admission by a mortgagor, *after* assignment of his equity of redemption, that he had paid interest to the mortgagee, up to a certain date *before* the assignment (*Dysart Peerage*, 6 App. Cas. p. 500). And an admission by a former party to a bill of exchange, after he had negotiated it, is not evidence against the holder (*Pocock* v. *Billing*, and *Shaw* v. *Broom*, *sup.*).

In a peerage case;—X., as the son of A. (a deceased peer) and B. (A.'s alleged widow), claims the peerage as against Y., as the son of A. and C. (A.'s alleged widow). On behalf of X. it is proved that A. had in 1857 married B. in a parish church in England, and died in 1871, leaving X. as their issue. On behalf of X., C. swears that A. contracted a Scotch marriage with her *per verba de præsenti* in 1844, and afterwards cohabited with her in Scotland and elsewhere till 1849, leaving Y. as their issue. Evidence is also tendered for Y. that A. had, *after* his marriage with B. in 1851, declared that C. was his wife and not B. Held,—these declarations were not receivable as admissions against X., since A. was not in the position of a party to the suit, which in this case were the Crown and X. and Y.; and in any case A.'s declarations were made *after* the status or interest of X. had come into existence by the solemn and formal marriage of A. and B. in the face of the church [*Dysart Peer.*, 6 App. Cas. 489, 499-501:—A.'s declarations were also rejected either as part of the *res gestæ* (*ante* 78), or as those of a deceased person relating to Pedigree, *post*, 317].

(C) **PARTNERS, JOINT-CONTRACTORS, CO-TRUSTEES AND OTHER ASSOCIATES.** An admission or representation, made by any partner concerning the partnership affairs and in the ordinary course of its business, is evidence against the firm (Partnership Act, 1890, s. 15); and an admission by one of several joint-contractors concerning the joint-contract, is evidence against the rest, whether sued or suing jointly or severally [Tay. ss. 598-601, 743-54, 789; Ros. N.P. 71; Steph. art. 17; Lindley, Partnership, 7th ed. 148-9; as to admissions by partners *inter se,* see *post,* 245].

Principle. The identity of interest rendering such evidence receivable arises from the principle that persons seised jointly are seised of the whole, and, being seised of the whole, the admission of each is deemed the admission of the other (*Re Whiteley,* 1891, 1 Ch. 558).

There must be a Joint, not merely a Common, Interest. (*a*) Thus, the admissions of partners, joint-contractors and joint-tenants, are receivable against the others; but not those of tenants in common (*Dan* v. *Browne,* 4 Cowen, 483, 492); nor of co-part-owners of a ship, as distinguished from co-partners therein (*Jaggers* v. *Binnings,* 1 Stark, 64; *Brodie* v. *Howard,* 17 C.B. 109). And the admissions of co-legatees, or co-devisees, have been rejected against the rest (*Turner* v. *A.-G.,* Ir. R. 10 Eq. 392, cited *post,* 246, 286; *Shailer* v. *Bumstead,* 99 Mas. 112, 127; Wigmore, s. 1081; 16 Harv. L. Rev. 305); as also those of the several underwriters of a policy (*Lambert* v. *Smith,* 1 Cranch C.C. 361), or of successive indorsees of a promissory note, though it is otherwise as to joint indorsees (Whart. s. 1199 *a,* citing *Painter* v. *Austin,* 37 Penn. 458). And the same has been held as to admissions by the several members of a board of public officers (*Lockwood* v. *Smith,* 5 Day, 309).

Co-representatives. An admission of the receipt of money by one of several trustees, who are personally liable, will bind the others (*Skaife* v. *Jackson,* 3 B. & C. 421); although *aliter* if they are not so liable (*Davies* v. *Ridge,* 3 Esp. 101; and see *Charlton* v. *Durham,* 4 Ch. Ap. 433; *Richardson* v. *Younge,* L.R. 6 Ch. 478; *Jago* v. *J.,* 68 L.T. 654); and an acknowledgment by one trustee will not bind the others under the Statutes of Limitation (*Astbury* v. *A.,* 1898, 2 Ch. 111). As to notice to one of several trustees, see *ante,* 90-1. So, the admissions of an executor, made in his representative character, will bind his co-executors in their representative, though not in their personal, capacity [*Re Macdonald, Dick* v. *Fraser,* 1897, 2 Ch. 181; *Astbury* v. *A., sup.;* and see *Fox* v. *Waters,* 12 A. & E. 43; and *Charlton* v. *Durham, sup.* In the first-mentioned case, Stirling J., remarked that the effect of *Tullock* v. *Dunn,* Ry. & Moo. 416, and *Scholey* v. *Walton,* 12 M. & W. 510, *contra,* was done away with by 9 Geo. IV. c. 14, s. 1, and 19 & 20 Vict. c. 97, s. 14, *post,* 244. In *Peck* v. *Ray,* 1894, 3 Ch. 282, 289, however, Kay, L.J., greatly doubted whether any admission by an executor could be received against his co-executor; see Ros. N.P. 679]. But the admissions of an executor are not receivable against an administrator appointed during the absence of the executor (*Rush* v. *Peacock,* 2 Moo. & Rob. 162; *Robinson's Case,* 5 Rep. 32 b), nor against an administrator *de bonis non* (*Pease* v. *Phelps,* 10 Conn. 62). As to Guardians see *ante,* 238.

Co-defendants, Respondent and Co-respondent. The admissions of co-defendants, merely as such, are not receivable against each other, for there is no issue joined between them, and no opportunity for cross-examination; besides

which the plaintiff might, by joining a friend as defendant, gain an unfair advantage (Tay. s. 754); nor are admissions between co-defendants under O. 32, r. 2, evidence against a plaintiff who is no party to them (*Dodds* v. *Tuke*, 25 Ch. D. 617). Similarly, the admissions of a respondent are not receivable against a co-respondent (*Robinson* v. *R.*, 1 S. & T. 362; *Crawford* v. *C.*, 11 P.D. 150); nor, *a fortiori*, against the petitioner (*Plumer* v. *P.*, 4 S. & T. 257). Nor are those of parties engaged in a joint-tort, or joint-crime, receivable against each other, except to the limited extent noticed *ante*, 92-4; *cp. post*, 269.

Principal and Surety. Declarations by a principal made during the transaction of the business for which the surety is bound, so as to become part of the *res gestæ*, are evidence against the surety; but his mere admissions, subsequently made, are not (Tay, ss. 785-786; Steph. art. 17; Whart. s. 1212), since, as the surety contracts with the creditor, there is no privity between the principal and himself (*Boon* v. *Cooper*, 9 M. & W. 701).

Thus, in an action against a surety upon a bond conditioned for the faithful conduct of a collector, one of the terms of the bond requiring the latter to keep proper books of account, entries made by him in such books in the ordinary course of duty were admitted against the surety, upon the grounds that the books were part of the *res gestæ*, and that the nature and effect of the contract made them evidence (*Abbeyleix Guardians* v. *Sutcliffe*, 26 L.R.Ir. 332, *per* Gibson and Holmes, JJ., *diss.* O'Brien, J.); but confessions of embezzlement made by the collector after his dismissal have been rejected (*Smith* v. *Whittingham*, 6 C. & P. 78). So, where A. guaranteed such goods as B. should send to C. in the way of trade, the admissions of C. that he had received the goods, made after the time of their supposed delivery, are not evidence against A. (*Evans* v. *Beattie*, 5 Esp. 26; *Bacon* v. *Chesney*, 1 Stark. 192). Nor, in the absence of special agreement, is a judgment or award against the principal admissible against the surety (*Exp. Young, Re Kitchen*, 17 Ch. D. 668; *post*, 427). In America, however, the admissions of the surety have been held evidence against both (*Chapel* v. *Washburne*, 17 Ind. 393). As to Statutes of Limitation, see *infra*. Where the debtor or creditor is dead, his declarations against interest may, of course, be received either for or against the surety (*Middleton* v. *Melton*, 10 B. & C. 317; *Davies* v. *Humphreys*, 6 M. & W. 153; *post*, 279-80).

The Admissions must be made during, and in Relation to, the Joint Interest. (*b*) Thus, an admission made by a partner *before* the partnership, is not evidence against his co-partner (*Tunley* v. *Evans*, 2 Dowl. & L. 747; *Catt* v. *Howard*, 3 Stark. 3); nor, generally, is an admission made *after* the dissolution (*Parker* v. *Morrell*, 2 Phill. 453; Tay. ss. 598-599), unless the joint liability continues, in which case the joint interest is deemed to continue also (*id.*; *Pritchard* v. *Draper*, 1 Russ. & Myl. 191). So, bankruptcy (*Re Wolmerhausen*, 38 W.R. 537; Bankruptcy Act, 1914, s. 117), or death (*Turner* v. *A.-G.*, I.R. 10 Eq. 386), will sever the joint interest of the deceased; consequently, in the latter case, the admissions of the survivors will not bind the estate of the deceased (*Atkins* v. *Tredgold*, 2 B. & C. 23); nor, conversely, will those of his representatives bind the survivors (*Slater* v. *Lawson* 1 B. & Ad. 396). Similarly, admissions made by the representatives *before* acquiring that character are not receivable (*Legge* v. *Edmonds*, 25 L.J. Ch. 125; *Fenwick* v.

Thornton, M. & M. 51; Steph. art. 16 *c; Webb* v. *Smith,* Ry. & Moo. 106). The admissions must also relate to the joint business, and not to matters outside its scope (*Jaggers* v. *Binnings,* 1 Stark. 64; *Fox* v. *Waters,* 12 A. & E. 43).

Of what Facts the Admissions are Evidence. The admissions or representations of a partner or joint-contractor are not, except as against himself, receivable to prove the existence of the partnership or joint-interest (*ante,* 90; Tay. s. 753); nor, probably, the nature or extent of the partnership business (Lindley, Partnership, 6th ed., 164-165); nor, the extent of his own authority to bind the firm (*Exp. Agace,* 2 Cox, Eq. 312).

Fraud. Admissions made by one partner in fraud of the firm are receivable against the latter (*Rapp* v. *Latham,* 2 B. & Ald. 795; *Moore* v. *Knight,* 1891, 1 Ch. 547); unless made collusively with the other side (Tay. s. 749; *Farrar* v. *Hutchinson,* 9 A. & E. 641).

Statutes of Limitation. Where actions on simple contracts have become barred by the Statute of Limitations, an acknowledgment or promise to take the case out of the statute must be in writing, signed by the *party chargeable* thereby (9 Geo. IV. c. 14. s. 1), or by his duly authorised *agent* (19 & 20 Vict. c. 97, s. 13); and no joint-contractor, or his personal representative (*ante,* 242), shall lose the benefit of the statute by reason only of any written *acknowledgment* or *promise* signed by any other joint-contractor or his representative (9 Geo. IV. c. 14, s. 1); nor shall any co-contractor or co-debtor (or his personal representative), whether bound jointly, or jointly and severally (or severally only, *Re Wolmerhausen,* 38 W.R. 527), lose the benefit of the statute by reason only of any payment of any principal, interest or other money, by any other co-contractor, &c. (19 & 20 Vict. c. 97, s. 14); even though such payment is made with the knowledge and consent of the co-debtors (*Jackson* v. *Woolley,* 27 L.J.Q.B. 181). As to acknowledgments by co-obligors of bonds, under the Civil Procedure Act, 1833 (3 & 4 Will. IV. c. 42, s. 3), see *Read* v. *Price,* 1909, 2 K.B. 724; and 53 Sol. Jo. 835.

Notwithstanding the above, each *partner* will, at all events *during* the partnership, be presumed, in the absence of evidence to the contrary, to be the agent of the rest for making acknowledgments or part payments so as to deprive them of the benefits of the above statutes (*Goodwin* v. *Parton,* 42 L.T. 568; *Watson* v. *Woodman,* 20 Eq. 721, 730; Lindley, Partnership, 7th ed. 295; *contra,* Tay., 8th ed. ss. 600-601, is probably not now law). Whether such agency will also continue *after* the dissolution is a question of fact determinable by the circumstances of each individual case; thus in *Bristow* v. *Miller,* 11 Ir. L.R. 461, and *Watson* v. *Woodman, sup.,* the agency was held not to have continued; in *Re Tucker,* 1894, 3 Ch. 429, the C.A. held, under the circumstances, that the agency had continued. So, an acknowledgment or promise by one *executor* binds the estate and is sufficient to take the case out of the statute as against his co-executor so far as their representative liability is concerned (*Re Macdonald; Dick* v. *Fraser,* 1897, 2 Ch. 181, *ante,* 242); though it is otherwise as to *trustees* (*Astbury* v. *A.,* 1897, 2 Ch. 111).

Where a *principal and surety* make a joint and several promissory note, part payments by the former will not deprive the latter of the benefit of the statute (*Cockrill* v. *Sparkes,* 1 H. & C. 699). But it is otherwise where the surety's debt arises upon a separate guarantee (*Re Powers,* 30 Ch. D. 291). And the statute does not apply to mortgages of land; so that, payments made

by either principal or surety will keep alive the mortgage debt as against the other (*Re Frisby,* 43 Ch. D. 106); and generally payments by any person entitled to pay will keep the debt alive against all (*Dibb* v. *Walker,* 1893, 2 Ch. 429; *Re Chant,* 1905, 2 Ch. 225).

Admissions by Partners, &c., inter se. Though admissions by partners bind the firm when tendered by *strangers,* they do not necessarily have this effect when tendered *inter se.* Thus, it has been held that, as between themselves, entries in the partnership books made without the knowledge of a partner will, as against him, be inadmissible (*post,* 258). And a similar rule holds as to directors and other members of a company, *inter se* (*id.;* and see *ante,* 92).

EXAMPLES.

Admissible.

(*a*) In an action by A. & B,. as partners, to recover goods alleged to belong to the partnership—an admission by A. that the goods were his sole property, is evidence to defeat the joint claim (*Lucas* v. *Delacour,* 1 M. & S. 249; so, as to admissions by one of several makers of a joint and several promissory note: *Whitcomb* v. *Whiting,* 2 Doug. 652).

(*b*) A. and B. sue C. for a debt due to them when in partnership;—an admission made by A. after the dissolution, that C. had, after the dissolution, paid the debt, is evidence against both to prove such payment (*Pritchard* v. *Draper,* 1 Russ. & Myl. 191).

Inadmissible.

(*a*) A., a seaman, sues B. and C. for wages. B. and C. are part owners of the ship in question, and are also partners in business, though not in the ownership of the ship. An admission by B. concerning the ship is not receivable against C., as it relates to a subject merely of co-part-ownership and not of co-partnership (*Jaggers* v. *Binning,* 1 Stark, 64; see *Fox* v. *Waters, inf.*).

(*b*) A. and B., as mercantile partners, are sued for a joint trespass;—an admission by either that they had committed the trespass, is not evidence against the other, as it does not relate to a partnership matter (see *Fox* v. *Waters,* 12 A. & E. 43, *per* Williams, J.).

A. files a bill in equity against B., C. and D. (as partners) to set aside a bond alleged to have been obtained from him by the false representation of D., who, since the transaction, had ceased to be a partner, and become a bankrupt. D.'s answer to the bill, admitting that he had made the false representation, is not evidence against B. and C., as his interest in the bond had ceased on his bankruptcy (*Parker* v. *Morrell,* 2 Phill. 453).

A. sues B., the widow of C. and administratrix of D., to recover money paid to B. on the assumption that D. was the legitimate child of B. & C. An admission by B. made during D.'s lifetime, *i.e. before* becoming administratrix, that D. was illegitimate, held not evidence for A., although B. was also sole beneficiary and next of kin of D. (*Legge* v. *Edmonds,* 25 L.J.Ch. 125, 141). So, where A., the assignee of B., a bankrupt, sued C., admissions by A. *before* the assignment were rejected [*Fenwick* v. *Thornton,* M. & M. 51, approved, Steph. art. 16 *c,* and by Pollock, C.B., in *Metters* v. *Brown,* 32 L.J. Ex. p. 140; *cp. New's Trustees* v. *Hunting, ante,* 238; *contra, Smith* v. *Morgan,* 2 M. & R. 257, is probably not law]. So, as to admissions by a next friend, made before action brought (*Webb* v. *Smith,* Ry. & Moo. 106).

Admissible.	*Inadmissible.*
	A. (deceased) by will in 1822, leaves his real and personal property to B., C. and D. on trust to pay certain legacies and as to the residue to them absolutely. B. and C. having died, D. claims the property. A declaration made in C.'s will in 1851, that the trust was that A.'s property was to be applied to the wants of the poor of A.'s parish, is not admissible against D. [*Turner* v. *A.-G.*, I.R. 10 Eq. 386, 392:—"One joint-tenant cannot by such declarations destroy the title of another joint-tenant, who was not bound by the alleged trust and never assented to it." As to *Secret Trusts* affecting wills, see fully, *post*, 530-81. C.'s declaration, though admissible against himself as against his proprietory interest, would also not be evidence against D. (*post*, 279)].
	(o) A. & B., as partners, are sued upon a bill of exchange signed in the name of the firm by A., and given in payment of a private debt of A.'s;—an admission by A. that he had B.'s authority to accept the bill is not evidence against P. (*Exp. Agace*, 2 Cox, Eq. 312).

(D) **AGENTS AND REFEREES.** The admissions of an agent made to third persons are receivable against his principal (1) when the agent is expressly authorized to make them; (2) when the agent is authorized to represent the principal in any business and the admissions are made in the ordinary course of such business. [Tay. ss. 602-605; Ros. N.P. 69-71; Steph. art. 17; Whart. ss. 1170-1191. As to proof of agency see *ante*, 89-90, 96-8; and as to acts and representations by agents which are original evidence, and receivable for, as well as against, his principal, see *ante*, 88].

Past Transactions. It is sometimes said that the declarations of an agent are not receivable as to past transactions. This is misleading, and has probably arisen from the common saying that the declarations of the agent must constitute a part of the *res gestæ*. But it has been pointed out that the Latin phrase is here used merely as a compact expression for "the business," regarding which the law identifies the principal and agent, and must not be taken to import that the declarations must form a part of the *res gestæ* in the evidentiary sense of that term; for, so long as they are made concerning the principal's business and in the ordinary course thereof, it is immaterial whether they relate to past or present events (Thayer, 15 Am. L. Rev. 80-81). Of course, if the transaction or business in which the agent is employed is at an end, his subsequent admissions regarding it will be rejected (*Peto* v. *Hague*, 5 Esp. 134; *Dwyer* v. *Larkin*, *post*, 248); as will his admissions regarding matters which are not properly within the scope of the employment.

Reports to Principal. An agent's reports to his principal are not evidence for the latter (*Turner* v. *Hutchinson*, 3 L.T. 815; *Splents* v. *Lefevre*, 15 *id.* 114, 117), nor against him as admissions (*Re Devala Co.*, 22 Ch. D. 593; *Re Djambi Rubber Estates*, 107 L. T. 631, 632; *Swan* v. *Miller*, 1919, 1 I.R. 151, C.A.; and cases *inf.*). *The Solway*, *post*, 251, *contra*, seems not sustainable, see *Admiralty Comms.* v. *Aberdeen Co.*, 1909, S.C. 335, Ct. of Sess.; *Swan* v. *Miller*, *sup.*, and *post*, 251. This, in an action for specific perform-

ance, an agent's letter to his principal: "S. called on me to-day to say he had bought the premises at £4,750 plus £50 ground rent," was rejected either as evidence of a concluded contract or as a memo. thereof under the Statute of Frauds (*Swan* v. *Miller, sup.*). If, however, the principal has adopted the statements in the report they will be evidence against him (*Re Djambi Rubber Estates, sup.*); and if he has *replied* to the agent, the letters of the latter will be admissible as explanatory of the statements of the former (*Coates* v. *Bainbridge,* 5 Bing. 58). As to reports by public or judicial officers to superiors, see *ante,* 194-6; *post,* 473.

The following are some of the chief cases in which principals may be affected by the admissions of their agents:

Corporations and their Officers. The *Directors* of a company may make admissions on its behalf when acting for it in the course of a transaction with a third person (*Re Devala Co. sup.; Meux's Exors. Case,* 2 De G.M. & G. pp. 533, 535-6; but their speeches at a shareholders' meeting (*Components Tube Co.* v. *Naylor,* 1900, 2 I.R. 1, 73; *Re Devala Co., sup.*), or their admissions at a board meeting of less than the requisite number of members (*Ridley* v. *Plymouth Banking Co.* 2 Ex. 711), are not so receivable. The *Secretary* of a company cannot, unless acting under the express orders of the directors, make admissions against the company, even as to the receipt of a letter (*Bruff* v. *G.N. Ry.,* 1 F. & F. 344; *Burnside* v. *Dayrell,* 3 Ex. 224; and see *ante,* 99). Nor do admissions made by *Shareholders* bind the company for any purpose whatever (*ante,* 92). The *Manager* of a banking company may make admissions against the bank as to its practice in making loans to customers (*Simmons* v. *Lond. J.-S. Bank* 62 L.T. 427). The *Surveyor* of a corporation who has the superintendence of its buildings may make admissions as to the pulling down of the buildings (*Peyton* v. *St. Thomas's Hospital,* 4 Mann. & Ry. 625 *n*); but his report to the corporation as to lands about to be purchased by it is not evidence, either of the truth of the facts stated, or to explain the resolutions or letters of the corporation (*Cooper* v. *Metr. Bd. of W.,* cited *ante,* 69); nor is a report as to its property, furnished by the engineer or other expert of a mining company, even though read out at a general meeting, evidence against the company in action for rescission of contract to take shares, unless the statements therein are adopted by the board (*Re British Burmah Co., Exp. Vickers,* 56 L.T. 815; *Re Djambi Rubber Estates,* 107 L.T. 631, C.A.); nor, in an action against a Docks Co. for loss of goods, are reports made either by its own officials, or by a superintendent of police to the docks police, admissible against the Co. (*Lamson* v. *London Docks,* 17 T.L.R. 663). The admissions of a *Waywarden* that a certain road is a highway, and that the parish is liable to repair it, are evidence against a highway board (*Loughboro' Board* v. *Curzon,* 55 L.T. 50). A *Stationmaster* may make admissions against a railway company as to property lost at his station when subsequently, in the course of his duty, giving information to the police as to such loss (*Kirkstall* v. *Furness Ry.,* L.R. 9 Q.B. 468). So, where, in reply to a complaint by the plaintiff, the agent of a second railway line, over which by arrangement with the defendant company the goods had to pass, wrote to the plaintiff stating that the defendant's *Traffic manager* had written to him (the agent) making certain statements about the delay, the letter of this agent was read against the defendant company as an admission, and also as primary evidence of the traffic manager's letter (*Ruddy* v. *Midland G.W. Ry.,*

8 L.R.I. 224, 237); and the admissions of a *coachman* as to the loss of a parcel entrusted to him have been received against the coach proprietor (*Mayhew* v. *Nelson*, 6 C. & P. 58; see also *Stiles* v. *Cardiff S.N. Co.*, 33 L.J.Q.B. 310; and for similar American decisions, Whart. s. 1182). Admissions, however, made by a *Night inspector* as to property lost a week before when in his charge have been rejected, though made in answer to inquiries by the owner (*G. W. Ry.* v. *Willis*, 18 C.B.N.S. 748; *sed qu.*); as also those by a railway servant in charge of cattle, as to the trains by which they would be forwarded (*Tobin* v. *L. & N.W. Ry.*, 1895, 2 I.R. 22, 32). In an action against a company for injury by a dog, admissions as to its ferocious character made by *servants* of the company who had known the dog, are not receivable against the company, though *aliter* if made by the manager of the business at the place, or by the person who had charge of the yard, or even of the dog (*Stiles* v. *Cardiff S.N. Co.*, *sup.*).

Contractor and Workman. In an action against a contractor for injury sustained by his workman through the fall of a bucket, an admission by a fellow-workman immediately after the accident and in answer to a question by the former as to why he had not hooked the bucket securely, that "we were in a hurry," is not evidence against the contractor (*Johnson* v. *Lindsay*, 53 J.P. 599; *cp. The Schwalbe*, and *Tustin* v. *Arnold*, *ante*, 71-2, and *Tucker* v. *Oldbury*, *ante*, 240).

Trader and Shopman. The admissions of a shopman are evidence against his master as to matters within the ordinary course of business (*e.g.* the receipt of shop goods), but not as to a transaction outside the usual business (*Garth* v. *Howard*, 8 Bing. 451, where the admission of a pawnbroker's assistant as to a loan made on *special* terms was rejected; and see *Schumack* v. *Lock*, 10 J. B. Moore, Rep. C.P. 39; *Clifford* v. *Burton*, 1 Bing. 199, and *Meredith* v. *Footner*, 11 M. & W. 202, *inf.*). So on a charge against a publican of selling liquor to a drunken person, admissions as to supplying the liquor made by the publican's assistant when testifying at an inquest, were rejected (*Dwyer* v. *Larkin*, 39 Ir. L.T.R. 40).

Landlord and Agent. The admissions of a land-agent or rent-collector, though evidence to prove the receipt of rent, are not receivable as to his landlord's title (*Ley* v. *Peter*, 3 H. & N. 101), nor as to the ownership of a disputed fence (*Henniker* v. *Howard*, 90 L.T. 157). Books kept by a mutual agent of landlord and tenants are, however, admissible against both (*Weller* v. *Stone*, 54 L.J. Ch. 497).

Consignor and Consignee. The admissions of a consignor, suing a shipowner for negligence in the carriage of goods, are admissible to affect a consignee substantially interested in the result (*Bauerman* v. *Radenius*, 7 T.R. 663). And *quære*, whether, when goods are consigned by a manufacturer to an agent in England for shipment and sale in a distant country, it may not be taken as an implied term of the agreement by the consignor, that the *Account sales* rendered by the agent's foreign correspondent shall be good *primâ facie* evidence of the amount realised by the sale (*Smith* v. *Blakey*, L.R. 2 Q.B. 326; *cp. ante*, 10); but in a criminal trial, *invoices* from abroad are no evidence of the truth of their contents (*R.* v. *Barker*, 11 Cr. App. R. 191).

Husband and wife. A wife, merely as such, cannot affect her husband by her admissions; though the latter may, of course, constitute her his agent for

that purpose either expressly or impliedly. Thus, where a husband allowed his wife to conduct the business of his shop in his absence, her admissions in the ordinary course of such business—*e.g.* as to the receipt of shop goods, or by offering to pay for them—are evidence against him; though not her admissions outside the scope of such business—*e.g.*, as to the amount of the shop rent, or other terms of the tenancy (*Clifford* v. *Burton, sup.; Meredith* v. *Footner, sup.*). So, where the business is such as is usually transacted by women, a wife's admission will be received against her husband—*e.g.* an admission that she had agreed to pay 4*s.* a week for the nursing of her child [*Anon.*, 1 Stra. 527; and see generally, Tay. ss. 766-771; Ros. N.P. 71-2; Whart. ss. 1214-1220]. On the other hand, a wife's admission has been rejected to prove a slander by her husband (*Tait* v. *Beggs*, 1905, 2 I.R. 525).

Client, Solicitor, Counsel, and Witnesses. In *civil cases* a solicitor has implied authority to make admissions against his client during the actual progress of litigation, either for the purpose of dispensing with proof at the trial, when they are generally conclusive (*Elton* v. *Larkins*, 1 M. & Rob. 196; *Doe* v. *Bird*, 7 C. & P. 6; *Langley* v. *Oxford*, 5 L.J. Ex. 166; *ante*, 19); or incidentally as to any of the facts of the case, when they are *primâ facie* evidence merely (*Holt* v. *Squire*, Ry. & M. 282). Such admissions may be made in court or chambers, or by documents or correspondence connected with the proceedings. Thus, an undertaking signed by their solicitor to appear for A. and B. "as joint-owners of the sloop in question," is evidence of such joint-ownership (*Marshall* v. *Cliff*, 4 Camp. 133; *Wagstaff* v. *Wilson*, 4 B. & Ad. 339); so, a notice, served by the defendant's solicitor, to produce "all documents relating to the bill accepted by the said defendant" is *primâ facie* evidence of the acceptance (*Holt* v. *Squire*, Ry. & M. 282). And admissions in a letter by a defendant's solicitor showing that his client has no defence, may justify immediate judgment (*Ellis* v. *Allen*, 1914, 1 Ch. 904). The solicitor also has implied authority *after*, but not *before*, the issue of the writ, to compromise a claim on behalf of his client (*Macaulay* v. *Polley*, 1897, 2 Q.B. 122, C.A.). As to statements by solicitors in judicial proceedings, see *Haller* v. *Worman*, 3 L.T.N.S. 741, *inf.* But admissions made by a party's solicitor *before* litigation has commenced (*Wagstaff* v. *Wilson*, 4 B. & Ad. 339; *Ley* v. *Peter*, 3 H. & N. 101, 111); or during litigation, but in *mere conversation* (*Petch* v. *Lyon*, 9 Q.B. 147; *Watson* v. *King*, 3 C.B. 608); or to a *third person* and not to the opposite party (*Wilson* v. *Turner*, 1 Taunt. 398);—are not evidence against their clients. So, although a solicitor's admission on the trial of an action is evidence against his client on a new trial of the same action (*Elton* v. *Larkins*, 5 C. & P. 385; *Doe* v. *Bird*, 7 *id.* 6), yet it seems an admission by him made in one action cannot be used against the client in another, being regarded as a mere waiver of proof (*Blackstone* v. *Wilson*, 26 L.J. Ex. 229; *Doe* v. *Ross*, 7 M. & W. 102, 122; *ante*, 19). So, admissions by a solicitor in fraud of his client are not evidence against the latter (*Williams* v. *Preston*, 20 Ch. D. 672).

The solicitor on the record will, except in the case of death or discharge, remain the solicitor until the final conclusion of the cause or matter, whether in the High Court or Court of Appeal (O. 7, r. 3; *Callow* v. *Young*, 55 L.T. 543; *De la Pole* v. *Dick*, 29 Ch. D. 351; *R.* v. *Oxfordshire*, 1893, 2 Q.B. 149). When a solicitor is already constituted in the cause, admissions made by his

managing clerk or *agent* are in general receivable as his own, not only against the client (*Taylor* v. *Willans,* 2 B. & Ad. 845, cited *ante,* 156; Tay. 782), but against the solicitor in favour of the client (*Ashford* v. *Price,* 3 Stark. 185). This rule, however, is not invariable, since the client, being entitled to the skill and judgment of his solicitor in the conduct of his business, is not bound to be satisfied with those of a clerk. Thus, though the client or solicitor has authority to withdraw or postpone a sheriff's sale under a *fi-fa,* this does not extend to a managing clerk left in charge in the absence of the solicitor (*Whyte* v. *Nutting,* 1897, 2 I.R. 241). As to compromises by a solicitor, see *Re Newen,* 1903, 1 Ch. 812; *Re Roberts,* 1905, 1 Ch. 704.

In *criminal cases,* as we have seen, admissions for the purpose of dispensing with proof are not generally receivable (*ante,* 19): nor has a solicitor implied authority, as in civil cases, to affect his client by admissions of fact incidentally made. In order to make a party responsible for his solicitor's letters they must be shown to have been written in pursuance of specific instructions from the client, and not merely in consequence of interviews with, or of general instructions from, him (*ante,* 98).

Counsel. Admissions by counsel stand upon a narrower footing, for while the attorney represents the client throughout the cause, the former represents him only upon the particular occasion for which he is briefed [*Richardson* v. *Peto,* 1 M. & G. 896; *R.* v. *Greenwich,* 15 Q.B.D. 54; Ros. N.P. 284; Tay. s. 784]. Subject to this, such admissions are, in civil cases, conclusive if made for the purpose of dispensing with proof at the trial (*Urquhart* v. *Butterfield,* 37 Ch. D. 357; *cp.,* however, *Barnes* v. *Merritt, ante,* 183), but are otherwise merely *primâ facie* evidence against the client. Thus, a special case signed by counsel on both sides is evidence of the facts stated on a new trial (*Van Wart* v. *Wolley,* Ry. & M. 4); and indorsements on their own briefs by two opposite counsel are a sufficient "submission" under the Arbitration Act, 1889 (*Aitken* v. *Batchelor,* 68 L.T. 530); so, statements made for the purpose of influencing a judge's decision in chambers, whether made by counsel, solicitor, or the latter's clerk, are evidence against the client on the trial of the action (*Haller* v. *Worman,* 2 F. & F. 165; affirmed, 3 L.T.N.S. 741); and where a case is so conducted by counsel as to lead to the inference that a certain fact is admitted by him, the Court or jury may treat it as proved (*Stracy* v. *Blake,* 1 M. & W. 168; *Doe* v. *Roe,* 1 E. & B. 279), not only for the particular issue, but for all purposes, and for the whole case (*Bolton* v. *Sherman,* 2 M. & W. 403). So, where counsel in his opening states, though he does not subsequently prove, his client to be in possession of a given document, this will, after notice to produce, admit secondary evidence thereof from his adversary (*Duncombe* v. *Daniell,* 8 C. & P. 222; approved in *Haller* v. *Worman, sup.; contra, Machell* v. *Ellis,* 1 C. & K. 682, in which Pollock, C.B., declined to take the facts upon the opening of counsel). Whether admissions made by counsel in his address to the jury in the presence of, and not dissented from, by his client, are evidence against the latter on a new trial of the same action, seems doubtful; in *Colledge* v. *Horn,* 3 Bing. 119, Burrough, J., considered they were, but the rest of the Court declined to express an opinion; see *R.* v. *Coyle,* 7 Cox, 74; *Doe* v. *Ross,* 7 M. & W. 102; *Haller* v. *Worman, sup.;* Tay. s. 784; and Statements in a Party's Presence, *post,* 257. On the other hand, admissions made by counsel out of court in conversation with the

solicitor for the opposite side are not evidence against his client (*Richardson* v. *Peto*, 1 M. & G. 896). The general authority of counsel in civil cases embraces the complete control of the suit and the mode of conducting it—*e.g.* withdrawing the record or a juror, calling no witnesses, assenting to a verdict (*Matthews* v. *Munster*, 20 Q.B.D. 141), agreeing not to appeal (*Re West Devon Mine* 38 Ch. D. 51), or to compromise any matter in dispute (*Ellender* v. *Wood*, 32 S.J. 628; *Alliance Syndicate* v. *McIvor*, 7 T.L.R. 599; *Kempshall* v. *Holland*, 14 R. 336). As to avoidance of such compromise for mistake, surprise, injustice, &c., see *Harvey* v. *Croydon Union*, 26 Ch. D. 249; *Lewis* v. *L.*, 45 Ch. D. 281; *Neale* v. *Gordon Lennox*, 1902, A.C. 465; *Shepherd* v. *Robinson*, 35 T.L.R. 220, C.A.).

Pleadings, although admissible in other actions, to show the institution of the suit and the nature of the case put forward, are regarded merely as the suggestion of counsel, and are not receivable against a party as admissions (*Boileau* v. *Rutlin*, 2 Ex. 665; Tay. ss. 821-823, 1753); unless sworn, signed, or otherwise adopted by the party himself (Tay. s. 1753; *Marianski* v. *Cairns*, 1 Macq. H.L. 212; *R.* v. *Walker*, 1 Cox, 99; *R.* v. *Simmonds*, 4 Cox, 277). And, *particulars* can only be taken as admissions in respect of the issues on which they are delivered (*Miller* v. *Johnson*, 2 Esp. 602; *Burkitt* v. *Blanshard*, 3 Ex. 89; Ros. N.P. 89).

Affidavits and Depositions of Witnesses. So, generally, the depositions, or *vivâ voce* testimony, of a party's witnesses are not receivable against such party in subsequent proceedings as admissions. But affidavits or documents which a party has expressly *caused to be made* or *knowingly used as true*, in a judicial proceeding, for the purpose of proving a particular fact, are evidence against him in subsequent proceedings to prove the same fact, even on behalf of strangers; and it is immaterial, in such a case, whether the documents are originals or copies (*Evans* v. *Merthyr Tydfil Council*, 1899, 1 Ch. 241; *Brickell* v. *Hulse*, 7 A. & E. 454; *Gardner* v. *Moult*, 10 A. & E. 464; *Boileau* v. *Rutlin*, 2 Ex. 665; *Richards* v. *Morgan* 4 B. & S. 641; *Pritchard* v. *Bagshaw*, 11 C.B. 459; *Simmonds* v. *Lond. J.-S. Bank*, 62 L.T. 427; *White* v. *Dowling*, 8 Ir. L.R. 128; and see *post*, 257, 261-2).

Shipowner and Ship's Officers. The *captain* of a ship may make admissions against the owners either in the official or ship's logs, in the protest, or perhaps in letters to, or conversations with, third persons (*The Midlothian*, 15 Jur. 806; *The Manchester*, 1 W. Rob. 63; *The Europa*, 13 Jur. 856). Thus, a statement by the captain of one vessel to the captain of another with which she had been in collision, that "it was a bad job, but could not be helped, as the mate was too close to the other vessel before he could see her," is evidence against the owners, although the captain was not on deck at the time, and only spoke from *hearsay* (*The Actæon*, 1 Spinks, E. & A. 176). Hannen, J., even admitted a letter from the captain to the owners, containing an account of a collision, on the ground that it was part of his duty to report to them all the circumstances of the voyage, though *opinions* expressed in the letter were rejected (*The Solway*, 10 P.D. 137; *sed qu.*; and this case has been disapproved, *ante*, 246).

The *officers and crew* cannot make admissions against the owners, except in the official, ship's, or engineer's log (*The Solway, sup.*; *The Earl of Dumfries*, 10 P.D. 31); nor can the *pilot* (*The Schwalbe*, and *The Mellona*,

cited *ante,* 71; *The Lord Seaton,* 9 Jur. 603). Entries in the log or protests, however, are only evidence against, and not in favour of, the owner, or to refresh memory or contradict the witness who has made them [*The Singapore,* L.R. 1 P.C. 378, cited *post,* 352; *Christian* v. *Coombe,* 2 Esp. 489; *The Earl of Dumfries, sup.; The Sociedade,* 1 W. Rob. 303, 311; Marsden on Collisions, 6th ed., 289; and *cp.* Public Registers, *post,* chap. xxx].

So, depositions on oath before the Receiver of Wrecks under the Merchant Shipping Act, 1854, s. 448 (repealed by the M. S. Act, 1876, s. 45), made by the captain and crew, have been rejected as evidence either for or against the owners, whether the deponents were living or deceased at the time of the trial, and although such depositions were, by s. 449 of the former Act, expressly made evidence of the truth of the matters stated [*The Little Lizzie,* L.R. 3 A. & E. 56, on the ground that the depositions were not subject to cross-examination; *The Solway, sup.; The Henry Coxon,* 3 P.D. 156; and see *Nothard* v. *Pepper,* 17 C.B.N.S. 39; *cp. post,* 361]. As to the admissibility of Depositions, &c., under The Merchant Shipping Act, 1894, ss. 690-1, 695, and Workmen's Comp. Act, 1906, s. 7, see *post,* 502.

Referrer and Referee. When a party refers to a third person for information or an opinion on a given subject, the information or opinion so given is receivable against the referrer as an admission [Tay. ss. 760-765; Ros. N.P. 69; Steph. art. 19; Whart. ss. 1190, 1191]. And it will be conclusive where there has been an agreement to refer, or where the position of the party tendering the evidence has been altered thereby.

It is immaterial whether the disputed matter be one of law or fact; whether the referee has, or has not, any peculiar knowledge on the subject; or whether the reference is made expressly, or by conduct evincing an intention to rely on the statement as correct (Tay. ss. 760-763). Thus, in an action against executors, the defendants having written to the plaintiff that if she wished for further information as to the assets, it could be obtained from a certain merchant—the replies of the merchant were held receivable against the executors (*Williams* v. *Innes,* 1 Camp. 364). In an action for goods sold and delivered, a statement by the defendant that he would pay for them if the plaintiff's carman would say he had delivered them, and the answer of the carman asserting the delivery, are evidence of that fact against the defendant (*Daniel* v. *Pitt,* 1 Camp. 366 *n*). And where A. agrees to admit a claim, provided B. will make an affidavit in support of it, B.'s affidavit is evidence against A. (*Lloyd* v. *Willan,* 1 Esp. 178). The question being whether a horse in the defendant's possession was identical with one lost by the plaintiff, and the latter having stated that if the former would swear the horse was his own he might keep it, the defendant's statement on oath that the horse was his was received as evidence, though not conclusive, against the plaintiff (*Garnet* v. *Ball,* 3 Stark. 160; *Sybray* v. *White,* 1 M. & W. 435). So, A. and B. having agreed to abide by the decision of a barrister on a disputed question of title, the opinion so given is evidence against both, although it might be invalid as an award (*Downs* v. *Cooper,* 2 Q.B. 256; *Price* v. *Hollis,* 1 M. & S. 105; *Sybray* v. *White, sup.*). And if a party in his examination refers to the testimony of another witness taken in his hearing, such testimony becomes evidence against him of the truth of the statements, or as explanatory of his own testimony, according to the manner in which the reference is made (3 Russ. Cr., 6th ed. 525, *note* (*e*)).

The same rule applies to *Criminal cases.* Thus, where the accused told a constable that his wife would make out a list of certain property, a list afterwards made out by her was held evidence against her husband (*R.* v. *Mallory,* cited *post,* 262). Here, the list was handed to the constable in the husband's presence, and Ld. Coleridge, C.J., expressly refrained from giving an opinion upon what would have been the effect of the prisoner's absence. But the accused's absence will not exclude the evidence; and where he had asked for certain enquiries to be made, facts elicited in direct answer thereto, although not further facts, or mere hearsay, are evidence against him (*R.* v. *Gray,* 6 Cr. App. R. 242; *R.* v. *Campbell,* 8 *id.* 75; *R.* v. *Westwood,* 8 *id.* 273, 280).

(E) **MISCELLANEOUS CASES. Bankrupt, Trustee, and Creditors.** The admissions of a debtor made *before* his bankruptcy are receivable to prove the petitioning creditor's debt (*Coole* v. *Braham,* 3 Ex. 183; *cp. ante,* 215); and his recitals in a deed are evidence against the trustee in bankruptcy when the latter resists the deed on grounds open to the bankrupt himself, for there he is identified in interests with him, but not when he resists on grounds that the bankrupt could not set up (*Re Holland, Gregg* v. *Holland,* 1902, 2 Ch. 360, 379-80). And the rule that a trustee is bound by the admissions of the debtor made before bankruptcy is subject also to the exercise of the trustee's power to admit or reject proofs of debt (*London and Westminster Bank* v. *Button,* 51 Sol. Jo. 466). Admissions made *after* bankruptcy, however, are not evidence against either the trustee or the creditors, because of the danger of fraud (Tay. s. 759; *Exp. Revell, Re Tollemache,* 13 Q.B.D. 720; *Exp. Edwards, Re Tollemache,* 14 *id.* 415; *Re Bottomley,* 84 L.J.K.B. 1020). So, his answers on public examination are inadmissible even in subsequent stages of the same bankruptcy, against all parties other than himself (*Re Brunner,* 19 Q.B.D. 572); and even against himself when sued or suing in a representative capacity (*New's Trustee* v. *Hunting,* 1897, 2 Q.B. 19). The depositions of a bankrupt, however, taken upon a private examination and relating to property claimed by a third person, were received against the latter after notice both of the examination and of the intention to use such depositions against him had been given (*Re Gavacan,* 1894, 1 I.R. 183, distinguishing *Re Brunner, sup.*). Depositions under the Companies (Consolidation) Act, 1908, s. 115, are receivable as admissions against the deponent, but not against others (*Re Norwich Equitable Co.,* 27 Ch.D. 515, decided under the Companies Act, 1862, s. 115); and in *Winding-up* proceedings, the verified notes of the depositions of officers of a company taken on their public examination under the Companies (Winding-up) Rules, 1909, r. 76, are admissible, on a misfeasance summons, against any respondent thereto who was, or might have been, present at such examination, provided due notice has been given of the parts of the examination intended to be used against him, and that the deponent is produced for cross-examination (*Re London & General Bank,* 63 L.J.Ch. 853; *post,* 502).

As to depositions by deceased witnesses, in bankruptcy, see *post,* 502.

Sheriff, Undersheriff, and Bailiff. The admissions of an undersheriff in his official capacity are evidence against the sheriff; and the relationship between them being that of principal and deputy (or *quasi*-principal), and not principal and agent, it is immaterial to inquire into the scope of the deputy's

authority, for no action lies against him (*Snowball* v. *Goodricke*, 4 B. & Ad. 451; *Jacobs* v. *Humphrey*, 2 C. & M. 413; *Scott* v. *Marshall*, 2 Cr. & J. 238; *Scarfe* v. *Halifax*, 7 M. & W. 288.) The *bailiff*, however, not being the general officer of the sheriff, it is necessary to show his agency in the particular instance, when his admissions will be receivable against the latter in the ordinary way (*North* v. *Miles*, 1 Camp. 389; *Bowsher* v. *Calley*, *id.* 391 *n*; Ros. N.P. 1175).

In actions by execution creditors against sheriffs for not executing process against debtors, the debtor's admissions of the debt are evidence against the sheriff in the same way as they are receivable to prove the petitioning creditor's debt in bankruptcy (*Coole* v. *Braham*, cited, *ante*, 241).

Bill of Sale holder and Execution Creditor. In interpleader issues the creditor being considered to claim through the debtor, the latter's admissions are receivable against the creditor, provided they qualify or affect the debtor's title to the goods, otherwise not (*id.*; *Willies* v. *Farley*, 3 C. & P. 395).

Arbitrator and Parties. The admissions of an arbitrator as to his own misconduct in a reference are not receivable against a party to the proceedings, unless made in the latter's presence (*Re Whiteley*, 1891, 1 Ch. 558).

CHAPTER XX.

STATEMENTS IN THE PRESENCE, AND DOCUMENTS IN THE POSSESSION, OF A PARTY.

STATEMENTS made in the presence and hearing of a party, and documents in his possession, or to which he has access, are evidence against him of the truth of the matters stated, if by his answers, conduct, or silence he has acquiesced in their contents.

[Tay. ss. 809-816; Best, ss. 574, 575; Ros. N.P. 64-65; Ros. Cr. Ev. 13th ed. 49-50; Russ. Cr., 7th ed. 2199-2204; Steph. art. 8; Gulson, ss. 486-7; Wigmore Ev. ss. 1071-87; Chamberlayne Ev. ss. 1392-1438. And a party may, on similar grounds, be affected by the acquiescence of his *Agents* or others for whose admissions he is responsible (*Haller* v. *Worman*, 3 L.T. N.S. 741; *Worth* v. *Brown*, *ante*, 96)].

Principle. It is commonly said that statements made in the presence and hearing of a party are evidence against him, but that those made in his absence or behind his back are not [*R.* v. *Gibson*, 18 Q.B.D. 537, 540, *per* Ld. Coleridge C.J.,—"It is admitted that the statement was not made in the prisoner's hearing and therefore could not legally be given in evidence against him; *R.* v. *Osborne*, 1905, 1 K.B. 551, 558,—"In all ordinary cases the principle must be observed which rejects statements made by anyone in the prisoner's absence; *cp. R.* v. *Wainwright*, 13 Cox 171; *R.* v. *Pook*, *id.* 172 *n;* Powell, Ev. 9th ed. 68-95]. As tests of admissibility, however, these propositions require some qualification. *Statements in presence.* When statements made in a party's presence are tendered against him as *original evidence, e.g.,* as constituting an offer or acceptance in a case of contract; or as introductory to, or explanatory of, his conduct; or as showing his knowledge or notice of the facts stated;—they are admissible, irrespective of their truth or falsity, as being in issue or relevant, *per se.* But when tendered against him as evidence of the *truth* of the matter asserted, *i.e.,* as hearsay admissible by exception, they are only receivable if, and so far as, he has, by his speech, silence or conduct, admitted their accuracy. [*R.* v. *Christie*, 1914, A.C. 545, 554, 559-60, 563-6, qualifying *R.* v. *Norton*, 1910, 2 K.B. 496; *R.* v. *Curnock*, 111 L.T. 816; 10 Cr. App. R. 207, explaining *R.* v. *Christie*, *sup.;* see also *R.* v. *Mitchell*, 17 Cox 503, 508; *R.* v. *Smith*, 18 *id.* 470, disapproved in *R.* v. *Thompson*, 4 Cr. App. R. 45; *Devonshire* v. *Neil*, 2 L.R.I. 132, 158.] *Statements in Absence.* On the other hand, statements which have been made behind the back of a party and which, for all he knows, may have been fabricated, misreported or made under circumstances wholly altering their effect, but which he has no means of contradicting, explaining, or testing by cross-examination, are, on grounds

of fairness, generally excluded for whatever purpose tendered. But to this rule there are several exceptions. Thus, statements which are part of the *res gestæ*, or which express the symptoms, or state of mind, of the declarant, or constitute complaints, or are inconsistent with a witness's subsequent testimony, are admissible as *original evidence* (*i.e.*, irrespective of their truth or falsity), notwithstanding that they were made in the absence of the party against whom they are offered. And even when statements so made are tendered as evidence of the *truth* of the matters asserted, they will still be admissible if falling within any of the recognized *exceptions to the hearsay rule*. Thus, declarations by deceased persons made against interest, in course of duty, as to public rights, pedigree or homicide, or declarations made in public documents, are all admissible to prove the truth of the facts stated, notwithstanding that they were made in the absence of the party affected thereby.

STATEMENTS. Reply, Denial, Silence. When statements made in a party's presence have been *replied to*, they will be evidence against him of the facts stated to the extent that his answer directly or indirectly admits their truth (*R.* v. *Christie, sup.*; *R.* v. *Norton, sup.*); while when his reply is a *denial*, the statements, though admissible as introductory to the reply will, in general, afford no evidence against him of the truth of the facts stated (*R.* v. *Curnock*, 112 L.T. s. 16, explaining *R.* v. *Christie, sup.*; *R.* v. *Thompson*, 4 Cr. App. R. 45, 47; *R.* v. *Norton*, 1910, 2 K.B. 496; *post*, 259-60), but may, on the contrary, even be evidence in his favour (*R.* v. *Ellis*, 1910, 2 K.B. 746, 755, C.A.; *R.* v. *Christie*, 1914, A.C. 545, 560). A mere denial, however, will not as a matter of *law* exclude such statements, for the denial may be given in such a manner and under such circumstances that the jury may disbelieve it and infer an acknowledgment; so, *e.g.* if, being charged with an assault, he denies the charge, but afterwards pleads self-defence (*R.* v. *Christie, sup.*, at pp. 554, 560). Inasmuch, therefore, as a denied statement will generally be of little value either for or against the accused, but may prejudice him quite disproportionately with the jury, it is a *rule of practice* that the judge should, if he is satisfied that an acknowledgment cannot reasonably be inferred, either exclude the evidence, or, if it be given, caution the jury as to its true effect (*R* v. *Christie, sup.*, at pp. 554-5, 560, 564; *R.* v. *Smith*, 11 Cr. App. R. 229, 230). Where the evidence appears on the depositions the former course seems the more satisfactory. Where it does not appear on the depositions, it has been suggested that the fact only, but not the contents, of the statement should be given in the first instance together with the answer, when if the judge thinks an admission may be inferred, the contents of both should be received; otherwise both should be excluded [*R.* v. *Norton*, 1910, 2 K.B. 496, 500; approved on this point as a rule of practice, though not one of strict law, in *R.* v. *Christie, sup.*, at p. 555].

So, a party's *silence* will render statements made in his presence (or hearing only, *Neile* v. *Jackle*, 2 C. & K. 709) evidence against him of their truth, provided he is reasonably called on to reply thereto (*Wiedemann* v. *Walpole*, 1891, 2 Q.B. 534, 539, C.A.; *Richards* v. *Gellatly*, L.R. 7 C.P. 127, 131; *cp. R.* v. *Tate*, 1908, 2 K.B. 680, 683). And even where the matter is not within his knowledge (*Hayslep* v. *Gymer*, cited *ante*, 59; *Price* v. *Burva*, 6 W.R. 40; *R.* v. *Cox* 1 F. & F. 90; *R.* v. *Mallory*, 15 Cox, 458), or the statements are not directly addressed to him (*R.* v. *Cox*, and *R.* v. *Mallory*, *sup.*); or are made by persons not called as, or competent to be, witnesses

(Russ. Cr. 7th ed., 2202), the evidence is strictly admissible, although its weight may be slight.

But when the circumstances are such that a reply cannot properly be expected, the party's silence will afford no inference of assent. Thus, the officious observations of a mere stranger may often best be rebuked in this manner (*Child* v. *Grace,* 2 C. & P. 193; *Lucy* v. *Mouflet,* 5 H. & N. 229; *Weidemann* v. *Walpole, sup.*). And statements addressed to a party when he is ignorant of the language, asleep, intoxicated, deaf (*Wright* v. *Tatham,* 5 C&F. pp. 701, 722), dying (*R.* v. *Mitchell,* 17 Cox, 503, 508), has for a proper purpose promised to keep silent (*Slattery* v. *People,* 76 Ill. 217), or is attending divine service (*Johnson* v. *Trinity Church,* 11 Allen, 113), are inadmissible. So, statements made in a party's presence in the course of judicial proceedings are not generally receivable against him merely on the ground that he did not deny them, for the regularity of such proceedings prevents the free interposition allowed in ordinary conversation (*R.* v. *Turner,* 1 Moo. C.C. 347; *R.* v. *Mitchell, sup.; R.* v. *Kelly,* 64 J.P. 84; see *Marsh* v. *Darley,* 1914, 3 K.B. 1226, 1233 C.A., *per* Kennedy, L.J.). Even here, however, cases may occur in which the refusal of a party to repel a charge made in a court of justice (*Simpson* v. *Robinson,* 12 Q.B. 511), or to cross-examine or contradict a witness (*R.* v. *Coyle,* 7 Cox, 74), or to reply to an affidavit (*Freeman* v. *Cox,* 8 Ch.D. 148; *Hampden* v. *Wallis,* 27 Ch.D. 251; *Hollis* v. *Burton,* 1892, 3 Ch. 226), may afford a strong presumption that the imputations made against him are correct.

DOCUMENTS. Documents which are, or have been, in the possession of a party will, as we have seen, generally be admissible against him as *original* (*circumstantial*) *evidence* to show his knowledge of their contents (*ante,* 145-8, 151-3), his connection with, or complicity in, the transactions to which they relate (*ante,* 93, 138, 142-3), or his state of mind with reference thereto (*ante,* 154-6). They will further be receivable against him as *admissions* (*i.e.,* exceptions to the hearsay rule) to prove the *truth* of their contents if he has in any way *recognized, adopted* or *acted* upon them. So, as we have seen, documents which a party has *caused to be made* or *knowingly used as true* in a judicial proceeding to prove a particular fact, are admissible against him in subsequent proceedings to prove the same fact, even on behalf of strangers (*ante,* 251). And documents furnished by persons specifically *referred* to for information are evidence against the referrer (*R.* v. *Mallory,* 13 Q.B.D. 23; *ante,* 252-3); though a mere general reference will not have this effect (*Vacher* v. *Cocks, ante,* 86-7; *Cottle* v. *Champion, post,* 261; and *cp. R.* v. *Cooper, ante,* 181).

The mere *failure to answer a letter or object to an account,* however, will not necessarily imply an admission of its contents. "What is said to a man, before his face, he is in some degree called on to contradict, if he does not acquiesce in it; but . . . it is too much to say, that a man by omitting to answer a letter . . . admits the truth of the statements that letter contains" (*Fairlie* v. *Denton,* 3 C. & P. 103, *per* Lord Tenterden), or "that every paper which a man might hold purporting to charge him with a debt or liability, was evidence against him" (*Doe* v. *Frankis,* 11 A. & E. 792, 795,

per Lord Denman; and see *Richards* v. *Gellatly*, L.R. 7 C.P. 127, 131; and *Wiedemann* v. *Walpole, sup.*). But it is otherwise if the letter is sent under circumstances which *entitle* the writer to an answer (*Edwards* v. *Towels*, 5 M. & G. 624; *Richardson* v. *Dunn*, 2 Q.B. 218; *Gaskill* v. *Skene*, 14 Q.B. 664; *Lucy* v. *Mouflet*, 5 H. & N. 229; or where it is the ordinary practice of people to reply (*Wiedemann* v. *Walpole, sup., per* Lord Esher). So, in the case of merchants' accounts, a presumption of correctness will generally arise unless objection be made within a reasonable time; and objection to one item only may imply assent to the others (*id.*; Tay. s. 810).

Access to Documents. if coupled with due opportunity of testing their accuracy, may also, by raising a presumption of knowledge and non-objection, sometimes affect a party with an implied admission of their correctness (Tay. s. 812). Thus, the rules of a club or the proceedings of a society, recorded by the proper officer and accessible to the members (*Raggett* v. *Musgrave*, 2 C. & P. 556; *Alderson* v. *Clay*, 1 Stark. 405; *Ashpitel* v. *Sercombe*, 5 Ex. 147); or an account-book kept openly in a club-room (*Wiltzie* v. *Adamson*, 1 Phil. & Arn., Ev., 10th ed. 339); as also vestry-books (*Cooper* v. *Law*, 28 L. J. C. P. 282), have been received against the members. So, accounts kept between master and servant, or trader and shopman, have, under special circumstances and on grounds of necessity and convenience, been similarly admitted (*Symonds* v. *Gaslight Co.*, 11 Beav. 283; Tay. s. 812; O. 33, r. 3).

Partnership Books, being accessible to all the partners, and kept more or less under their individual supervision, may also generally be received as *primâ facie* evidence *inter se* (*Gething* v. *Keighley*, 9 Ch. D. 547, 551; Lindley, Partnership, 7th ed., 566); unless the entries can in fact be proved to have been made fraudulently (*Lodge* v. *Prichard*, 3 DeG. M. & G. 906), or without the knowledge of any particular partner, when, as against him, they will, it seems, be inadmissible (*Hutcheson* v. *Smith*, 5 Ir. Eq. 117; *Stewart's Case*, 1 Ch. App. p. 587; *ante*, 145-6).

Company Books. This presumption, however, does not apply to the case of a director with respect to the books of a company; there being no inference of knowledge from his merely acting as such, nor any duty upon him to know their contents (*Hallmark's Case*, 9 Ch. D. 329). Nor are shareholders, as between themselves and their directors, presumed to have such knowledge (Lindley, Company Law, 6th ed., 432). And entries in the books of a corporation upon private matters are not evidence against its members, even though they have a legal right of inspection, unless their acquiescence in the entries is shown (*Hill* v. *Manchester Co.*, 5 B. & Ad. 886; *Waterford Corporation* v. *Price*, 9 Ir. L.R. 319); or unless made so by statute, as in the case of *Company* and *Bankers' Books, post*, chap. xxxiii.

EXAMPLES.

Statements in Party's Presence.

Admissible.

A. sues B. for breach of promise of marriage;—an oral statement made by A. to B., "You know you have always promised to marry me, and now you don't keep your word," to which B. made no answer, is admissible to prove the promise (*Bessela* v. *Stern*, 2 C.P.D. 265; and see Corroboration, *post*, chap. xli.). In divorce cases, evidence of this kind will not dispense with the necessity of calling witnesses, if they are available, to prove the facts admitted (*White* v. *White*, 62 L.T. 663).

A. sues B. for money paid by A., as B.'s surety to C.;—a statement made by A. to B., that the former had paid the money to C., which B. did not at the time deny, is evidence against B. to prove that fact (*Price* v. *Burva*, 6 W.R. 40; *cp. Hayslep* v. *Gymer*, *ante*, 73).

A.'s counsel makes a statement in an interlocutory proceeding before a judge in chambers, which conduces to a decision in A.'s favour. The statement is made in the presence of A.'s solicitor, who does not deny it. This staement is evidence against A. on the hearing of the action (*Haller* v. *Worman*, 3 L.T. N.S. 741; it is also evidence as an admission by A.'s counsel; *ante*, 250).

A. is charged with indecently assaulting B., a boy of 5. Evidence that a short time after the alleged assault B. said to his mother and a constable in A.'s presence, 'That is the man, Mum,' and being asked by the constable 'Which man?' went on to describe the details of the assault, to which A. replied "I am innocent";—Held, (1) as a matter of strict law, as distinguished from a rule of practice and discretion (see *ante*, 256) that B.'s statement was admissible against A. as being relevant to his conduct and demeanour [*R.* v. *Christie*, 1914 A.C. 545 (modifying *R.* v. *Norton opposite*). No opinion was expressed as to whether, under the circumstances B.'s statement was, or was not, evidence of the *truth* of the facts asserted, although, in *R.* v. *Curnock*, 111 L.T. 816, Lord Reading, C.J., is reported to have remarked: "In *R.* v. *Christie*, *sup.* it was decided that evidence of a statement made in the presence of a prisoner is admissible, but is not evidence of the truth of the facts stated." Held further (2) that B.'s first statement, but not his second, was admissible as part of the act of identification, though neither was admissible as part of the main *res gestæ* (*i.e.* the assault) [*ante* 72]; and (3) that B.'s statement whether proved by himself, or by other witnesses, was not admissible to corroborate his own subsequent testimony at the trial (*post*, chap. xli. Corroboration)].

Inadmissible.

As to unanswered *letters*, in a breach of promise case, see *Wiedemann* v. *Walpole*, *inf.*, Documents.

A., a doctor, upon arrest by a constable, is charged with procuring an abortion upon B. A. makes no reply. Held, A.'s silence is no admission of the truth of the charge (*R.* v. *Tate*, 1908, 2 K.B. 680, 683.)

A. is charged with the manslaughter of B. by performing an illegal operation. The police having taken A. to B.'s bedside, ask B. questions as to the cause of her illness, to which B. replies incriminating A. These replies are then reduced to writing and read over to A., who says, "That is not true." Held, B.'s statement is not admissible against A. (*R.* v. *Smith*, 18 Cox, 470, *per* Hawkins, J.; *R.* v. *Essex*, 148 C.C.C. Sess. Pap. 126).

So, where A. found B. writing a letter to a friend, describing the operation, and A. took it away saying. "I am not angry but only grieved with you for writing it," it was held no evidence against A., since his statement was equally consistent with admission or denial (*R.* v. *Monks*, 148 C.C.C. Sess. Pap. 672, *per* Bucknill, J.).

A. is charged with carnal knowledge of B., a girl under 13. B. is not called, but evidence is given that the day after the alleged outrage A. asked B., before some neighbours, who had done it, and B. replied, "You." And when the same question was repeated by a bystander, B. replied, "A." A. then lifted his arms and, according to one witness, exclaimed, "If I have done it, I hope the Lord will strike me dead," but according to another, "if you say so, I might as well put on my clothes and go home." Held, that as there was nothing in A.'s answers necessarily amounting to an admission, the evidence was inadmissible [*R.* v. *Norton*, 1910, 2 K.B. 496, C.C.A. followed in *R.* v. *Murtrie*, 6 Cr. App. R. 128; *R.* v. *Hickey*, 6 *id.* 200; *R.* v. *Stroud*, 7 id. 38; but afterwards modified by *R.* v. *Christie*, *opposite*.

A. and B. are jointly charged with stealing and receiving. A. makes a statement to a constable, which is put into writing and signed by A. Afterwards the constable reads it over to B. in A.'s presence, saying it was made by B. Neither A. nor B. makes any reply. Held, the statement was not evidence against A. (*R.* v. *Pearson*, 72 J.P.R. 449, C.C.A.)

Admissible.

A., a doctor, is charged with procuring an abortion upon B. Evidence that C. (B.'s father), had said to A., "I have here those things which you gave my daughter to procure abortion," to which A. made no reply;—Held admissible; for here, A., if innocent, may reasonably have been expected to disavow those evidences of his guilt [*R.* v. *Cramp*, 14 Cox, 390; approved in *R.* v. *Tate*, *sup.*].

A. and B. are charged together at a police station with stealing and receiving. In answer to the charge B. says: "Yes, it's quite right. I sold them for A." A. makes no reply. The constable then reads over to A. a statement which B. had previously signed, implicating them both, to which A. also makes no reply. Held, that both statements by B. were admissible against A. (*R.* v. *Bromhead*, 71 J.P.R. 103, C.C.A.).

A. and B. are jointly charged with burglary. A written confession by A. showing that he and B. were concerned in that and other burglaries and had been previously convicted, was read over in the presence of both prisoners, whereupon B. said: "This is a pack of lies!" Held that A.'s statements, though admissible against B. as showing to what he was called on to reply, were no evidence of their truth [*R.* v. *Thompson*, 4 Cr. App. R. 45, 47, reported less clearly on this point 1910. 1 K.B. 640; see *R.* v. *Christie*, *ante* 242, 244. When the judge is satisfied that the reading over is resorted to for the purpose of extracting an admission from the prisoner, he may and should altogether exclude the evidence (*R.* v. *Gardner*, 85 L.J.K.B. 13. 206)].

A. and B., are charged with stealing and receiving hose-pipe. At the police-court, B. said, pointing to A. "That is the man who brought the hose-pipe from the cellar and went with me to try and sell it," to which A., replied: "That is a lie." Held, B.'s statement though in strictness admissible against A., was no evidence of the *truth* of the facts stated (*R.* v. *Curnock*, 112 L.T. 816; 10 Cr. App. R. 207).

A. is charged with receiving property alleged to have been stolen by B. A confession made by B. to a constable, in the presence of, and not denied by, A., that he (B.) had stolen the goods, is admissible against A. to prove that fact (*R.* v. *Cox*, 1 F. & F. 90; *post*, 262; and see *R.* v. *Mallory*, *post*, 262).

A., a married woman, is charged with the murder of her child. A having made a statement as to the child's death to B., her husband, the latter takes A. to the police and repeats her statement to them in A.'s presence. A. makes no reply, but bursts into tears. Held, B.'s statement to the police is admissible against A. (*R.* v. *Bexley*, 70 J.P. Rep. 263).

Inadmissible.

A. is indicted for receiving property alleged to have been stolen by B. A confession made by B. to a magistrate on the hearing of the charge, in the presence of, and not denied by, A., that he (B.) had stolen the goods, is not admissible against A. to prove that fact (*R.* v. *Appleby*, 3 Stark, 33; *R.* v. *Turner*, 1 Moo. C.C. 347; *R.* v. *Swinnerton*, C. & M. 593; *R.* v. *Kelly*, 64 J.P. 84).—So, with a prisoner's non-denial in court of remarks made by a judge (*R.* v. *Britton*, 17 Cox, 627); or magistrate (*Child* v. *Grace*, 2 C. & P. 193); or prosecutor (*Finden* v. *Westlake*, M. & M. 461); or of the depositions of witnesses (*Melen* v. *Andrews*, *id.* 336; *R.* v. *Mitchell*, 17 Cox, 503, disapproving *R.* v. *Mann*, 49 J.P. 743, *contra*, which was considered to have been misreported. In *R.* v. *Mitchell*, *sup.*, Cave, J., remarked: "Where evidence is being formally taken and the prisoner is represented by his solicitor, his non-denial is no evidence of guilt; it is only so where the parties are speaking on even terms").

On the hearing of a bastardy summons by A. against B., A. swore that B. was the father of her child. In corroboration of A.'s testimony, a constable proved that he was present in Court on the hearing of a prior criminal charge against B. for having had unlawful carnal knowledge of A. when the jury found him guilty. Held that the opinion of the jury expressed in the presence of B. was not admissible as proof of the conviction [*Mash* v. *Darley*, 1914. 3 K.B. 1226, 1233, *per* Kennedy, L.J., overruling 1914, 1 K.B. 1. See *post*, 490, 558)].

A., in 1920, is charged with perjury committed in a Divorce case tried in 1919. In the latter case, A., when a witness, had been asked on cross-examination, if she had been charged with theft in 1911. A. replied that she knew nothing of that case, or of the people implicated. In the perjury trial in 1920, depositions taken at the police-court in 1911, were tendered by the prosecution, but objected to by A.'s counsel on the grounds that the charge was a different one and that A. had in fact been acquitted of the alleged theft. Held, that the depositions, though admissible as having been taken in A.'s presence and to rebut her denial of any knowledge of the incident, were not evidence that the matters stated in the depositions were *true;* and as she was acquitted, the jury must not conclude that she had been guilty of any improper conduct in 1911 (*R.* v. *Bamberger*, Times, Sep. 23, 1920).

Admissible.

A., when in custody with B., on a charge of murdering C., makes a statement to the police in the absence of B., but incriminating him, which is taken down in writing and afterwards read over to B., who then, in A.'s presence, admits it, and on the admission being put into writing and read over to him, he (B.) signs it. This admission held to be voluntary and receivable against B. (*R.* v. *Goddard*, 60 J.P. 491. B.'s statement is also receivable against him as a confession, *post* 259; and *cp. R.* v. *Hirst*, *id*).

Inadmissible.

Documents in Party's Possession.

A. sues B. to recover back money paid to the latter twice over, by mistake. A.'s clerk had repeatedly written to B., explaining how the mistake arose and asking for repayment, but of these letters B. took no notice. Held, that the letters were admissible against B. to prove the facts stated (*Gaskill* v. *Skene*, 14 Q.B. 664; and see *Fairlie* v. *Denton*, 3 C. & P. 103).

A. sues B. for work done at a house occupied by the latter, but owned by C. A. had, through his agent, sent his bill to B., and B. had replied to the agent that before the work was begun A. was informed it would be paid for by C., who must be looked to for payment. A. saw this letter, and did not at the time deny the facts stated. Held, that the letter was evidence against A., that C., and not B., was liable (*Carne* v. *Steer*, 5 H. & N. 628; *cp. Gerish* v. *Chartier*, *ante*, 133).

In an action by A., a copyholder, against B., the lord of a manor, a copy of an ancient decree establishing the customs of the manor, which B. had given C. in proof thereof, is primary evidence of such decree and customs against B. [*Price* v. *Woodhouse*, 3 Ex. 616. Though the copy *per se* would only be secondary evidence of the decree, its adoption by B. made it primary as against him; *post*, 538.]

In an action between A. and B., an affidavit which A. had, in a former suit between himself and C., knowingly used to prove a certain fact, is evidence against A. of the same fact, though the deponent is present in court and might be called as a witness [*Brickell* v. *Hulse*, 7 A. & E. 454; so, with affidavits by third persons used by A. upon an interlocutory application in the same action: *Campbell* v. *Rothwell*, 38 L.T. 33. As to affidavits filed, but not sworn, or *vice versa*, see *post*, 313].

A., the former mistress of B., sues him for breach of promise of marriage;—letters written both by A. and the clergyman of A.'s parish to B., alleging that B. had promised to marry A., to which letters B. did not reply, are not admissible either in proof or corroboration of the promise [*Wiedemann* v. *Walpole*, 1891, 2 Q.B. 534; *cp. Thomas* v. *Jones*, 36 T.L.R. 872 C.A.)].

A. sues B., an underwriter, in respect of the loss of a vessel. A.'s shipping agents having written to C., a passenger by the vessel, for information as to its loss, used C.'s reply to induce B. to pay the policy-moneys. The statements contained in this letter are not evidence against A. as admissions by his agent (*Cottle* v. *Champion*, 2 Peake, 45; and see *White* v. *Dowling*, *inf.*).

In an action by A., a copyholder, against B., the lord of the manor, a copy of an ancient decree establishing the customs of the manor, which had been found deposited among the papers of a former deceased lord, is not admissible against B. as primary evidence of such decree or customs, in the absence of evidence that the former lord had dealt with it as a true account thereof [*Price* v. *Woodhouse*, *opposite*. Such possession, however, was regarded as a sufficient recognition of the document as a true *copy* of the decree, to admit it as secondary evidence on proof of the loss of the original. *Cp. Devonshire* v. *Neill*, 2 L.R.I. 132; *R.* v. *Plumer*, *ante*, 82; and *Vacher* v. *Cocks*, *ante*. 87].

In an action between A. and B., an affidavit which had, in A.'s absence and without his knowledge, been made and used by his attorney's clerk in an earlier stage of the same action is not admissible in proof of the facts stated, against A. (*White* v. *Dowling*, 8 Ir.L.R. 128). As to depositions, in a prior suit, to perpetuate testimony, made on behalf of A's predecessors in title and found unsealed, but not shown to have been used or adopted by them, see *Evans* v. *Merthyr Tydfil Council*, cited *ante*, 240.

Admissible.

A., a marine-store dealer, is indicted for receiving property alleged to have been stolen by B. A constable having asked A. where he had bought the goods, to which he replied that his wife would make out a list of the things;—a list subsequently handed to the constable by A.'s wife, who remarked in A.'s presence, "This is the list of what we bought, and what we gave for them," is admissible against A., although (1) he had not read the list; (2) the statement was not addressed to him; and (3) his wife was not a competent witness (*R.* v. *Mallory*, 13 Q.B.D. 33; 15 Cox, 458; *ante*, 252-3).

Inadmissible.

The question being as to the sanity of a deceased testator;—letters from third persons, treating him as sane, found in his possession with their seals broken, but without any evidence of their having been acted on by him, are inadmissible, the mere act of sending the letters to the testator being *per se* irrelevant [*Wright* v. *Tatham*, 5 C. & F. 670; *ante*, 84. In other cases than *sanity* this would generally be sufficient evidence of knowledge to admit the letters; *id.* p. 748; Tay, s. 573; *ante*, 135, 145].

A. sues a company for rescission of a contract to take shares on the ground that untrue statements were made in the prospectus. A. tenders in evidence a report as to the property obtained by the Board from an expert, in which statements were made conflicting with those in the prospectus. The chairman had read out the report to a meeting of the shareholders, but, without adopting its statements, had invited the meeting to accept or reject it as they thought fit, and the shareholders had accepted it. Held, that the report was not receivable as an admission against the Company [*Re Djambi Rubber Estates*, 107 L.T. 631, C.A.; see for other points decided in this case, *ante* 247, and *post*, 283].

A. is charged with libelling B. A similar libel, published by C. against B. some time before, had been brought to B.'s notice, but he had taken no proceedings against C.;—held, that C.'s libel, which was tendered by A. to prove the truth of the imputations contained in it on the ground that B. had by his conduct impliedly admitted its truth, was not admissible (*R.* v. *Newman*, 1 E. & B. 268; *Pankhurst* v. *Hamilton*, 2 T.L.R. 682; Odgers on Libel, 4th ed. 369; *ante* 134. *Cp.*, however, *Irving* v. *Bodie*, 1909, Times, Nov. 5).

A. indicts B. for libel in describing him as a swindler. On the publication of the libel, A. had sent a friend to B. to demand an explanation, and B. had thereupon shown the friend a copy of a French police report in which B. was similarly described. This report is not evidence against A. of the *facts* stated, as A.'s friend was not his agent for the purpose of making admissions (*R.* v. *Labouchere*, 14 Cox, 419. The report was, however, admitted to show the *bona fides* of the defence, though not to justify the libel; *ante*. 133).

CHAPTER XXI.

CONFESSIONS.

In criminal cases, a confession made by the accused *voluntarily* is evidence against him of the facts stated. But a confession made after suspicion has attached to, or a charge been preferred against, him, and which has been induced by any promise or threat relating to the charge and made by, or with the sanction of, a person in authority, is deemed *not to be voluntary*, and is inadmissible.

[*R.* v. *Thompson*, 1893, 2 Q. B. 12; *Ibrahim* v. *R.*, 1914, 599, 609-614; Tay. ss. 862-906; Best, ss. 551-553; Rus. Cr., 7th ed., 2155-2212; Ros. Cr. Ev., 13th ed., 35-50; Archb. Cr. Pl., 23rd ed., 325-339; Steph. arts. 21-24; Wills, Circ. Ev., 6th ed., 108-28; Joy on Confessions; Hopwood, Confessions, 3 Jur. Soc. Pap., 129-49; Wigmore Ev. ss. 815-867].

Sir J. Stephen states that "a confession is an admission made *at any time* by a person charged with a crime, stating, or suggesting the inference, that he committed the crime." If the words "at any time" include statements made *before* the crime, they seem too wide, since such statements, *e.g.* as to his motives and intentions, his preparations, or his references to prior relevant crimes, are admissible or not, irrespective of the above limitations (*ante*, 63-4, 80, 137, 183; *R.* v. *Crossfield*, 26 How. St. Tr. 314-5; *State* v. *Picton*, 51 La. 624; Wills, Cir. Ev., 6th ed., 68-70; Wigmore, s. 1050). A confession made *after* the trial, is also admissible on appeal (*R.* v. *Robinson*, 1917, 2 K.B. 108). The rules as to confessions made by defendants *out of court*, must be distinguished from those relating to self-crimination by *witnesses*, whether parties or not, in the box, as to which see *ante*, 211-16. As to opening confessions to the jury, see *ante*, 38.

History. *Judicial* Confessions, *i.e.* pleas of guilty, appear from an early date to have been considered invalid if induced by fear, menace, or duress (1547, 1 Ed. VI. c. 12, s. 22; 1607, Staundford's Pl. Cr. b. 2, c. 51). It was otherwise, however, with self-criminatory statements, made in or out of court, but tendered against the accused merely as evidence. To the admission of these latter there was, until modern times, no such limitation. Thus, from 1468 to 1640, confessions extracted by torture were freely received (Jardine on Torture, *passim*); while from the earliest periods down to about the last-mentioned date, it was customary for the accused to be interrogated by the court, sometimes on oath and sometimes not, and for his answers to be accepted against him (*ante*, 211). Gradually, however, the doctrine that duress vitiated a formal plea came to be extended to less formal statements, at first to examinations of the accused before a magistrate (1741, *R.* v. *White*, 17 How. St. Tr. 1085; 1775, *R.* v. *Rudd*, 1 Lea. C.C. 115), and finally to all extra-

judicial confessions induced by promises or threats (1783, *R.* v. *Warickshall, id.* 263). Since the last-named case, however, the character of the decisions has varied materially. From about 1800-1850, the courts were disposed, probably as a protest against the rigours of the then penal code, to exclude confessions upon proof even of the most trivial inducements; but since *R.* v. *Baldry,* 1852, 2 Den, C.C. 430, the leading case on this branch of the subject, this disposition has been checked, and the tendency is, if anything, rather the other way [Steph. 1 Hist. Criminal Law, 446-7; Wigmore, Ev., ss. 816-20].

Principle. The ground of reception of voluntary confessions is usually said to be the presumption that no person will wilfully make a statement against his interest unless it be true; at all events, such confessions may reasonably be taken to be true as against the defendant himself (*ante,* 228; *R.* v. *Turner,* 1910, 1 K.B. 346). The ground of rejection of confessions which are not voluntary is the danger that the prisoner may be induced, by hope or fear, to criminate himself falsely [Tay. s. 874; 2 Russ. Cr. 7th ed. 2155; Joy, 51; Wigmore, ss. 822-3]. In *R.* v. *Baldry,* 2 Den. C.C. 430, it was contended for the prisoner that there was a presumption of *law* that confessions so induced were false; Pollock, C.B., however, remarked *arguendo,* "the law doesn't presume the statement to be untrue, but rather that it is uncertain whether it is true," adding, in his judgment, "the ground of exclusion is, that it would not be safe to receive a statement made under any influence or fear." Campbell, C.J., who had admitted the confession at the trial because the caution given "could have no tendency to induce the prisoner to say anything untrue," also remarked in his judgment, "the reason is, not that the law supposes the statement will be false, but that the prisoner has made the confession under a bias, and that therefore it would be better not to submit it to the jury"; afterwards, in *R.* v. *Scott,* 1 Dears. & B. 47, the latter judge again stated the ground of exclusion to be "that the party may have been influenced to say what is not true." *R.* v. *Baldry, sup.,* was approved on this point in *R.* v. *Thompson,* 1893, 2 Q.B. 12, and *Ibrahim* v. *R.,* 1914, A.C. 599, 610-11. Mr. Taylor suggests, as a further reason for the exclusion, that the reception of such evidence might encourage the police, in the hope of professional advancement, to extort incriminatory statements from their prisoners (s. 874).

Burden of Proof. The question of voluntariness is for the judge; and it is now settled that it lies upon the prosecution to establish, and not upon the accused to negative, this element, it being the duty of the prosecution to satisfy itself thereon before putting the statement in (*R.* v. *Thompson, sup.; R.* v. *Rose,* 18 Cox, 717; *Ibrahim* v. *R., sup.*).

Corroboration. A confession duly made and satisfactorily proved is, in general, sufficient to warrant a conviction without corroboration (*R.* v. *Unkles,* I.R. 8 C.L. 50, 58; *R.* v. *Sullivan,* 16 Cox, 347; *R.* v. *Kersey,* 21 *id.* 690; *R.* v. *Sykes,* 8 Cr. App. R. 233; *R.* v. *Wheeling,* 1 Lea. 311 *n; R.* v. *McNicholl,* 1917, 2 I.R. 557; *R.* v. *McKenna,* Ir. Cir. R. 461; Archb. Cr. Pl., 23rd ed. 338; 2 Russ. Cr. 7th ed., 2156; Best, s. 553; though this is doubted in Tay. s. 868, and Ros. Cr. Ev. 13th ed., 35, and contested in Wills Circ. Ev., 6th ed., 109). But this general rule has been thought not to apply to confessions of murder (*R.* v. *Sullivan, sup.; R.* v. *Kersey, sup.; R.* v. *Williams,* 11 Cox, 684, 695; *R.* v. *Farquharson* (1908), cited Kenny, Cr. Law, 339 *n;* but see *R.* v. *Unkles, R.* v. *McNicholl* and *R.* v. *Sykes, sup.*); or to bigamy, or crimes connected with title to property which involve mixed law and fact (*ante,* 233).

Ipsissima Verba. If the substance of a confession be given, failure to prove the actual words will not exclude it, though it may affect its weight (*R.* v. *Godhino,* 7 Cr. App. R., 12, disapproving *R.* v. *Sexton,* cited in Joy on Confessions, p. 19).

Persons in Authority. (*a*) To exclude a confession, the inducement must have been held out by a person in authority—*i.e.* some one engaged in the *arrest, detention, examination,* or *prosecution* of the accused; or by some one acting in the presence, and without the dissent, of such a person (*R.* v. *Pounteney,* 7 C. & P. 302; *R.* v. *Spencer, id,* 776; *R.* v. *Taylor,* 8 C. & P. 733; *R.* v. *Drew, id.* 140; *R.* v. *Simpson,* 1 Moo. C.C. 410; *R.* v. *Laugher,* 2 C. & K. 225; *R.* v. *Millen,* 3 Cox, 507; *R.* v. *Hewitt,* 1 C. & M. 534; *R.* v. *Luckhurst,* 1 Dears. 245; *R.* v. *Jones,* 49 J.P. 728; though in *R.* v. *Parker,* 8 Cox, 465, where one *prisoner* had said to another in the presence of the prosecutor, "you had better tell Mr. W. the truth," a confession subsequently made was received; but here the prosecutor's assent could hardly have been implied); or, perhaps, by some one erroneously believed by the accused to be in authority (see Russ. Cr., 7th ed., 2165 *n;* *R.* v. *Frewin,* 6 Cox, 530; Tay. s. 874; though there is no express decision).

The following have been held to be persons in authority: A constable, or other officer, having the accused in custody (*R.* v. *Shepherd,* 7 C. & P. 579; *R.* v. *Gillis,* 11 Cox, 69; or in cases of felony, perhaps a private person arresting, Russ. Cr., 7th ed., 2258-9; Ros. Cr. Ev. 40); the prosecutor (*R.* v. *Jenkins,* Russ & Ry. 492); or his wife (*R.* v. *Upchurch,* 1 Moo. C.C. 465); or partner's wife, if the offence concerns a partnership (*R.* v. *Warringham,* 2 Den. 447 *n*); or his attorney (*R.* v. *Croydon,* 2 Cox, 67); the master or mistress of the prisoner, if the offence has been committed against the person or property of either, but otherwise not (*R.* v. *Moore,* 2 Den. 522); a magistrate, whether acting in the case or not (*R.* v. *Gillis, sup.;* *R.* v. *Clewes,* 4 C. & P. 221); the magistrate's clerk (*R.* v. *Drew,* 8 C. & P. 140); a coroner (*R.* v. *Waltho,* 1905, Times, June 17).

It is doubtful whether a private person, to whose temporary custody the accused has been committed by a constable, is a person in sufficient authority (the affirmative is maintained in *R.* v. *Enoch,* 5 C. & P. 539; *R.* v. *Winsor,* 4 F. & F. 363, the case of a female searcher; Ros. Cr. Ev. 41; and Russ. Cr. 2188-9; *contra,* *R.* v. *Sleeman,* 2 Dears. 249; *R.* v. *Vernon,* 12 Cox, 153; and Tay. s. 873 *n*); or the chaplain of a gaol (the affirmative is stated in 3 Russ. Cr., 6th ed., 501, citing *R.* v. *Gilham,* 1 Moo. C.C. 186, and see 7th ed., 2178 *n;* but in Ros. Cr. Ev., 12th ed. 38, where it is pointed out that the Court expressed no opinion on the point, the contrary is contended); or a surgeon (*R.* v. *Kingston,* 4 C. & P. 387; *R.* v. *Gibbons,* 1 C. & P. 97; and *R.* v. *Bowden,* cited *post,* 272, support the affirmative, though the first two cases seem questionable; *contra* *R.* v. *Cain,* 1 Cr. & D. 36); or the husband of the prosecutrix (*R.* v. *Laugher,* 2 C. & K. 225). The captain of a ship, merely as such, would seem not to be in such a position with regard to the crew (*R.* v. *Moore,* 2 Den. 526, explaining that in *R.* v. *Parratt,* 4 C.P. 570, *contra,* the captain had threatened to take part in the prosecution); nor is the wife of a constable a person in authority (*R.* v. *Hardwick,* 1 C. & P. 98 *n*).

A confession made to, but not induced by, a person in authority is admissible (*R.* v. *Gibbons, sup.;* *R.* v. *Tyler,* 1 C. & P. 129; *R.* v. *Godinho,* 7 Cr. App. R.

12, 14); while conversely, a confession induced by, though not made to, such a person will be rejected (*R.* v. *Boswell,* C. & M. 584; *R.* v. *Blackburn,* 6 Cox, 333). As to by, and to, whom confessions may be made, see generally *infra,* 253.

The Inducement. (*b*) A promise or threat, in order to exclude a confession, must *relate to the charge—i.e.* must reasonably imply that the prisoner's position with reference thereto will be rendered better or worse according as he does or does not confess (Tay. ss. 879-881; Steph. art. 22). It need not, however, be *express,* but may be implied from the conduct of the person in authority, the declarations of the prisoner, or the circumstances of the case (*R.* v. *Gillis,* 11 Cox, 69); nor need it be made *directly to the prisoner;* it is sufficient if it may reasonably be presumed to have come to his knowledge, providing, of course, it appears to have induced the confession (*R.* v. *Thompson,* 1893, 2 Q.B. 12; Tay. s. 885).

On the other hand, *fear* alone, without threats, will not exclude (*R.* v. *Rome,* 137 C.C.C. Sess. Pap. 220, *per* Darling, J.). Nor will a promise or threat to *one prisoner* exclude a confession made by another, who was present and heard the inducement (*R.* v. *Jacobs,* 4 Cox, 54; *R.* v. *Bate,* 11 Cox, 686; though perhaps the principle of *R.* v. *Thompson, sup.,* would include such a case); nor will an inducement to confess as to *one crime* invalidate a confession as to a different one (*R.* v. *Warner,* Russ. Cr., 7th ed., 2174 *n*), unless both are parts of the same transaction (*R.* v. *Hearn,* 1 C. & M. 109). So, it has been held, though not uniformly, that a confession induced by a *conditional promise* relating to the charge will not be excluded if the prisoner has violated the condition [*R.* v. *Burley,* 2 Stark. Ev., 3rd ed., 13 *n,* afterwards confirmed by all the judges; *R.* v. *Smith, R.* v. *Stokes, R.* v. *Holtham,* cited Russ. Cr., 2284 *n; R.* v. *Dingley,* 1 C. & K. 637, 640, *per* Pollock, C.B.; Tay. s. 881; *Com.* v. *Knapp,* 10 Pick. 477; *contra* in Ireland, *R.* v. *M'Hugh,* 7 Cox, 483, C.C.R.; *R.* v. *Gillis, post,* 272, explaining *R.* v. *Burley;* in Ros. Cr. Ev., 12th ed., 118, *R.* v. *Gillis* is erroneously cited as admitting the evidence]. Neither will a confession be excluded which has been obtained from the accused by an inducement relating to some *collateral matter* unconnected with the charge (Tay. s. 880); or by *moral or religious exhortation* (whether by a chaplain, *R.* v. *Gilham,* 1 Moo. C.C. 186; or others, *R.* v. *Jarvis,* L.R. 1 C.C. 96; *R.* v. *Reeve, id.* 362); or by a *promise of secrecy* (*R.* v. *Shaw,* 6 C. & P. 372; *Com.* v. *Knapp,* 9 Pick, 495); or even by *false representations* made to, or *deception* practised upon, him (*R.* v. *Burley, sup.; R.* v. *Derrington,* 2 C. & P. 418; and see remarks, *inf.*); or by his having been *made drunk* for the purpose (*R.* v. *Spilsbury,* 7 C. & P. 187); or by *questions,* which he need not have answered, having been put to him by a private person (*R.* v. *Wild,* 1 Moo. C.C. 452); or by the police before arrest (*R.* v. *Dougal,* 67 J.P. 325; *R.* v. *Kershaw,* 18 T.L.R. 357; *R.* v. *Best,* 1909, 1 K.B. 692; *R.* v. *Liebling,* 2 Cr. App. R. 315), even though put to enable them to determine whether or not to arrest (*R.* v. *Knight,* 20 Cox, 711; *R.* v. *Booth,* 5 Cr. App. R. 711; *Lewis* v. *Harris,* 110 L. T. 337). And the better opinion is that confessions made in answer to questions by the police put to the accused, even when in custody, are in strict law admissible, provided there was no promise or threat used (*Rogers* v. *Hawken,* 19 Cox, 122; *R.* v. *Best, sup.; Ibrahim* v. *R.,* 1914, A.C. 599, 611-14; *R.* v. *Gardner* (1915), 85 L.J.K.B. 206). Such questions, however,

as well as statements by fellow prisoners read over to the accused to induce him to confess (*ante*, 245), are to be condemned, and judges, it seems, have a discretion to exclude evidence so obtained (*R.* v. *Gardner, Ibrahim* v. *R.*, *R.* v. *Knight, R.* v. *Booth, Lewis* v. *Harris, sup.*; *R.* v. *Voisin*, 1918, 1 K.B. 531; *R.* v. *Cook*, 34 T.L.R. 515, citing Rules of the Judges, *infra*).* Nor will the confession be inadmissible though the defendant had been allowed to speak *without previous caution* (*R.* v. *Coote*, L.R. 4 P.C. 605; *R.* v. *Godinho*, 7 Cr. App. R. 12; *R.* v. *Voisin, sup.*). As to the statutory caution to be given by magistrates on the examination of the prisoner, and questions put by them during such examination, see *post*, 508).

Illegal Imprisonment. Violence. Where the accused was illegally arrested without a warrant, a confession subsequently made was in one case rejected (*R.* v. *Ackroyd*, 1 Lew. C.C. 49); but in a similar case a majority of the judges decided *contra* (*R.* v. *Thornton*, 1 Lew. C.C. 49; Tay. s. 883; Russ. Cr., 7th ed., 2180). Confessions induced by violence are, however, bad, irrespective of the present rule, as not being free and voluntary [*R.* v. *Wong*, 3 Hong Kong L. R. 89 (1908), cited with approval in *Ibrahim* v. *R.*, 1914, A.C. p. 613; Thayer, Cas. Ev., 2nd ed., 296 *n*].

Removal of the Inducement or the Caution. (*c*) If the impression produced by the promise or threat is clearly shown to have been removed—*e.g.* by lapse

* These rules, which were approved by the Judges and issued to the police at the request of the Home Secretary, are as follows:—"(1) When a police officer is endeavouring to discover the author of a crime there is no objection to his putting questions in respect thereof to any person or persons, whether suspected or not, from whom he thinks that useful information can be obtained. (2) Whenever a police officer has made up his mind to charge a person with a crime, he should first caution such person before asking any question or any further questions, as the case may be. (3) Persons in custody should not be questioned without the usual caution being first administered. (4) If the prisoner wishes to volunteer any statement the usual caution should be administered. It is desirable that the last two words ("against you") of such caution should be omitted, and that the caution should end with the words "be given in evidence."—The Court remarked that these rules have not the force of law, but are administrative directions which should be observed by the police for the fair administration of justice, and that statements obtained from prisoners contrary to their spirit may be rejected at the trial (*R.* v. *Voisin* and *R.* v. *Cook, sup.*). The following further rules have since been added by the Judges:—(5) The caution to be administered to a prisoner when he is *formally* charged should therefore be—"Do you wish to say anything in answer to the charge? You are not obliged to say anything unless you wish to do so but whatever you say will be taken down in writing and may be given in evidence." Care should be taken to avoid any suggestion that his answers can only be used in evidence *against* him, as this may prevent an innocent person making a statement which might assist to clear him of the charge. (6) A statement made by a prisoner before there is time to caution him is not rendered inadmissible by reason of no caution having been given, but in such case he should be cautioned as soon as possible. (7) A prisoner making a voluntary statement must not be cross-examined and no questions should be put to him except for the purpose of removing ambiguity in what he has actually said. For instance, if he has mentioned an hour without saying whether it was morning, or has given a day of the week and day of the month which do not agree, or has not made it clear to what individual or what place he intended to refer in some part of his statement, he may be questioned sufficiently to clear up the point. (8) When two or more persons are charged with the same offence, and statements are taken separately from them, the police should not read these statements to the other persons charged, but each of such persons should be furnished by the police with a copy of such statements and nothing should be said or done by the police to invite a reply. If the person charged desires to make a statement in reply the usual caution should be administered. . (9) Any statement made in accordance with the above rules should, whenever possible, be taken down in writing and signed by the person making it after it has been read over to him and he has been invited to make any correction he may wish [145, LT. Jo. 389].

of time, or by any intervening caution given by some person of superior (but not of equal or inferior) authority to the person holding out the inducement—a confession subsequently made will be strictly receivable (*post*, 257-8). Conversely, if the effect of a caution has worn off the confession may be rejected (*R.* v. *Knight*, 20 Cox, 711).

Form of Confession: Depositions, Conduct, Silence. The form of a confession is, in general, immaterial (*cp. ante*, 234). Thus, it may be made either orally or in writing; and a letter written by the prisoner to the prosecutor, even when in custody and although no caution was given him, is receivable (*R.* v. *Heal*, 69 J.P. Rep. 224; though *aliter*, perhaps, had it been written to the police). As to confessions inferred from the conduct or silence of the accused when statements are made in his presence, see *ante*, 241-7. So, evidence given by a person *on oath as a witness*, in a proceeding having reference to the same or a different matter, is receivable against him as a confession (*R.* v. *Chidley*, 8 Cox, 365; *R.* v. *Tubby*, 5 C. & P. 530; *R.* v. *Coote*, *sup.*; *R.* v. *Bird*, 19 Cox, 180, where the prisoner having given evidence before the magistrate, but declining to testify at the trial, his former evidence was received as a confession; *R.* v. *Boyle*, 20 T.L.R. 192), *unless* (1) he is specially protected by statute (*ante*, 202-4); or (2) his testimony was obtained by any improper inducement (*R.* v. *Gillis*, *sup.*; *R.* v. *Cherry*, 12 Cox, 32); or (3) he was unjustly compelled to answer criminating questions after claiming privilege (*R.* v. *Garbett*, 1 Den. 236; *R.* v. *Coote*, *sup.*; the reason here being, it seems, not that the statement is likely to be untrue, but that it is expedient to uphold the privilege of witnesses). Depositions by the accused on a charge of misdemeanour under the Cr. L. Amend. Act, 1885, s. 5, are admissible against him on a charge of felony under s. 4 (*R.* v. *Chapman*, 29 T.L.R. 117; *cp. R.* v. *Laurent*, *post*, 273). And, where a bankrupt's depositions were excluded because not properly authenticated, parol evidence of his statements was received (*R.* v. *Erdheim*, 1896, 2 Q.B. 260; *ante*, 215). So, depositions by the accused before a *coroner* are admissible against him under the present head (*R.* v. *Bateman*, 4 F. & F. 1068, *per* Martin, B., and Willes, J.; *R.* v. *Waltho*, 1905, Times, June 17; Arch., Cr. Pl., 23rd ed., 327; though some early cases are *contra*, and in *R.* v. *Roberts*, 98 C.C.C. Sess. Pap. 691, Hawkins, J., excluded them apparently because not sworn or signed by the accused; in *R.* v. *Waltho*, *sup.*, however, the latter objection was overruled).

Whole Confession. As in the case of admissions, the *whole* confession must, in general, be taken, even though containing matter favourable to the prisoner, though the jury may attach different degrees of credit to the different parts [*ante*, 218; Wills, Circ. Ev., 6th ed., 118-20]. Where, however, a caution had been given and a 3-hours' interrogation followed, Channel, J., admitted the first part when the caution was fresh but not the later parts [*R.* v. *Knight*, 20 Cox, 711 (1905), *contra*, *R.* v. *Booth*, 5 Cr. App. R. 177, where, however, the facts were not so strong]. And if the confession implicate others their names cannot be omitted, though the judge should warn the jury that it is only evidence against the maker (*R.* v. *Fletcher*, 1 Lew. C.C. 107; *R.* v. *Hall*, *id.* 110; *R.* v. *Foster*, *id.* 110; *R.* v. *Shakespeare*, 34 L. Jo. 116; *R.* v. *Thyra Court*, 7 Cr. App. R. 127; *contra*, *R.* v. *Barstow*, 1 Lew. C.C. 110, would probably not now be followed), or he may, where the charge is joint, order separate trials (R. v. *Jackson*, 7 Cox, 357; *R.* v. *Taylor*, 37 Ir. L.T.R. 28).

Confessions relating to *other* crimes, will, however, be rejected, irrespective of the present rule (*R.* v. *Cole, ante,* 165; *R.* v. *Butler,* 2 C. & K. 221), unless such crimes form part of the main transaction (*R.* v. *Long,* 6 C. & P. 179), or are relevant to show identity (*ante,* 163), intent, &c. (*ante,* 172).

Ambiguous Confessions. Where a confession is equivocal the court may quash a conviction founded solely thereon (*R.* v. *Barker,* 11 Cr. App. R. 191, where A., being charged, replied "All right," which might mean either that he would go to the police-station, or that the charge was true). So, on a charge of being an habitual criminal, the judge having remarked, "There is a long list of convictions against you," and the prisoner replied "Yes, sir," it was held this was no admission that the list was correct, nor the matters contained therein true (*R.* v. *Metcalfe,* 9 *id.* 7, reported more fully on this point, 135 L.T. Jo. 40); nor is a prisoner's statement, "There is no end to my troubles," an admission of a previous conviction (*R.* v. *Curtis,* 29 T.L.R. 512); nor his remark, "Just my luck," necessarily evidence of guilt, for it might be merely disappointment at being charged (*R.* v. *Schofield,* 12 Cr. App. R. 191). And an admission made in court, of the possession of stolen property, is not an admission of its wrongful possession (*R.* v. *Baker,* 28 T.L.R. 363). [As to ambiguous admissions in civil cases, see *ante,* 234].

Matters Provable by Confession. *Law and Fact. Documents, &c.* [See *ante,* 233].

To, and by, whom Confessions may be made. (*d*) It is in general immaterial *to whom* a voluntary confession has been made. Thus, a confession made to a person in authority, is admissible if not induced by him; while one induced by, though not made to, him will be rejected (*ante,* 265-6). So, statements made, or letters written, when in custody, by the accused to the prosecutor (*R.* v. *Heal,* 69 J.P. Rep. 224), or to outside friends (*R.* v. *Robinson,* 1917, 2 K.B. 108, where the letter was written after trial and received on appeal); or statements which he had been overheard muttering to himself (*R.* v. *Simons,* 6 C. & P. 540, if otherwise than in his sleep, *R.* v. *Sippet,* cited Tay. s. 881 *n*); or making in confidence to a fellow-prisoner (*R.* v. *Broughton,* 70 J.P. Rep. 508; *R.* v. *Gardner,* 85 L.J.K.B. 206; *post,* 275); or to his own wife or solicitor, are admissible against him, if independently proved (Tay. s. 1881; but see *R.* v. *Pamenter, ante,* 201, 211). And it is immaterial whether the person to whom the statement was made, *denied it* or not; *contra, R.* v. *Welsh,* 3 F. & F. 275, is probably not sustainable (Russ. Cr. 7th ed. 2203 *n*).

On the other hand, a prisoner can only be affected by the confessions of *himself,* and not by those of *agents, accomplices, or strangers* (*R.* v. *Turner,* 1 Moo, C.C. 347; *R.* v. *Gardner,* 9 Cox, 332; *R.* v. *Dibble,* 72 J.P. Rep. 498; Tay. ss. 904-906; Russ. Cr., 7th ed. 2179; Ros. Cr. Ev. 46-8; Archb. Cr. Pl. 23rd ed. 338; *ante,* 93); unless made in his presence otherwise than in a judicial proceeding, or assented to by him (*R.* v. *Cox,* and *R.* v. *Mallory,* cited *ante,* 260; *R.* v. *Hirst,* 18 Cox, 374; *cp. R.* v. *Taylor,* 37 Ir. L.T.R. 28). And the judge should warn the jury on this point; though even if he has done so, and the inadmissible statement has materially influenced the verdict, the conviction may be quashed (*R.* v. *Dibble,* 72 J.P. Rep. 498); while, if he has omitted to do so, and the statement was not relied on by the prosecution, and caused no substantial miscarriage, the conviction may be upheld (*R.* v. *Pope,* 2 Cr. App. R. 22). Nor, of course, can confessions by third persons be used in the prisoner's favour (*R.* v. *Gray,* Ir. Cir. Rep. 76).

The *prosecutor* is not considered sufficiently a party to the inquiry for his admissions to be evidence for the accused, although they may of course be proved to impeach his own testimony as a witness [Ros. Cr. Ev. 47; Best, s. 184; 1 Greenleaf, ss. 362, 537; in *R.* v. *Arnall,* 8 Cox, 439, a case of rape, Martin B., however, admitted statements made in the presence of the prosecutrix as evidence for the prisoner, on the ground that though in law the former was not strictly a party to the proceedings, yet she might be considered sufficiently so, in fact, to admit the evidence; *sed qu.,* and in 2 Russ. Cr., 7th ed. 2203 (*n*), it is properly said that the evidence might more safely have been received as affecting the credit of the prosecutrix, who was called as a witness, after she had been cross-examined to it in the first instance. As to the status of the prosecutor, see further, *ante,* 38; *post,* 413, 537; and as to acts done by the agents of the prosecutor, *Queen's Case,* 2 B. & B. 302, 304].

Facts discovered through Inadmissible Confessions. (*e*) Facts and documents disclosed in consequence of inadmissible confessions are receivable if relevant (*R.* v. *Leatham,* 8 Cox, 498). And where property has been discovered or delivered up in this way so much of the confession as strictly relates thereto will be admissible, for these portions at least cannot be untrue; but independent statements not qualifying or explaining the fact, though made at the same time, will be rejected (*R.* v. *Butcher,* 1 Lea, 265 *n; R.* v. *Griffin,* Rus. & Ry. 151; *R.* v. *Harris,* cited Joy, 83; *R.* v. *Gould,* 9 C. & P. 364; the earlier rule admitted the facts, but excluded the accompanying statements, *R.* v. *Warickshall,* 1 Leach, 263; *R.* v. *Cain,* 1 Cr. & D. 37). If however, the inadmissible confession be *not confirmed* by the finding of the property, no proof either of the statements or acts can be received; for the influence which produces a groundless confession may equally produce groundless conduct (*R.* v. *Jenkins,* R. & R. 492). [Tay. ss. 902-903; Russ. Cr. 7th ed., 2196-9; Ros. Cr. Ev. 45; Steph. art. 22; Joy, 81-88.]

EXAMPLES.

Admissible.

(*a*) A., a maid-servant, being charged with concealing the birth of her illegitimate child, makes a confession in consequence of an inducement held out by her mistress;—the confession is admissible, for the mistress is not a person in authority, the offence having no connection with the management of the house (*R.* v. *Moore,* 2 Den. 522).

(*b*) Confessions induced by the following promises or threats from persons in authority have been admitted:

A promise to give the prisoner a glass of spirits (the contrary was decided in *R.* v. *Sexton,* cited Joy, 17-19, but this was doubted both by him and repeatedly since, *e.g.* Tay. s. 880; Ros. Cr. Ev. 38; 3 Russ. Cr., 6th ed. 482*n*); or to strike off his handcuffs (*R.* v. *Green,* 6 C. & P. 655; in Ros. Cr. Ev. 38, the report of this case is considered too obscure to be relied on); or to let him see his wife (*R.* v. *Lloyd,* 6 C. & P. 393);—for these are matters collateral to the charge.

Inadmissible.

(*a*) A., a maid-servant, being charged with setting fire to her master's house, makes a confession in consequence of an inducement held out by her mistress;—the confession is inadmissible, for the mistress is a person in authority, the offence relating to her husband's property (*R.* v. *Upchurch,* 1 Moo. C.C., 465).

(*b*) Confessions induced by the following promises or threats from persons in authority have been excluded:

"It is no use to deny it, for there are the man and the boy who will swear they saw you do it" (*R.* v. *Mills,* 6 C. & P. 146); "I dare say you had a hand in it; *you may as well tell me all* about it" (*R.* v. *Croydon,* 2 Cox, 67); "It will be the right thing for him (the defendant) to make a clean breast of it" (*R.* v. *Thompson,* 1893, 2 Q.B. 12); "The inspector tells me you are making housebreaking implements; if that is so *you had better tell the truth*" (*R.* v. *Fennell,* 7 Q.B.D. 147; *R.*

Admissible.

"You had better be careful what you reply" (*R.* v. *Day*, 147 C.C.C. Sess. Pap. 960); "Be sure to tell the truth" (*R.* v. *Court*, 7 C. & P. 486; *R.* v. *Holmes*, 1 Cox, 9); "Have you my rings? Be a good girl and tell the truth" (*R.* v. *Stanton*, 6 Cr. App. R. 198); "I should advise you to answer truthfully, so that if you have committed a fault you may not add to it by saying what is untrue" (*R.* v. *Jarris*, L.R. 1 C.C. 96); "*You had better, as good boys, tell the truth*" (*R.* v. *Reeve*, *id.* 362; followed in *R.* v. *Stanton*, *sup.*) "I hope you will tell, because Mrs. G. can ill afford to lose the money" (*R.* v. *Lloyd*, 6 C. & P. 393); "Don't run your soul into more sin, but tell the truth" (*R.* v. *Sleeman*, Dears. 249);—for these are mere cautions, or admonitions on moral or religious grounds. So, in *R.* v. *Gilham*, 1 Moo. C.C. 186, where both chaplain and gaoler had impressed on the prisoner the *religious* duty of confessing, the confession was received, though no grounds are given: see as to this case, *ante*, 265; Steph., art. 22*n*; and Joy, 52-56.

"Why have you done such a senseless act?" (*Ibrahim* v. *R.* 1914, A.C. 599, cited more fully and on other points, *post* 257); "I must know more about it" (*R.* v. *Reason*, 12 Cox, 228); "Now is the time to take it back to the prosecutrix" (*R.* v. *Jones*, 12 Cox, 241); "I am a constable. You will have to accompany me to the police-station, where you will be charged" (*R.* v. *Males*, 137 C.C.C. Sess. Pap. 225); "You would not have told so many lies if you had not done it" (*R.* v. *Thornton*, 1 Lew. 49);—for no promise or threat is thereby imported.

"What you say will be used as evidence against you" (*R.* v. *Baldry*, 2 Den. 430, overruling several earlier cases); "What you say will be used against or for you" (*R.* v. *Lang*, 142 C.C.C. Sess. Pap. 1427-8; *R.* v. *James*, 2 Cr. App. R. 319); "You are in the presence of two police officers; I should advise that to any questions put to you, you will answer truthfully . . . Take care, we know more than you think we know" (*R.* v. *Jarvis*, *supra*);—for such language imports a mere caution.

A magistrate having told the prisoner that his wife had already confessed the whole, and that there was enough case against him to send a bill before the grand jury, asked him what he had to say. A confession then made by the prisoner held admissible, as the magistrate's statement merely amounted to a caution (*R.* v. *Wright*, 1 Lew. 48; and see *R.* v. *Long*, 6 C. & P. 179). A. is charged with stealing B.'s purse. A policeman having found A., said it was supposed he had picked up B.'s purse. A. denied it, but upon being searched and some of the money found upon him, said, "I'll make it all up

Inadmissible.

v. *Hatts*, 49 L.T. 780; "The words 'you had better' seem to have acquired a sort of technical meaning," *per* Kelly, C.B., in *R.* v. *Jarvis*, *opposite*); "It would have been better if you had told at first" (*R.* v. *Walkley*, 6 C. & P. 175); "You had better tell me about the corn that is gone" (*R.* v. *Rose*, 18 Cox, 717, C.C.R.).

"If you tell me where my goods are I will be favourable to you" (*R.* v. *Cass*, 1 Lea, 293 *n*). A servant in the custody of a constable said to her mistress, "if you forgive me I will tell the truth"; the mistress replied, "Anne, did you do it?" (*R.* v. *Mansfield*, 14 Cox, 639). The accused said to a constable "I will tell you all about it, if you won't pinch me," to which the constable did not reply (*R.* v. *Aldridge*, Middlesex Sess., Times, Mar. 12, 1912). So, where the mistress said, "If you are guilty, do confess; it will perhaps save your neck; you will have to go to prison; pray tell me if you did it" (*R.* v. *Upchurch*, 1 Moo. C.C. 465). "If I tell the truth, shall I be hung?" "No, nonsense, you will not be hung." (*R.* v. *Winsor*, 4 F. &. F. 363). "I only want my money; if you give me that you may go to the devil]" (*R.* v. *Jones*, Rus. & Ry. 152).

"If you don't tell me, you may get yourself into trouble, and it will be the worse for you" (*R.* v. *Coley*, 10 Cox, 536). "If you don't tell me, I will send for a constable" (*R.* v. *Richards*, 5 C. & P. 318). "I shall be obliged if you would tell me what you know about it; if you will not, of course we can do nothing for you" (*R.* v. *Partridge*, 7 C. & P. 551). "If you decline to make a statement we must draw our own conclusions?" "Am I obliged to make a statement?" "No one can force you to make one" (*R.* v. *King*, 151 C.C.C. Sess. Pap. 233-5). "Now be cautious in your answers to the questions I am going to put about this watch" (*R.* v. *Fleming*, 1 Arm. M. & O. 330, Ir.). "This is a serious charge; take care that you do not say anything to injure yourself; but if you say anything in your defence we are willing to hear it and to send to any person to assist you" (*R.* v. *Hornbrook*, 1 Cox, 54). "It will depend on your statement whether you are charged or not" (*R.* v. *Inger*, 135 C.C.C. Sess. Pap. 505, *per* Fulton, R.).

A., charged with concealment of birth, is told by a constable that he "would take her to prison where she would be examined by a doctor." A. pleaded, "Oh, no don't do that," and afterwards confessed. Confession held inadmissible (*R.* v. *Day*, 147 C.C.C. Sess. Pap. 959-60, *per* A. T. Lawrence, J.) So, where a surgeon who had been called to examine A. (charged with the murder of her child), asked if she had had a child recently, adding, "If you don't tell me I shall examine you to see if you

Admissible.

to her." Held, the confession was admissible, as the constable's statement imported no promise or threat (*R.* v. *Jones*, 27 L.T. 765).

A. and B., apprentices, are charged with robbing their master. The master had told A., in the presence of B., that if he did not confess, a constable would be sent for. A. then admitted that both of them had robbed their master; whereupon B. said: "You are a liar; I only took one handkerchief."—B.'s confession is admissible, as the threat was not made to him; but A.'s is not [*R.* v. *Jacobs*, 4 Cox, 54; and see *R.* v. *Bate*, 11 Cox, 686, where a confession by a prisoner was received, although an inducement had been held out to an accomplice which might have been communicated to the prisoner. *Sed qu.* perhaps, as to these cases since the decision in *R.* v. *Thompson*, *inf.*].

A., a prisoner, asks the chaplain of the gaol if any offer of pardon has been made. The chaplain replies that one had been, but that he could offer no inducement to A., and any confession must be voluntary. A. then signs a confession before a justice, stating he had received no promise or inducement from any one. Held, the confession was admissible (*R.* v. *Dingley*, 1 C. & K. 637).

A. is charged with a crime;—A. had, under the expectation of being allowed to turn Queen's evidence against his accomplices, made a confession to a magistrate; but, afterwards, refusing to testify against them, had been put upon his own trial. Such a confession has been considered admissible [*R.* v. *Burley*, 2 Stark., Ev. 3rd ed. 13 *n*; and cases *ante*, 266; followed in America in *Com.* v. *Knapp*, 10 Pick. 776. In *R.* v. *Gillis*, *inf.*, however, *R.* v. *Burley* was explained as deciding merely that the prisoner's breach of condition rendered him liable to be tried and convicted on his own confession, if the latter were legally, but not if it were illegally, obtained].

A., a soldier, is charged with murder. B., his superior officer, had had A. arrested on suspicion and marched to the guard-room where, in the presence of a superintendent of police, B. asked A. "whether he had not broken out of barracks on the night in question." Held, A.'s answer was admissible since it was no breach of discipline to refuse to answer the question, although it was an offence to break out of barracks (*R.* v. *Brown*, 68 J.P.Rep. 15, *per* Wills, J.).

A., a non-commissioned officer, and B., a civilian, are charged with conspiracy to defraud the military authorities. A. and B. had both been invited to give evidence at a prior military enquiry held under the Army Act 1881, and had done so. By a military regulation, statements made at

Inadmissible.

have had," and A. replied, "Oh, don't do so and I will tell you all;"—Held, a confession thus made was inadmissible (*R.* v. *Bowden*, L'pool Winter Ass., Dec., 1859, *per* Martin, B., after consulting Willes, J., *ex rel.* Ch. Hy. Hopwood, 3 Jurid. Soc. Pap. 134; Tay. s. 880 *n*. *Contra*, in Ireland, *R.* v. *Cain*, 1 Craw. and D. 36; see *ante*, 265.]

A. is charged with setting fire to the house of B., her master. Shortly after the fire some of B.'s goods had been found concealed in the garden of the house. B. thereupon said to A.: "If you don't tell me the truth about the things found in the garden, I will send for a constable." A. then confessed having set fire to the house. This confession is inadmissible, as the threat was made with regard to a crime which, though different, formed part of the same transaction as the first (*R.* v. *Hearn*, 1 C. & M. 109; *aliter*, if the two crimes had been on distinct occasions, *R.* v. *Warner*, 2 Russ. Cr., 7th ed. 2174). A., a postman, being in custody for tampering with letters, a superior clerk in the post-office said to A.'s wife, "Do not be frightened; I hope nothing will happen to your husband beyond the loss of his situation." A confession afterwards made by A. held inadmissible, as the wife might have communicated the inducement to him (*R.* v. *Harding*, 1 Arm. M. & O. 320; but see *R.* v. *Bate*, *opposite*).

Where the employer of the prisoner said to the latter's brother, "It will be the right thing for him to make a clean breast of it"; held, that this inducement might be inferred to have reached the prisoner, and that it excluded the confession (*R.* v. *Thompson*, 1893, 2 Q.B. 12).

A. is charged with murder. When in custody, a Government handbill, offering a pardon to any accomplice who would give information to the police, had been brought to his notice, and induced him to confess. The confession held inadmissible (*R.* v. *Boswell*, C. & M. 584; *R.* v. *Blackburn*, 6 Cox, 233). A. is charged with treasonable conspiracy. A constable having gone to A.'s house to search for arms, said, "I understand you have a forge?"—A. then volunteered a statement implicating himself and others, and being asked if he would mind repeating this to a superintendent, said, "No." Thereupon they went to the superintendent and thence to a magistrate, before whom, without caution or inducement, A. made a similar information on oath. Some days later, on this information being read over in the presence of his confederates, A. said, "I came here to save myself." A. was not then in custody, no charge was made against him, and no caution given, the magistrate regarding him as an approver. Subsequently, on his refusing to testify against his confederates, A. was tried and convicted.

Admissible.

such enquiries are not admissible against military men except on proceedings against them under such Act for wilfully giving false evidence. Neither A. nor B. knew of the Regulation and they were not bound to make statements. Held that the above Regulation did not apply to trials in non-military courts, and that the evidence of A. and B. was admissible against them as a confession (*R.* v. *Colpus*, 1917, 1 K.B. 574).

A., an Indian soldier, is charged with the murder of B., his officer. While in custody, his commander said to him, 'Why have you done such a senseless act?' to which A. replied, 'Some three or four days he has been abusing me and without doubt I killed him? Held, (1) That A.'s confession, not being induced by hope or fear, was admissible; (2) *semble*, that it was not inadmissible because elicited by a person in authority and whilst the prisoner was in custody (*Ibrahim* v. *R.* 1914 A.C. 599, reviewing the cases on both points).

A. is charged with murder of a child. A police constable, who did not suspect A. of the murder, said to her: "You had a child handed over to you on the 10th., and it has not been seen since the 12th. I want to know where it is?" A. replied she had given it to a stranger whose name and address she did not know. The constable said: "You can't ask me to believe that," to which A. replied. "You would be silly if you did," and later said: "I drowned it." Held, A.'s statement was voluntary and admissible (*R.* v. *Cook*, 34 T.L.R. 515).

A. is charged with acts of gross indecency with B. At a prior hearing at the police court, of a charge of larceny preferred by A. against B. and C., A. had in his depositions admitted the alleged indecency with B. These depositions were held admissible against A. on the subsequent trial (*R.* v. *Laurent*, 62 J.P. 250; *cp. R.* v. *Chapman*, 29 T.L.R. 117, cited *ante*, 268).

(*c*) In the following cases the *effect of the original inducement was held to have been removed* and the confession to be admissible:

A person, who assisted a constable to arrest the prisoner, having told the latter that it would be better to confess, the magistrate on the following morning, before the prisoner made any statement, cautioned him "to say nothing against himself";—a confession subsequently made held admissible (*R.* v. *Lingate*, 1 Phil. & Arn. Ev., 10th ed. 414; *R.* v. *Bate*, 11 Cox, 686). So, where a constable had made a similar remark to the prisoner, and the latter afterwards asked the magistrate if this was so; to which the magistrate replied

Inadmissible.

Held, by a majority of the Court, that the statement and informations were inadmissible, being made under the hope of being received as an approver and not being validated by A.'s breach of promise (*R.* v. *Gillis*, 11 Cox, 69; 17 Ir. C.L.R. 512, following *R.* v. *M'Hugh*, 7 Cox, 483).

A. gives evidence in a trial, induced by a promise from a person in authority that it would not be used against him. Such evidence is not admissible against A. as a confession (*id.*); though it might be, notwithstanding the inducement, if given by A. in his own bankruptcy (*R.* v. *Cherry*, 12 Cox, 32; *cp. ante*, 215).

(*c*) In the following cases the *effect of the original inducement was held not to have been removed* and the confession to be inadmissible:

A constable having told a prisoner that it would be better to confess, the prisoner made a statement, which was afterwards taken down in the constable's deposition and read over to the prisoner in the presence of the magistrate. Before the prisoner had made any answer, the magistrate cautioned him not to say anything to injure himself, as it would be taken down and used against him. The prisoner then said: "What I have stated before is true"—held, confession inadmissible, as the magistrate, by not cautioning the prisoner

Admissible.

that he would not say that it was, and the prisoner had then confessed (*R.* v. *Rosier*, 1 Phil. & Arn. Ev., 10th ed. 414).

A magistrate, having told a prisoner that if the latter would confess he would use his influence to obtain a pardon for him, afterwards received a letter from the Secretary of State refusing the pardon, which letter the magistrate communicated to the prisoner. A confession subsequently made held admissible (*R.* v. *Clewes*, 4 C. & P. 221; and see *R.* v. *Howes*, 6 C. & P. 404).

The prosecutor's wife said to the prisoner, "If you do not tell, I will send for a constable in the morning to take you to the magistrate." The prisoner did not then say anything, but next morning, being arrested, made a confession on his way to the magistrate. Confession held admissible, as the inducement—viz., that the constable would *not* be sent for, and the prisoner would *not* be taken to the magistrate—ceased when these events happened (*R.* v. *Richards*, 5 C. & P. 318).

(*d*) A. is charged with receiving property stolen by B. A confession made by B. to a constable in the presence of, and not denied by, A., that he (B.) had stolen the goods, is admissible against A. to prove that fact (*R.* v. *Cox*, 1 F. & F. 90; see also *ante*, 260).

Inadmissible.

that he must not rely on the constable's promise, had impliedly sanctioned it, and the prisoner might well have believed that the second confession would do him no injury (*R.* v. *Smith*, cited 2 Russ. Cr., 7th ed. 2183; and see *R.* v. *Compson*, *id.* In *R.* v. *Horner*, 1 Cox, 364, however, the contrary was held on identical facts, but *R.* v. *Smith* was not cited, and no notice was taken by the judge that the original confession had been incorporated in the constable's deposition: see as to this case, 2 Russ. Cr. 7th ed. 2183).

A constable told a prisoner in the morning that it would be "better to tell the truth"; in the evening another constable cautioned the prisoner that "anything he might say would be used against him." A confession afterwards made held inadmissible (*R.* v. *Doherty*, 13 Cox, 23; *contra*, Tay. s. 878, citing several earlier cases).—A magistrate having told a prisoner that if the latter would confess he would do all he could for him, the prisoner subsequently confessed to a turnkey who did not caution him. Confession held inadmissible (*R.* v. *Cooper*, 5 C. & P. 535. It would probably have been inadmissible even if the turnkey had cautioned him).

The prosecutor's wife said to the prisoner, "You will be forgiven if you confess"; the prisoner was then taken before a magistrate, but discharged without having confessed. Afterwards she was rearrested, when the constable said to her in the presence of her mistress, "You are not bound to say anything, but if you do, your mistress will hear you." Confession held inadmissible, as the original inducement might be considered to have been resanctioned by the mistress not dissenting from the constable's remark. *Aliter*, if the mistress had not been present (*R.* v. *Hewitt*, 1 Car. & M. 534).

A. is charged with the murder of B.'s child. B. having asked A. if she had anything to do with the disappearance of the child, A. cried and said, "If you won't send for the police I'll tell the truth." B. promised not to hurt her or send for the police if she told the truth, and A. then confessed. Afterwards C., a neighbour of B.'s, took A. into a room, and on questioning her A. repeated the confession. Held, the first confession was inadmissible, and the second was so connected therewith as to be also so, although C. was not in authority and held out no inducement (*R.* v. *Rue*, 34 L.T. 400).

(*d*) A. is charged with receiving property stolen by B. A confession by B. before a magistrate in A.'s presence, and not denied by A., that he (B.) had stolen the goods is not admissible against A. to prove that fact (see fully *R.* v. *Turner*, and other cases, *ante*, 260].

Admissible.

A., when in custody with B., on a charge of murdering C., makes a statement to the police in the absence of, but incriminating, B., which is taken down in writing and afterwards read over to B., who then, in A.'s presence, admits it, and on the admission being put into writing read over to him, he (B.) signs it. Held, the statement was voluntary and admissible against B. (*R.* v. *Goddard*, 60 J.P. 491; it is also admissible as made in B.'s presence and assented to by him, *ante*, 260).

A. and B. being in custody on a joint charge, A. makes and signs a voluntary statement implicating B. Upon this statement being read over to B. by the police, B., who is first cautioned, makes a confession which, after it is written down, he signs. Held, that both statements were admissible against B. (*R.* v. *Hirst*, 18 Cox, 374).

A. is charged with crime. While in prison, A. makes a confession to B., a fellow-prisoner, which the police, by means of a hole bored in the wall, overhear. Held, though with hesitation, that the confession was admissible [*R.* v. *Boughton*, 70 J.P. Rep. 508; *R.* v. *Gardner*, 85 L.J.K.B. 206 (1916)].

A. is convicted of crime. After the trial A. wrote a letter to a friend confessing the crime. The prison officials having opened the letter and taken a copy, forwarded the letter to the friend, who destroyed it. On proof of these facts the copy was, on appeal, held admissible and not privileged (*R.* v. *Robinson*, 1917, 2 K. B. 108).

(*e*) A. is charged with stealing money from B. The fact that A., after an improper inducement to confess, gave up the money to B., saying, as he did so, that it was the money which had been stolen from him, held admissible (*R.* v. *Griffin*, Rus. & Ry. 151).

A. is charged with burglary, the fact that, after an improper inducement, A. confessed to having thrown a lantern into a pond, and the fact that the lantern was found there are admissible (*R.* v. *Gould*, 9 C. & P. 364; *R.* v. *Harris*, cited Joy, 83; *R.* v. *Thurtell*, *id.* 84. *Aliter* as to other parts of the confession).

Inadmissible.

A. and his wife, B., are charged with the murder of B.'s child. B. had at the inquest testified that the child had fallen from a perambulator; but afterwards stated to the coroner that she "had told the tale about the pram. to screen A., who had struck the child." Held, B.'s statement, though evidence against herself, was not admissible against A. (*R.* v. *Flutter*, 114 C.C.C. Sess. Pap. p. 1259, *per* Wright, J.).

A. is charged with the murder of B. A death-bed confession made by C. that he, and not A., had murdered B., is inadmissible as evidence of that fact for A. (*R.* v. *Gray*, Ir. Circ. Rep. 76).

(*e*) A. is charged with stealing money from B. The fact that A. after an improper inducement to confess, gave up some of the money to B., saying as he did so that it was all he had left of it (*R.* v. *Jones*, Rus. & Ry. 152), or that he had stolen it (2 East P.C. 658), held inadmissible.

A. is charged with theft. The fact that, after an improper inducement, A. confessed to the theft; and the fact that he took a constable to a house where, and to persons to whom, he said he had disposed of the property, which persons, however, denied the receipt of the property, which was never found, both held inadmissible (*R.* v. *Jenkins*, R. & R. 492).

CHAPTER XXII.

STATEMENTS BY DECEASED PERSONS.

THE second main class of exceptions to the hearsay rule consists of declarations, oral or written, made by persons since deceased, which are admissible in proof of the facts declared in the undermentioned cases, the truth of the declarations being deemed to be *primâ facie* guaranteed by the special conditions of admissibility imposed: (1) Declarations against interest; (2) Declarations in the course of duty; (3) Declarations as to public rights; (4) Declarations as to pedigree; (5) Dying declarations in cases of homicide; (6) Declarations by testators as to their wills.

In (1) and (2) the declarations are admissible upon any issue; in (3) to (6) they are only admitted from the necessity of the case, and in proof of the particular issues specified.

Extrinsic Proof of Death, Identity, &c. The special conditions of admissibility must be proved *aliunde* to the satisfaction of the judge; though after seven years' absence the death of the declarant (*Wills* v. *Palmer,* 53 W. R. 169), and in the case of documents, after 30 years, the death and generally the genuineness of the handwriting of the writer (*Wynne* v. *Tyrwhitt,* 4 B. & Ald. 376; *Doe* v. *Davies,* 10 Q.B. 314; *Doe* v. *Michael,* 17 Q.B. 276; see, however, *post,* 281), may be presumed.

Competency and Credibility. Mr. Justice Stephen states that the credit of a deceased declarant may be impeached or confirmed in the same manner as that of a witness who has denied on cross-examination the truth of the matter suggested (art. 135). *R.* v. *Drummond,* 1 Lea, 338, and *R.* v. *Pike,* 3 C. & P. 598, in which dying declarations in cases of homicide were excluded because the declarants were incompetent as witnesses, are cited in support, but it is added that "the principle would obviously apply to all the cases in question"; this, however, seems doubtful, the case of dying declarations being somewhat exceptional. Thus, although incompetency excludes a dying declaration, it does not exclude a declaration against interest (*Gleadow* v. *Atkin,* 1 C. & M. 410); so, want of personal knowledge would be fatal to the former, but not, it has been held, to the latter (*Crease* v. *Barrett,* 1 C. M. & R. 919; see, however, *Tucker* v. *Oldbury,* V.C., 1912, 2 K.B. 317; *Lloyd* v. *Powell,* 1913, 2 K.B. p. 137, and *post,* 281). Again though proof of previous inconsistent statements is admissible to discredit a witness, and has been received in America to impeach a dying declaration (*post,* 319), yet such evidence has been rejected when tendered in disparagement of a declaration made in the course of duty (*Stapylton* v. *Clough,* 2

E. & B. 933, *post,* 288, 293, in which case Lord Campbell remarked "what the deceased did in discharging his duty was signing the written entry; what he may babble during the rest of his life on the subject cannot be admitted in evidence, contradicting as it does here what he has before written"). Formerly, indeed, where a subscribing witness was dead, it was admissible to impeach the credit of his attestation by proof of his own declarations, *e.g.* that he had forged the document (*Wright* v. *Littler,* 3 Burr. 1244, 1255; *Doe* v. *Ridgway,* 4 B. & Ald. 53, 55; *Aveson* v. *Kinnaird, ante,* 83); but since the leading case of *Stobart* v. *Dryden,* 1 M. & W. 615, this is no longer law. Parke, B., there remarked: "It was contended (1) that as the plaintiff used the declaration of the subscribing witness, evidenced by his signature, to prove the execution, the defendant might use any declaration of the same witness to disprove it. The answer is, that the attestation is not used as a declaration by the witness, but to show that he put his name in that place and manner in which, in the ordinary course of business, he would have done if he had actually seen the deed executed. A statement of the witness by parol or written on any other document would be inadmissible. Proof of attestation is, therefore, not proof of a declaration, but of a fact. (2) That proof of the declarations of the deceased was in the nature of a substitute for the loss of the benefit of cross-examination, by which either the fact confessed would have been proved, or the witness would have been liable to be contradicted by proof of his admission. But, if such declarations were to be admitted, the rights of parties under wills and deeds would be liable to be affected at remote periods by loose declarations which those parties would have no opportunity of contradicting or explaining. The party impeaching the instrument would, it is true, have an equivalent for the loss of his power of cross-examination, but the party supporting it would have none for the loss of his power of re-examination." So, declarations of attesting witnesses made as part of the act of attestation, and showing whether they signed *animo attestandi,* are not hearsay, but original evidence admitted as part of the *res gesta* (*post,* 326). [In America attestation seems to be treated as a declaration admitted in proof of the act by exception to the hearsay rule, Wigmore, s. 1505; *cp.* 24 Harv. L .Rev. 409].

Where, however, fraud is imputed to a deceased declarant, *general* evidence of good character is admissible to re-establish his credit, *ante,* 192. As to the admissibility of this and other forms of parol evidence to affect documents, see *post,* 325-6, 525, 575, 666.

Miscellaneous. The declarations (1) may be either oral or written; (2) they are not rendered inadmissible by the existence of better evidence of the same facts; and (3) they are receivable either for or against the parties.

CHAPTER XXIII.

DECLARATIONS AGAINST INTEREST.

Declarations, oral or written, made by deceased persons as to facts within their personal knowledge or belief and consciously against their pecuniary or proprietary interests, are admissible in proof of the matters stated.

[Tay. ss. 668-695; Best, s. 500; Ros. N.P. 55-59; Steph. art. 28; 2 Smith L.C., 11th ed. 327, *notes* to *Higham* v. *Ridgway;* Wigmore, Ev. ss. 1455-77. The declarations may be *oral* or *written* (*Bewley* v. *Atkinson,* 13 Ch.D. 297-8; *Re Perton,* 53 L.T. 707)].

Principle. The grounds of reception are (1) *death;* and (2) the presumption that what a man states *against his interest* is probably true.

History. Written entries by deceased bailiffs, stewards and vicars in books charging themselves with the receipt of rent, tithe, &c., were probably admitted as evidence long before any definite rule against hearsay was formulated. Entries by deceased vicars and rectors were, however, at one time supposed to be anomalous, since though strictly against their own interest, they enabled the declarants to make evidence *for* their successors (Steph. *sup.*). Two of the earliest cases in which evidence under the present head was received by way of exception to the hearsay rule occur in 1724 and 1737, when old rent-books were held admissible as evidence of payment, because no other could be had (*Woodnoth* v. *Cobham,* Bunbury 180; *Manning* v. *Lechmere,* 1 Atk. 453). Oral declarations against interest were not admitted until about half a century later (1787, *Davies* v. *Pierce,* 2 T.R. 54) [Thayer, Pr. Tr. Ev. 520-1; *id.* Cas. on Ev. 2nd ed. 474-6; Wigmore, s. 1476; *cp. ante,* 228].

The Interest. (*a*) The interest involved must be *pecuniary or proprietary;* no other, even though of a *penal* kind, will suffice (*Sussex Peerage,* 11 C. & F. 108; *R.* v. *Birmingham,* 1 B. & S. 763). And the *amount* is immaterial so far as the admissibility of the declaration is concerned (*Orrett* v. *Corser,* 21 Beav. 52; *Taylor* v. *Witham,* 3 Ch. D. 605). The declarations must also have been against interest *at the time* they were made; it is not enough that they might possibly turn out to be so afterwards (*Smith* v. *Blakey,* L.R. 2 Q.B. 326; *Massey* v. *Allen,* 13 Ch.D. 558; *Exp.* Edwards, *Re Tollemache,* 14 Q.B.D. 415; *Tucker* v. *Oldbury,* U.D.C. 1912, 2 K.B. 317, C.A.; *Lloyd* v. *Powell & Co.,* 1913, 2 K.B. 130, C.A.). Where the declaration takes the form of an entry in a book of account, it will be against the declarant's interest if it either acknowledges the payment of money due to himself, or charges him with the receipt of money for which he is accountable to a third person (*Foster* v *McMahon,* 11 Ir. Eq. R. 287,299; Tay. s. 673). In *Taylor* v. *Witham, sup.,* Jessel, M.R., remarked,—"What is the meaning of being against interest? I

adopt the view of Mr. Baron Parke in *R.* v. *Lower Heyford,* 2 Sm. L.C. 12th ed, 313, that it must be *prima facie* against his interest, that is to say, the natural meaning of the entry standing alone must be against the interest of the man who made it. Of course, if you can prove *aliunde* that the man had a particular reason for making it, and that it was for his interest, you may destroy the value of the evidence altogether, but the question of admissibility is not a question of value. The entry may be utterly worthless when you get it, if you show any reason to believe that he had a motive for making it, and that though apparently against his interest, yet really it was for it; but there is a matter for subsequent consideration when you estimate the value of the testimony." And see to same effect, *Re Perton,* 53 L.T. 707, 710, *per* Chitty, J. In *Lloyd* v. *Powell & Co., sup.,* the Court remarked, "The only doubt that arises is whether the statement must be one which 'never could be made available for the person himself,' as Blackburn, J., said in *Smith* v. *Blakey, sup.,* or whether it is sufficient that the entry be *prima facie* and in its natural meaning, standing alone, against interest, as Jessel, M.P., states in *Taylor* v. *Witham, sup.* So far as there is any real difference between them, the former statement seems to be the better opinion." It is not clear, however, what Blackburn, J., meant by his remark. It is difficult to imagine a statement which could never be made available for the declarant himself; and in any case the test is whether the statement is against interest at the time, and not what its effect might be in the future.

Proprietary Interest. Declarations made by deceased persons in disparagement of their title to land are admissible if made while the declarant was in actual possession of the property, and as to matters either within his personal knowledge, or on which he had formed an opinion (Tay. 8th ed. s. 685; *Fawke* v. *Miles,* 27 T.L.R. 202, cited *post,* 283), or perhaps which he believed, although without personal knowledge (*Trimlestown* v. *Kemmis,* 9 C. & F. 749, 780, 784-6). And as, in the absence of other proof, mere possession implies seisin in fee, any declaration of an occupier tending to cut down, charge, or fetter his presumably absolute interest, will be receivable under this head. A distinction, however, exists between statements which limit the declarant's *own title,* and those which go to abridge or encumber the *estate* itself; the former being receivable even between strangers, the latter being only so as against the declarant and his privies (*Papendick* v. *Bridgwater,* 5 E. & B. 166; *Blandy-Jenkins* v. *Dunraven,* 1899, 2 Ch. 121, 128; *cp. ante,* 239).

Statutes of Limitation. An acknowledgment made by (or by the direction of) a deceased creditor of money received on account of a debt or interest due to him is receivable as a declaration against interest if made *before,* but *not after,* the debt has become statute-barred (*Briggs* v. *Wilson,* 5 De G. M. & G. 12). Where such an acknowledgment was made after a simple contract remedy, but before a remedy against lands in respect of the same debt, had become barred, the evidence was rejected by North, J. [*Newbould* v. *Smith,* 29 Ch.D. 882; *sed qu.,* and Sir J. Stephen remarks that this decision seems inconsistent with *Bradley* v. *James, inf.* (Dig. art. 28); the former case was affirmed on other grounds in 33 Ch.D. 127, and 14 App. Cas. 423, but no opinion was expressed as to the admissibility of the evidence]. If the acknowledgment be *indorsed* upon the instrument itself, this will not be

sufficient proof of such payment to defeat the statute, in cases of *simple contract debts* (9 Geo. IV. c. 14, s. 3); though an acknowledgment in any other form may be (*Bradley* v. *James,* 13 C.B. 822; Steph. art. 28). In the case of *specialty debts,* such an indorsement will be sufficient, if it is shown by extrinsic evidence to have been written at the time expressed; though *quære* if it will be presumed correct without such proof (Tay. ss. 690-696; Steph. art. 28).

Personal Knowledge. Mr. Taylor remarks: "It would seem from many of the (older) cases that the declarant must be shown to have had a competent, if not a peculiar, knowledge of the facts which form the subject matter of the declaration; and indeed in the *Sussex Peerage claim,* 11 C. & F. 112, the rule was so laid down. In all these cases, however, the law was taken for granted; and in *Crease* v. *Barrett,* 1 C.M. & R. 919, 925, where the question was expressly raised, the Court of Exchequer after argument held 'that it was not necessary that the deceased person should have his own knowledge of the fact stated,—that, if the entry charged himself, the whole of it became admissible against all persons,—and that the absence of such knowledge went to weight and not to the admissibility, of such evidence" (8th ed. s. 669; and see *Percival* v. *Nanson,* 7 Ex. 1, cited, *post,* 285). In *Lloyd* v. *Powell,* 1913, 2 K.B. 133, 137, C.A., reversed on other grounds, 1914, A.C. 733, on the other hand, the C.A. decided that personal knowledge is essential to the admissibility of such statements. This case, however, seems unsatisfactory, since (1) *Crease* v. *Barrett* and *Percival* v. *Nanson, sup.,* were not brought to the attention of the Court; (2) *The Henry Coxon,* 3 P.D. 156, is referred to as an authority on declarations against interest, whereas it related to those made in the course of duty, where an admittedly stricter view prevails; and (3) *Trimblestown* v. *Kemmis,* 9 C. & F. 749, 780, 784-6, is cited without reference to the fact that the declarations there rejected were against *proprietary interest,* where, also, perhaps, a greater stringency obtains, and that even there, the declarant's belief, without his personal knowledge, would appear to have been thought sufficient to render the declaration admissible (*cp.* Tay. s. 685; *post.* 284).

Competency. Contemporaneousness, Post Litem Motam. (*b*) Declarations against pecuniary interest have been held admissible (i) although the declarant would have been incompetent as a witness (*Gleadow* v. *Atkin,* 1 C. & M. 410), (ii) although they were not made contemporaneously with the facts (*Doe* v. *Turford,* 3 B. & Ad, 890; *Smith* v. *Blakey, sup.; Whaley* v. *Masserene,* 8 Ir. Jur. N.S. 281, where a receipt given in substitution for a lost receipt of twenty-eight years before, was admitted); and (iii) although the declaration was made *pendente lite* as evidence, or *post litem motam* (*Whaley* v. *Masserene, sup.*). These circumstances affect the weight, not the admissibility, of the evidence.

Collateral Facts. Contradiction of Documents. (c) The declarations are evidence not only of the precise fact against interest, but of all *connected facts* (though not against interest) which are necessary to explain, or are expressly referred to by, the declaration—and whether contained in the same or other documents (*R.* v. *Birmingham,* 1 B. & S. 763, 767-70; *R.* v. *Exeter,* L. R. 4 Q.B. 341, 345; *Taylor* v. *Witham,* 3 Ch.D. 605; *The Swiftsure,* 82 L.T. 389; *Connor* v. *Fitzgerald,* 11 L.R.Ir. 106; and compare admissions, *ante,*

232-3). Thus, accounts are admissible some items of which charge the declarant, though other connected items discharge him, or even show a balance in his favour; for in the former case it is not to be presumed that a man will charge himself falsely for the mere purpose of getting a discharge, and in the latter the debit items would still be against interest, since they diminish the balance in his favour (Tay. s. 674). But *disconnected facts*, though contained in the same document or statement, are inadmissible (*Doe* v. *Beviss*, &c., cited, *post*, 285).

The declarations are subject to the rules as to parol evidence affecting documents. Thus, they cannot be received to derogate from the declarant's own grant (*Lalor* v. *L.*, L.R.I. 678; and *cp. O'Brien* v. *Sheil*, I.R. 7 Eq. 255); nor to qualify the estate of a co-devisee (*Turner* v. *A.-G.*, I.R. 10 Eq. 386, 392; see *post*, 598). As to declarations by a deceased attesting witness impeaching his attestation, see *ante*, 277.

Extrinsic Proof. (*d*) Extrinsic proof must be given of the declarant's *death* (unless presumable from seven years' absence, *Wills* v. *Palmer*, 53 W. R. 169), and that the statement was either *made, written or signed by him*, or, if made or written by another, that it was *authorised* (*Lancum* v. *Lowell*, 6 C. & P. 437, 443-5; *Bradley* v. *James*, 13 C.B. 822; *Doe* v. *Hawkins*, 2 Q.B. 212; *Re Fountaine*, 1909, 2 Ch. 382), or *adopted* (*Doe* v. *Hawkins, sup.; Devonshire* v. *Neill*, 2 L.R.I. 132, 157; *ante*, 257, 261), by the deceased. Where, however, the document is thirty years old, and produced from proper custody, the handwriting may, if it is a private one, generally be presumed (*post*, 523-5; Tay. s. 682; Ros. N.P. 141-4; *contra, Devonshire* v. *Neill*, *post*, 286); but this rule has not been acted on in the case of declarations as to pedigree (*Fitzwalter Peerage*, 10 C. & F. 193; Tay. ss. 1874, 1875), nor in those made in the course of duty (*Doe* v. *Davies*, 10 Q.B. 314; *Miller* v. *Wheatley*, *post*, 275, where the handwriting of a deceased clergyman to a register more than thirty years old was required to be proved). If the declarant purport to charge himself as the *agent, steward* or *receiver* of another, it is necessary, in addition, to give some proof that he really occupied the alleged position; except (i) where the agency is a *public* one; or (ii) perhaps, where the entries are *ancient*, produced from proper custody, and bear strong internal evidence of genuineness (Tay. s. 683; *cp. ante*, 127-9). It is not, however, necessary to prove independently the *existence of the charge* of which the entry shows the subsequent liquidation (*Taylor* v. *Witham, sup.*; Tay. s. 675).

EXAMPLES.

Admissible.

(*a*) To prove the execution of a will; —an entry made by a deceased solicitor in his ledger of the payment of his charges for drawing the will and attending its execution, is admissible as a declaration against interest [*Re Thomas*, 41 L.J. P. & M. 32; *Wills* v. *Palmer*, 53 W.R. 165; *Bradshaw* v. *Widdrington*, 86 L.T. 726, 733. And entries of charges would, it seems, be admissible, even though they appear to have been paid otherwise than upon the face of the entries: *Doe* v. *Robson*, 15 East, 32].

Inadmissible.

(*a*) The question being whether certain jewels, which A. (deceased) had delivered to his wife "for her use," belonged to her absolutely or only for life;—a revoked codicil made by A. reciting that he had given them to her for life, held not to be a declaration which was against A.'s interest (*Re Bowes*, 1889, W.N. 138).

To prove that certain shares belonged to A.;—an entry in the day-book of a deceased stockbroker—"Bought for A. 200 L.C. Co.'s shares, £1400"—held not admissible as a declaration against the broker's

Admissible.

An entry by a deceased accoucheur of the payment of his charges for attending a confinement is evidence of the fact and date of the child's birth (*Higham* v. *Ridgway*, 10 East, 109). Such an entry would also be evidence of the name of its parents, though only stated on hearsay (*Percival* v. *Nanson*, 7 Ex. 1, cited *post*, 285), and of the payment of the declarant's charges, though the payer was alive and might have been called (*id.*; *Middleton* v. *Melton*, 10 B. & C. 317).

To prove that A. was illegitimate;—a statement by him that he was so, held receivable after his death as a declaration both against pecuniary and proprietary interest (*Re Perton*, 58 L.T. 707; *contra*, *Haslam* v. *Cron*, *post*, 309).

A declaration by A. (deceased) who would, in the event of B. dying intestate, have been entitled to a certain sum under a settlement, that B. had made a will leaving her a less sum, is admissible as against interest (*Flood* v. *Russell*, 29 L.R.I. 91; *post*, 268).

To prove that A. was the owner of certain goods;—a bill of lading in which they were consigned to A., signed by the deceased master of the vessel in which they were shipped, held admissible as a declaration against the master's interest (*Haddow* v. *Parry*, 3 Taunt. 303. *Aliter* if the cases had been marked "contents unknown"). —So, a letter acknowledging the receipt of a will has been held evidence that the testator sent the will to the writer (*Pyke* v. *Crouch*, 1 Ld. Raym. 730). [*Sed qu.*, perhaps, as to these two cases, since *Smith* v. *Blakey*, *opposite*.]

To prove the payment of rent by A., a tenant, to B., his landlord;—a receipt therefor given by B. (deceased) to C. (his agent); or a receipt given by C. (deceased) to A., is admissible as against interest [*Vivian* v. *Moat*, 44 L.T. 210; and *inf.* examples (*d*)].

To prove the payment of rent by A. to B.;—a statement made by B.'s deceased agent when handing B. a sum of money that "he had received it from A. as rent," held admissible as against interest [*Bewley* v. *Atkinson*, 13 Ch.D. 283, C.A. The same point was discussed, but not decided, in *Fursden* v. *Clogg*, 10 M. & W. 572; but see *opposite*. A statement by A., deceased, that he had received money from B., and paid it over to C. (who, it appeared, could not give a valid discharge), was held admissible in *Orrett* v. *Corser*, 21 Beav. 52].

To prove that A., a testatrix, was not of sound mind when she destroyed her will;—a statement made by B., her deceased husband, who under the will took a life interest only in her estate, whereas under an ante-nuptial settlement he was,

Inadmissible.

interest; for if the price fell, and he was not bound to deliver any specific shares, the transaction might be for his advantage [*Massey* v. *Allen*, 13 Ch.D. 558. A corresponding entry in the broker's ledger in which the latter, in addition, debited himself with the purchase-money received from A., was admitted].

A., as a dependent of B., deceased, sues C., B.'s employer, under the Workmen's Compensation Act, 1906, for injuries by an accident to B.'s thumb. To disprove the accident, C. tenders a statement made by B. to C.'s manager, in answer to a question as to what was the matter with his thumb that "he had a whitlow on it," and in reply to the further question whether he had been hammering it, B.'s reply of "No." Held not admissible, because the statements when made were not to B.'s knowledge against his interest, since (1) no claim had then been put forward, nor was there reason to believe B. knew he would be able to make one; (2) they were not necessarily hostile to such a claim, even if he had lived to make it [*Tucker* v. *Oldbury* U.D.C. 1912, 2 K.B. 317, C.A. B.'s statements were also held not receivable as admissions, since A. did not claim through B. (*ante* 240). Nor would they be admissible as part of the *res gesta* (*ante* 83), or as declarations in the course of duty (*post*, 289)].

In a similar claim to the above by A., a posthumous illegitimate child of B., to prove dependency and paternity;—statements by B. (deceased) promising to marry A.'s mother, and other statements that he intended to marry and make a home for her, and that he was the father of, and intended to maintain, A., were held inadmissible as declarations against B.'s interest, since (1) a promise, or intention, *to marry* is not against the interest of either party; (2) a statement as to paternity by an alleged father, unlike one by a mother, is not one as to a fact of which he has peculiar, or direct, *personal knowledge;* nor is it one which is against interest *at the time*, though it might, on subsequent (bastardy) proceedings ultimately turn out to be so [*Lloyd* v. *Powell &c., Co.*, 1913, 2 K.B. 130, C.A.; reversed upon other grounds, 1914 A.C. 733, the statements being held admissible as conduct and part of the *res gestæ* (*ante*, 62)].

To prove the marriage of A. and B.; —a statement by a deceased clergyman that he had performed the ceremony, the circumstances being such as to render him liable to a criminal prosecution, held inadmissible, not being against "pecuniary or proprietary interest" (*Sussex Peerage*, 11 C. & F. pp. 103-114).

To prove the terms on which A. sent goods to B.;—a letter written to B. by his

Admissible.

if the will were displaced, entitled absolutely to her estate,—that "he did not think A. was of sound mind when she destroyed her will," is admissible as being in disparagement of his own title by limiting it to a life-estate (*Fawke* v. *Miles*, 27 T.L.R. 202, *per* Evans, P.)

To prove the existence and terms of a (lost) lease;—an entry made in a rent-book by a deceased landlord that he had "agreed to grant a lease for thirty-one years at £96 rent, and accept the old rent (£84) for one year in consequence of the potato famine";—held admissible as against *pecuniary* interest because of the abatement of the first year's rent, although the entry proved an increase in the new rent; and admissible against *proprietary* interest because the agreement to grant a lease tended to fetter the landlord's absolute ownership (*Connor* v. *Fitzgerald*, 11 L.R.Ir. 106).

To prove that A. had granted a (lost) renewable lease to B. of certain lands, a covenant contained in a sub-lease by B. to C. of the same lands, whereby B. undertook to obtain a renewal of A.'s lease to him, is admissible after B.'s death as secondary evidence of A.'s lease, being against B.'s proprietary interest, which would otherwise be presumed to be absolute. The fact that B. granted C. a lease is also evidence of an act of ownership sufficient to show that B. was in possession at the time (*La Touche* v. *Hutton*, Ir. R. 9 Eq. 166).

A., as tenant-in-tail, brings ejectment against B. for land held by B. under a lease in 1811, for 3 lives with a covenant for renewal if the new lives were successively nominated, on the fall of each life. A. contends that the lease had lapsed as the new lives had only been simultaneously nominated on the fall of all the lives. To rebut this, B. puts in 2 deeds of renewal, executed in 1872 and 1879, by C., the tenant for life of the reversion, containing recitals that the new lives had been successively nominated "pursuant to the covenant for renewal" in the 1811 lease. If these renewals had been invalid and the lease ended, C. would have been entitled to an increased rental from the property. Held, that the recitals were admissible as statements on a matter of which C. had special knowledge and which were against her interest, since the obligation to renew and execution of the deeds imposed a burden on her estate and decreased her rental therefrom (*Domvile* v. *Callwell*, 1907, 2 I.R. 617).

A. sues B. for trespass. To show that the land in question belonged to A., a statement by C. (deceased) when selling the land to A. that it was part of the property sold, held admissible, it being against C.'s interest to part with more than possible, though it might be for his interest

Inadmissible.

deceased manager, stating that A. had sent the goods to the office on the terms in question, is not admissible; the possible liability of B.'s manager to an action for damages in case the goods were lost being too remote a pecuniary detriment (*Smith* v. *Blakey*, L.R. 2 Q.B. 326).

The certificate of a deceased auditor is not admissible to prove an account, on the ground of his liability to an action of negligence if the account turned out incorrect (*Vivian* v. *Moat*, 44 L.T. 210). Nor is the report of a deceased planter as to the value of a rubber estate, furnished to the directors of a company, which was about to buy it, a statement against his interest (*Re Djambi Rubber Estates*, 107 L.T. 631 C.A. See the judgment of Warrington, J., in the Court below; and as to other points decided in this case, see *post*, 289, 292).

The executors of A. (a deceased stock-broker) sue B. for money lent her by A. Defence, that the advance was a gift, not a loan. Entries in A.'s office books treating it as a loan and debiting B. with interest thereon.—Held, inadmissible as being in A.'s own interest [*Schwabacher* v. *Heimer*, C.A., cited *ante* 133. It was also held inadmissible to show A.'s *bona fides*].

To prove a debt due from a deceased bankrupt,—an admission of the debt in the bankrupt's statement of affairs is not receivable as a declaration against interest, on the ground that there might turn out to be a surplus after payment of the creditors which would be diminished by the amount of the debt admitted (*Exp. Edwards, Re Tollemache*, 14 Q.B.D. 415).

To prove the payment of interest by A. to B.;—a letter written by A.'s former attorney (deceased) to B., stating that he (the attorney) had paid to B.'s account a sum of money which he had received from A. as interest;—held, not admissible as a statement against interest (*Newbould* v. *Smith*, 33 Ch.D. 127, C.A.; affirmed on other grounds, 14 App. Cas. 423).

A., tenant for life of trust-funds, sues B., her trustee, for moneys misappropriated by C., a deceased partner in the firm of C. & Sons, solicitors to B. To prove acknowledgment by B. so as to take the case out of the Trustee Act, 1888, s. 8, A. tenders account-books kept by C. & Sons of the capital and income of the trust funds, in which interest thereon is credited to B. Held, not admissible because (*a*) the accounts were those not of C. personally, but of his firm; and (*b*) they only showed a debt from the firm to B., and not from B. to A. (*Re Fountaine*, 1909, 2 Ch. 382).

To prove a contract by A. to hire B. as a servant;—an entry in the diary of A.

Admissible.

to make a good title (*Parrott* v. *Watts*, 37 L.T. at 757; the statement was also admitted as part of the *res gesta*, *ante*, 72).

To prove that A. owned certain land;—a statement of that fact made by B. (deceased) while felling timber on the land is admissible; this act being a sufficient assertion of ownership to imply seisin in B., and so to admit his declarations in derogation of title (*Doe* v. *Arkwright*, 5 C. & P. 575). So, where A. claimed lands by cession from B. (deceased), evidence that B. managed the property and while so doing had declared he did so in A.'s name, held admissible without first proving the cession (*De Bode's Case*, 8 Q.B. 208).

Declarations by A., the deceased occupier of a house, that he was the tenant of B. at £22 a year, and had paid the rent; and entries in his books that he had paid £5 10*s.* for the quarter due midsummer, 1830; — held admissible as against A.'s proprietary interest (*i.e.* cutting down his presumed seisin in fee) to prove the fact of the tenancy and the amount and payment of the rent (*R.* v. *Exeter*, L.R. 4 Q.B. 341; *R.* v. *Birmingham*, 1 B. & S. 763). They would also be evidence of the name of A.'s landlord (*Peaceable* v. *Watson*, 4 Taunt. 16).

A. sues B. for trespass to land over which B. claims a right of common. A. tenders a document dated 1659, produced from his own muniment room, but signed by D. (tenant of a predecessor in title of B.), witnessing that C. (a predecessor in title of A.) had been persuaded to stay an action of trespass against D. upon D. binding himself by the document to pay C. 16*s.* costs and to refrain from further trespass. Held admissible as a declaration by D. (deceased) against his pecuniary interest (*Blandy-Jenkins* v. *Dunraven*, 1899, 2 Ch. 121, 127, *per* Jeune, P., and Romer, L.J.; it was also received as tantamount to an act of ownership, *ante*, 129).

A. propounds for probate a copy of a (lost) will of B., and to establish the existence of the original will, tenders a recital by C., deceased, who occupied land formerly owned by B., in a deed whereby C. charged his interest in the land, that he held a life-estate therein derived from B.'s will, of which X. and Y. were executors;—held admissible as against C.'s interest by reason of its twofold limitation of the declarant's estate to a life-interest and under a particular document (*Sly* v. *Sly*, 2 P.D. 91; *post*, 292; *Flood* v. *Russel*, *ante*, 282). As to declarations by deceased devisees that they were merely trustees, see *post*, 286.

On a question of title to land;—the fact that A. (deceased) accepted an allotment

Inadmissible.

(deceased) as follows: "April 4.—B. came as a servant; to have for the half-year £2"—is not admissible as a statement against A.'s interest, being merely a memorandum of an agreement which could not be presumed to be prejudicial to either party (*R.* v. *Worth*, 4 Q.B. 132; so, as to a contract to marry, *Lloyd* v. *Powell &c., Co.*, *supra*, 282). Nor to prove the terms upon which horses were hired from a jobmaster, is an entry by his deceased servant of such terms admissible as a statement against the servant's interest (*Calvert* v. *Canterbury*, 2 Esp. 646).

A deed of conveyance executed, among others, by A., which contained a recital against her interest (*i.e.* that land of which she was devisee for life was subject to a mortgage), but the consideration for which was stated to be that she obtained a forbearance from a debt due from her and a further advance, held not admissible, there being a balance of interests (*Doe* v. *Wainwright*, 8 A. & E. 691, 699-701; as to debtor and creditor accounts, see *infra*, 285-6).

To prove that a certain spot was not within the waste of a manor;—a declaration by the deceased lord that "he was entitled to the waste up to a certain point (which did not include the *locus in quo*), but no further," is inadmissible—(1) the lord not being in possession of the *locus;* (2) as not being against proprietary interest, because, though disclaiming as to one part, he affirmed as to the other [*Crease* v. *Barrett*, 1 C.M. & R. 919; see, however, as to debtor and creditor accounts, *infra*, 285-6].

A declaration by a deceased occupier of land as to what he had *heard another person* state respecting the ownership, but as to which the deceased did not even say that he *believed* what was told him;—Held not admissible as against proprietary interest (*Trimlestown* v. *Kemmis*, 9 C. & F. 749, 780, 784-6).

The question being whether a right of common existed over a field;—a statement by a deceased lessee of the field that the right did or did not exist, is not admissible against either the owner of the field or strangers, though *aliter* against the declarant's own successors in title [*Papendick* v. *Bridgwater*, 5 E. & B. 166; *R.* v. *Bliss*, 7 A. & E. 550; *Blandy-Jenkins* v. *Dunraven*, 1899, 2 Ch. 121, 128].

So, a declaration by a deceased tenant for life as to the boundary of the estate is inadmissible against the remainderman (*Howe* v. *Malkin*, 27 W.R. 340; 40 L.T. 196).

Admissible.

of less of the land than he was *prima facie* entitled to, is receivable, even against strangers, as an admission against proprietary interest [*Gery* v. *Redman*, 1 Q.B. D. 161, cited more fully *ante*, 134. This case is peculiar as applying the rule to *acts* of deceased persons against interest; though *qu.* whether the death of the declarant is an essential in such cases, and so whether they properly fall under the present head].

(*b*) To prove the payment of rent by B., C., and D. to A.;—an entry by A.'s deceased steward of the receipt of money from B., "as rent both from himself and C. and D.," is admissible, although the payments by C. and D. rested merely on hearsay from B. (*Percival* v. *Nanson*, 7 Ex. 1).

(*c*) A. (debtor) and B. and C. (sureties) sign a promissory note for £300 in favour of D. (creditor). In an action by B. against C. for contribution, an indorsement made by D. (deceased) on the note, "Received of B. £280 on account of the £300 originally advanced to A.," held admissible to show that C. was a co-surety and A. the principal debtor (*Davies* v. *Humphreys*, 6 M. & W. 153).

To prove that A. lent B. £2000, the following entries in the private account-book of A. (deceased):

(1) 1872, Oct. 1, B. paid me three months' interest, £20.

And on another page,

(2) 1872. January. B. acknowledged loan to this date, £2000.

1872. March. Interest	£20
July.—Interest paid me . . .	£20
Oct.—Interest paid me . . .	£20
Dec.—Paid interest	£20
	£80

1872. Dec. 27. Paid off £20. Left £1980;—held admissible in (1) as being *prima facie* against interest, though collaterally proving B.'s debt; and in (2) the entries against interest being sufficiently connected with those in A.'s favour to render the latter also receivable [*Taylor* v. *Witham*, 3 Ch.D. 605; *Peck* v. *Peck*, 21 L.T. 670; *The Swiftsure*, 82 L.T. 389]. So, a testator's instructions to his solicitor: "C. owes me £400 which I lent him on two houses, the deeds of which I hold, but have pledged for an overdraft, held admissible, as the pledging clause, which was against interest, could not be separated from the rest (*Smith* v. *Gooch*, Chelmsford Assizes, Feb. 6, 1907, *per* Ridley, J., *ex rel.*).

To prove that A. had tendered and B. refused £100;—two entries by a deceased clerk of A.'s solicitor made in a day-book, the first charging himself with the receipt of £100 from his master "to tender to B." the second stating the tender of £100 to B. and B.'s refusal of it,—are admissible, the

Inadmissible.

(*c*) An account kept by the deceased steward of A., on one side of which the steward debited himself with rents received for A., but on the opposite side credited himself with certain disbursements and the tenants with certain allowances;—held inadmissible to prove the disbursements and allowances, the debit and credit items not being connected together by any specific reference [*Doe* v. *Beviss*, 7 C.B. 456; *Knight* v. *Waterford*, 4 Y. & Coll. pp. 293-5]. So, a debtor and creditor account, in which a balance is struck in favour of the deceased declarant, but in which the credit items are not otherwise connected with the debit items, held inadmissible [*Whaley* v. *Carlisle*, 15 W.R. 1183; 17 Ir.C.L.Rep. 792; *aliter* as to other items showing how the total of the debit amounts is made up. Compare examples, *ante*, 236].

The question being whether land which A. (deceased) had conveyed to C. had been bought by A., in 1852, as trustee for B.—a statement made by A., at the time of the purchase, that he had bought the land in trust for B., upon the terms of B. repaying him the amount of the purchase-money, having been rejected because not in writing, as required by the Irish St. of Frauds (7 Will. III. c. 12) s. 4 [*cp.* however, *post*, 580-1, 598]; a further statement by A., made after the conveyance, that he had received the purchase-money from B., was also rejected—(1) as in derogation of his own grant; and (2) as made after having parted with his interest [*Lalor* v. *Lalor*, 4 L.R.I. 350, *affd.* 678; *cp. ante*, 241].

Admissible.

second being connected with the first, as explanatory of it (*Marks* v. *Lahee*, 3 Bing. N.C. 408).

To prove a customary payment by a certain part of a parish;—two entries on the same page of a parish book, signed by deceased church-wardens, as follows, are admissible:

(1) "It is our ancient custom thus to apportion church-lay. The chapelry of Haworth to pay one-fifth," &c.

(2) Received of Haworth, who this year disputed this our ancient custom, but after we had aued him paid it according—£8 and £1 for costs" (*Stead* v. *Heaton*, 4 T.R. 669).

So, old unsigned accounts found in the same box and contemporaneous with a signed account, charging the party signing, are admissible, the sums received being the same in both (*Musgrave* v. *Emmerson*, 10 Q.B. 326).

A. devised property absolutely to B., and B., after A.'s death, devised all her property absolutely to C. In an action by D. (B.'s daughter) against C. for an account, evidence of a declaration by B. (deceased) that "part of what she possessed was devised to her by A. for D.";—held admissible to prove B. was a trustee of that part for D. (*Strode* v. *Winchester*, 1 Dick, 397; see fully as to secret trusts, *post*, 580).

(*d*) A., a lessee of a corporation, sues B. for tolls. A. puts in an ancient account of tolls purporting to have been rendered by C., a deceased treasurer to the corporation, but in the handwriting of the town-clerk (deceased) whose custom it was to enter the information when received from the treasurer. The treasurer then attended before the auditors and produced vouchers verifying the clerk's statement. Held, that entries charging the treasurer and *signed* by the auditor as *allowed* were admissible as against the interest of the former (*Lancum* v. *Lovell*, 6 C. & P. 443-5; *cp. post*, 340. *Aliter* as to others respecting which there was merely an *unsigned* entry of their having been *examined*).

So, to prove payment by B. to A. of interest on a mortgage, accounts showing the receipt of such interest by C., a deceased steward of A., which accounts, though in the handwriting of C.'s clerk, had been delivered by C. at an audit, held admissible as having been adopted by C. (*Doe* v. *Hawkins*, 2 Q.B. 212).

So, the signing of a rent account by a deceased agent was held to be an adoption by him of entries for rents expressed to be "paid to me" and made in the handwriting of a deceased clerk, though they might not have been admissible as declarations against interest by the clerk, he not purporting to charge himself thereby (*Richards* v. *Gogarty*, 4 Ir. R.C.L. 300).

Inadmissible.

A. devises property to B. and C. jointly and absolutely. A declaration made by B. (deceased) thirty years afterwards that the property was held by him and C. in trust for certain secret purposes, though against B.'s interest, is not admissible to prove the trust against C. (*Turner* v. *A.-G.*, I.R. 10 Eq. 386, 392; *ante*, 242, 246).

(*d*) To prove the terms of a tenancy;—entries in the rent-books of a deceased steward, wherein he was debited with the rents received, the entries being in the handwriting of a person (also deceased) who styled himself "clerk to the steward," held inadmissible as declarations against the steward's interest, in the absence of extrinsic proof that the clerk was employed by him to make the entries; and inadmissible as against the clerk's interest, as they did not purport to charge the clerk [*De Rutzen* v. *Farr*, 4 A. & E. 53; and see *Bright* v. *Legerton*, *ante*, 98].

A. sues B. for trespass to a several fishery, and tenders a document dated 1733, found among the muniments of C., A.'s deceased ancestor, purporting to be an account of the weirs and nets on the river in question in the possession of persons other than C. Held not admissible as a statement against the proprietary interest of C., since it was not signed, nor was the handwriting proved, nor was there anything on its face or otherwise to show by whom, or for what purpose, it was made, or whether the facts were within the writer's knowledge or received from others (*Devonshire* v. *Neill*, 2 L.R.I. 132, 157).

CHAPTER XXIV.

DECLARATIONS IN THE COURSE OF DUTY.

Declarations, oral or written, made by deceased persons in the ordinary course of duty, contemporaneously with the facts stated and without motive to misrepresent, are admissible in proof of their contents.

[Tay. ss. 697-713; Best, s. 501; Ros. N.P. 59-61; Steph. art. 27; 2 Smith L.C., 11th ed. 320, *notes* to *Price* v. *Torrington;* Wigmore, Ev. ss. 1517-61].

Principle. The grounds of reception are (1) *death;* and (2) the presumption of truth which arises from the mechanical and generally disinterested nature of entries made in the ordinary *course of duty,* and from their constant liability, if false, to be detected by the declarant's superiors.

History. As with writings against interest, so the admission of written entries made by deceased clerks, &c., in the ordinary course of duty, probably antedates the establishment of the hearsay rule itself. There seems reason to suppose that the practice of admitting entries made in the books of strangers, grew out of the practice of admitting similar entries in the shop-books of the parties themselves (*ante,* 229). The earliest cases in which such entries appear to have been received after the final establishment of the hearsay rule, and so presumably as exceptions to it, are (1698) *Pitman* v. *Maddox,* 1 Ld. Ray. 732, and (1703) *Price* v. *Torrington,* 2 *id.* 873, which is usually referred to as the leading case for the exception. In both cases books kept by deceased servants in the usual routine of business were admitted as evidence for their masters. The admissibility of *oral* declarations was not established until later, and appears to have originated with a dictum of Ld. Campbell in 1844 (*Sussex Peerage,* 11 C. & F. 85, 113; *cp. R.* v. *Buckley,* 13 Cox, 293). [Thayer, Pr. Tr. Ev. 520-1; *id.* Cas. Ev., 2nd ed. 509, 514, 576; Wigmore, s. 1518].

The Duty. (*a*) The declarations must have been made in the discharge of a duty to a *third person;* a mere personal custom, not involving responsibility, is insufficient (*R.* v. *Worth,* 4 Q.B. 132; *Massey* v. *Allen,* 13 Ch.D. 558; *Trotter* v. *Maclean, id.* 574). It has been said, also, that the duty must not be a *general* one, involving a variety of acts that may change from time to time, but *specific and twofold—i.e.* to do a particular act and to record or report it when done (*Smith* v. *Blakey,* L.R. 2 Q.B. 326; *Sturla* v. *Freccia,* 5 App. Cas. 623; *Lyell* v. *Kennedy,* 56 L.T. 647, reversed on other grounds, 14 App. Cas. 437; *Mercer* v. *Denne,* 1905, 2 Ch. 538, 558; though a rigid application of this dictum would conflict with several of the cases in which the evidence has been received). The *acts must have been done by the declarant,* and not by third persons [*Smith* v. *Blakey, sup.; Ryan* v. *Ring,* 25 L.R.I.

184; *Mercer* v. *Denne, sup.;* in *Polini* v. *Gray,* 12 Ch.D. 411 (affirmed *sub nom. Sturla* v. *Freccia, sup.*), however, James, L.J., held that entry must relate not to something said, learned, or ascertained by the declarant, but to something done *by,* or *to,* him, and in *Lyell* v. *Kennedy, sup.,* Bowen, L.J., approved this statement; *cp.* also *The Henry Coxon,* 3 P.D. 156]. It seems doubtful whether declarations as to *acts to be done* are admissible; they were received in *R.* v. *Buckley,* 13 Cox, 293, but rejected in *Rowlands* v. *De Vecchi,* 1 C. & E. 10, and the principle of the above cases would seem to exclude future acts. It must have been the declarant's duty to make (or cause to be made, *Brain* v. *Preece,* 11 M. & W. 773; *R.* v. *St. Mary,* Warwick, 22 L.J.M.C. 109) the *whole of the entry* or record (*Trotter* v. *Maclean,* 13 Ch.D. 574). Reports on the value of property, consisting chiefly of matters of opinion, have been considered inadmissible (*Re Djambi Rubber Estates,* 107 L.T. 631, C.A.; though see *North Stafford Ry.* v. *Hanley Corp., infra*).

Contemporaneousness. (*b*) The declarations must have been made contemporaneously with the facts recorded (*Doe* v. *Turford,* 3 B. &. Ad. 890; *Smith* v. *Blakey, sup.; Mercer* v. *Denne,* 1905, 2 Ch. 538; *Re Djambi Rubber Estates, sup.; Ryan* v. *Ring,* 25 L.R.I. 184); which term, however, is not to be construed in the strict sense applicable to declarations that are a part of the *res gesta;* or in the loose one applicable to entries in public registers, or memoranda admitted to refresh the memory of a witness. The entry should be made at or near the time of the act—a record in the evening of an act done the same morning has been received (*Price* v. *Torrington,* 1 Salk, 285); so, perhaps, might one be which was made the next day (*Re Djambi Rubber Estates, sup.*); while an interval of two days has sufficed to exclude (*The Henry Coxon, sup.*).

Collateral Facts, Personal Knowledge, Motive to Misstate, Contradiction. (*c*) The declarations are only evidence of the precise facts that it was the writer's duty to record, and of which consequently he had personal knowledge; and not of other matters which, though contained in the same statement, were merely collateral thereto (*Chambers* v. *Bernasconi,* 1 C.M. & R. 347; *Brain* v. *Preece, Smith* v. *Blakey, Sturla* v. *Freccia, The Henry Coxon,* and *Ryan* v. *Ring, sup.*). Moreover, proof of a motive to misrepresent will exclude the declaration (*Chambers* v. *Bernasconi, sup., Poole* v. *Dicas,* 1 Bing, N.C. 649; *The Henry Coxon, sup.*).

The entries cannot be contradicted or explained by subsequent declarations (*Stapylton* v. *Clough,* 2 E. & B. 933).

Extrinsic Proof. Extrinsic Proof must be given of the declarant's *death, handwriting* (*ante,* 276, 281), *official character* (though where the office is public, proof of acting therein is sufficient: *Bright* v. *Legerton,* 2 De G.F. & J. 606), and *duty* (*Lyell* v. *Kennedy,* 56 L.T. 647, *per* C.A.; *Miller* v. *Wheatley,* 28 I.R.I. 144); as to the duty being presumed, see *Sly* v. *S., post* 276. *Contemporaneousness* must also be established independently, unless it can be presumed from the circumstances of the case (Tay. s. 704; *East Union Ry.* v. *Symonds,* 5 Ex. 237; *Esch* v. *Nelson,* 1 T.L.R. 610, cited, *infra*).

Note. Declarations in the course of duty differ, as we have seen, from those against interest in requiring contemporaneousness, personal knowledge (though see as to this point, *ante,* 280) absence of motive to misrepresent, and the exclusion of collateral matters.

EXAMPLES.

Admissible.

(*a*) To prove that A. executed a deed at a certain time and place;—an entry made by a deceased *solicitor* in his diary of his having attended A. on his executing the deed at that time and place, held admissible. [*Rawlins* v. *Rickards*, 28 Beav. 370. In *Hope* v. *H.*, 1893, W.N. 20, the Court of Appeal doubted whether a solicitor is under a sufficient duty to his client within the rule; and North, J., in *Ecroyd* v. *Coulthard*, 32 L.Jo. 161, rejected similar evidence upon the authority of this doubt; *cp.* also *Martin* v. *Johnston*, 1 F. & F. 122, 124-5. The duty in question was, however, expressly recognised in *Doe* v. *Turford*, cited *post*, 276; *Brain* v. *Preece*. 11 M. & W. 773; *Dundonald Peerage*, cited 2 Sm. L.C. 11th ed. 325; *Bright* v. *Legerton*, 2 De G.F.&J. 606, 614; and *Esch* v. *Nelson*. 1 T.L.R. 610, *per* Ld. Coleridge, C.J., where, also, the entry being in a *diary*, was presumed to be contemporaneous. In *Bradshaw* v. *Widdrington*, 86 L.T. 726, 730-33, C.A., in which *Hope* v. *H.*, *sup.*, was cited, account-books kept by a deceased solicitor were received under the present head, partly, no doubt, because the opposing counsel was precluded from objecting to them, but partly also because the Court "was not disposed to attach very great weight to the objections themselves." (See 27 L.Q. Rev. 117). If the entries were *against the interest* of the solicitor as well, they would be admissible on that ground irrespective of the present rule, *Re Thomas*, *ante*, 281].

Estimates made by a deceased surveyor to road-trustees as to the expense of constructing certain roads, and a report as to alternative lines,—held admissible as made by a deceased official in the course of official duty (*North Stafford Ry.* v. *Hanley Corp.* 73 J.P.R. 477, C.A.; 26 T.L.R. 20; distinguishing *Mercer* v. *Denne*, *supra*. See, however, *Re Djambi Rubber Estates*, *opposite*). And entries made by a deceased surveyor in his field-book for the purposes and at the time, of a survey on which he was professionally employed, held admissible as in the discharge of professional duty [*Mellor* v. *Walmesley*, 1905, 2 Ch. 164, 167-8, C.A., overruling Eady, J., 1904, 2 Ch. 525, 527-8. As to surveys and reports made in the discharge of public duty and admitted as public documents, see *post*, chap xxxi.].

Inadmissible.

(*a*) To prove the purchase of shares for a client;—an entry made by a deceased *stockbroker* in his day-book that he had bought the shares for his client, is inadmissible, there being no duty to make the entries (*Massey* v. *Allen*, 13 Ch.D. 558).

To prove the terms on which A., a *farmer*, hired B., a labourer;—a memorandum of the transaction, made at the time by A. (deceased) in his own books, and according to his usual custom, is inadmissible, there being merely a practice and not a duty to make the entries (*R.* v. *Worth*, 4 Q.B. 132).

A., the widow of B., deceased, sues C., B.'s employer, under the Workmen's Compensation Act, 1906. Statements by B. to his fellow workmen, or employer, shortly after his injury, as to the cause of it, being tendered on the ground that there was a duty upon B. under the Act, to report the occurrence, Held, that the statements were inadmissible, as there was no such duty [*Wolsey* v. *Pethick*, 1 B.W.C.C. 411 C.A. (1908); *Tucker* v. *Oldbury* U.D.C. (1912) 81 L.J.K.B. 668, 669, where Buckley, L.J., remarked that though it might have been to B.'s advantage to tell his employer, he was under no duty to do so. (This case is reported on other points, 1912, 2 K.B. 317, see *ante* 83, 240, 282].

A. a wife, petitions for divorce from B., her husband. To prove that B. had infected her with a certain disease, A. tenders an oral statement as to the nature of her disease, made to her by a deceased *doctor* at a professional consultation. Held, inadmissible, no duty being proved (*Dawson* v. *D.*, 22 T.L.R. 52; *Mills* v. *M.*, 36 *id.* 772).

The report of a deceased planter as to the value of a property which he was employed to examine on behalf of a company about to purchase it, which report contained one or two statements of fact, the rest being matter of opinion, is (probably) inadmissible [*Re Djambi Rubber Estates*, *per* Farwell, L.J., cited *post*, 292; *Sturla* v. *Freccia*, *post*, 293].

To prove that certain lands near Walmer Castle had, in 1616, been covered by the sea;—statements to that effect contained in an ancient survey, made in that year by a surveyor under the direction of the then Lord Warden of the Cinque Ports, as to the repairs necessary to be done at Walmer Castle, and an estimate made by the King's engineer for the doing thereof;—held not admissible, there being no proof that they were made contemporaneously with the doing of some act which it was the duty of the deceased official to record, nor what his instructions were, nor the source of the knowledge on which the

Admissible.

To prove that A. delivered certain beer to B.;—an entry of the delivery made in A.'s books at night by his *drayman* (deceased), whose duty it was to deliver the beer during the day and afterwards to make the entry, is admissible (*Price* v. *Torrington*, 1 Salk. 285).—So, of entries by the deceased *clerk* of a notary, to prove presentment and dishonour of a bill (*Sutton* v. *Gregory*, 2 Pea. N.P. 150; *Poole* v. *Dicas*, 1 Bing. N.C. 649); and of the deceased clerk of a rate collector to prove payment of rates (*R.* v. *St. Mary, Warwick*, 22 L.J.M.C. 109; and see as to the admissibility of entries by merchants and solicitors' clerks, to prove the contents, service, and posting of documents, *infra*, 291-2).

To prove the baptism and marriage of A.;—entries made in old Irish chapel-books by a deceased Roman Catholic priest, who had performed the ceremonies, held receivable [*Malone* v. *Lestrange*, (1839), 2 Ir. Eq. R. 16; 17 W.R. 345*n*, 346*n*, *per* Crampton, J., and Plunkett, C.; on appeal the point was reargued, but no decision given, see *O'Connor* v. *Malone*, 6 C. & F. 572; *Dillon* v. *Tobin*, 12 Ir. L.T.R. 32; and *cp. Ryan* v. *Ring*, *post*, 293].

So, with entries (more than 30 years old) made in parish registers before the

Inadmissible.

contents of the documents were based [*Mercer* v. *Denne*, 1905, 2 Ch. 538, C.A.; they were also held inadmissible as public documents (*post*, 358), and as evidence of reputation (*post*, 301, 304)].

So, to show what had, in 1777, been the line of high-water mark at a dock, ancient surveys and terriers have been rejected both under the present rule, and as evidence of reputation (*Assheton-Smith* v. *Owen*, 75 L.J. Ch. 181, 188, 191-2, C.A.).

In *Trotter* v. *Maclean*, 13 Ch.D. 574, the diary of a deceased *colliery manager*, alleged by a witness to have been kept in the course of business for the purpose of reporting to the owner, was rejected, Fry, J., remarking that proof must be given not only of its being made in the usual routine of business, but that it was the manager's duty to make the whole of it.

To prove the terms on which A. sent goods to B.—a letter, stating the terms, and written by B.'s deceased *manager* at the branch office at which the goods were received, in pursuance of a duty to keep his principal informed of all business done at that branch, is not admissible, the manager's duty being a general and not a specific one (*Smith* v. *Blakey*, L.R. 2 Q.B. 326; *cp. ante*, 283; and see for a similar case, *Turner* v. *Hutchinson*, 3 L.T. N.S. 815).

To prove the items of an account;—the certificate of a deceased solicitor, whose duty it was to audit the account, but by merely checking the arithmetic without testing its accuracy with the vouchers, held inadmissible (*Vivian* v. *Moat*, 44 L.T. 210).

The question being which of two ships was to blame for a collision occurring on a certain Saturday;—an entry of the circumstances of the collision, made by a deceased mate in the ship's log on the following Monday, held inadmissible—(1) The acts recorded having been done by third persons and not by the deceased; (2) the entries not being contemporaneous; and (3) it being in the interest of the declarant to represent the collision as occurring through the fault of the other ship (*The Henry Coxon*, 3 P.D. 156).

To prove the baptism and marriage of A.;—entries in old Irish chapel-books by a deceased Roman Catholic priest held inadmissible [*Malone* v. *O'Connor*, 1859, Drury, 632; 17 W.R. p. 345 *n*, 347 n, *per* Napier, C., on the ground that the entries were not contemporaneous and there was not a known legal obligation to make them; and see *Ennis* v. *Carrol*, 17 W.R. 344, *per* Walsh, M.R.].

To prove a marriage solemnised in Ireland in 1842 (before the Irish Marriage Act) in the private house of a Protestant clergyman;—an entry made by him in a

Admissible.

Marriages (Ireland) Act, 1844, by a deceased Protestant clergyman [*Miller* v. *Wheatley*, 28 L.R. Ir. 144, *per* O'Brien, J., 157-9; *contra*, however, by the majority of the Court, on the ground that no proof had been given of the handwriting, official position, or duty; though *aliter* if this had been given. As to the necessity of such proof, see also *Lyell* v. *Kennedy*, 56 L.T. 647, *per* C.A. (reversed on other grounds, 14 App. Cas. 437). Both classes of entries would be inadmissible as parish registers (*post*, 344). Mr. Justice Stephen, indeed, cites *R.* v. *Clapham*, 4 C. & P. 29, as an illustration under this head, but the entry there, which was in an English parish register, seems to have been admitted as a public document, and not as a declaration by a deceased clergyman in the course of duty; see *per* Pollock, C.B., *Milne* v. *Leisler*, 7 H. & N. 786, 795]

To prove the contents and posting of a letter, not produced on notice;—a copy bearing an indorsement that the original had been posted, and made in the handwriting of a merchant's clerk (deceased), whose duty it was to copy and post all letters, is admissible as secondary evidence (*Pritt* v. *Fairclough*, 3 Camp. 305; *Hagedorn* v. *Reid*, *id.* p. 379; *Rowlands* v. *De Vecchi*, 1 C. & E. 10; *post*, 542).

To prove the *contents* of a lost will;—a copy of the will, made by a clerk of the solicitor of the executor of the will, all three being dead, and indorsed "will of Mary Sly,"—the same clerk appearing in the copy as one of the attesting witnesses, and the other not being found;—held ad-

Inadmissible.

register which he kept of such private marriages, held inadmissible [*Stockbridge* v. *Quicke*, 3 C. & K. 305, *per* Parke, B. No reasons are given; but the entry was not made in the ordinary parish register. This case was doubted by O'Brien, J., in *Miller* v. *Wheatley*, *opposite*. Baron Parke in the former case, however, admitted a certificate of the same marriage as being a "part of the transaction"; a ground which seems unsatisfactory, and was also doubted by O'Brien, J., as in no other case have certificates been so received (see *post*, 365). A certificate of marriage (not tendered as secondary evidence of the register) was rejected in *Nokes* v. *Milward*, 2 Add. 386; so also in *Farrell* v. *Maguire*, 1841, 3 Ir.L.R. 187, where, however, the ceremony had been performed some years before and in a neighbouring parish].

The question being as to the age of A. (a Jew), and a custom being proved to perform circumcision eight days after birth;—an entry made in course of duty by a deceased Chief Rabbi in the books of the synagogue that he had circumcised A. eight days after his birth, held inadmissible [*Davis* v. *Lloyd*, 1 C. & K. 275, *sed qu.* No reasons are given: possibly because the duty was not one known to the law, or because it depended on the parents performing their duty by bringing the child within the eight days, of which there was no evidence. This case was doubted by Mr. Taylor, s. 701; by O'Brien, J., in *Miller* v. *Wheatley*, *sup.*; and in America in *Kennedy* v. *Doyle*, 10 Allen, 161].

To prove the marriage of a fellow of a college;—*un*signed entries relating to the marriage, and made in the college books by a deceased registrar, whose duty it was to make and *sign* the entries, were rejected, although in the same handwriting as the signed ones (*Fox* v. *Bearblock*, 17 Ch.D. 429; and see *Lancum* v. *Lovell*, *ante*, 270; *aliter*, if there had been no usage to sign them, *Lauderdale Peerage*, 10 App. Cas. 692).

To prove the posting of a letter;—an entry as to the letter made by a deceased clerk in a book wherein it was his duty to enter all letters *to be* posted, held inadmissible (*Rowlands* v. *De Vecchi*, *opposite*; *aliter* if the duty had been to enter the letters *after* posting).

To prove the contents of a lost deed, executed in 1570;—an entry, stating the substance of the deed, and made in 1610, in the books of a deceased steward of the property to which the deed related, is inadmissible, not being contemporaneous, and it not appearing to be part of the steward's duty to make the entry (*Doe* v. *Wittcomb*, 6 Ex. 601; 4 H.L.C. 425; *Doe* v. *Skinner*, 3 Ex. 84). So, a copy of a

Admissible.

missible, being presumably made by the clerk in the course of his duty as such (*Sly* v. *Sly*, 2 P.D. 91; *ante*, 284; and *post*, 542).

So, with drafts of lost deeds, made by the deceased clerk to a solicitor (*Waldy* v. *Gray*, L.R. 20 Eq. 238). And, perhaps, also, an abstract of title, made at the time of a sale and in the course of business, would be admissible as secondary evidence of the deeds recited (*Doe* v. *Wittcomb*, 6 Ex. 601).

To prove service of a notice to quit on A.'s tenant;—an indorsement of the fact and time of service made ou a duplicate notice by a deceased *clerk* of A.'s solicitor, whose duty it was to serve the notice, is admissible (*Stapylton* v. *Clough*, 2 E. & B. 933; see further, *infra*, 293).

So, a similar indorsement made by a deceased *solicitor*, stating that he himself had served the notice is admissible, the solicitor being under a duty to his client, and the presumption being that the principal would observe the rules of the office as well as the clerks (*Doe* v. *Turford*, 3 B. & Ad. 890).

The question being whether A. murdered B., a policeman, at a certain time and place;—an oral report made by B. in the course of duty, to his inspector, that he was *about to go* to that place at that time, in order to watch A.'s movements, held admissible (*R.* v. *Buckley*, 13 Cox 293; but see *contra* as to future acts, *Rowlands* v. *De Vecchi*, *sup.*).

(*b*) See *Price* v. *Torrington*, 1 Salk. 285, cited *ante*, 290.

Inadmissible.

deed made by a deceased solicitor at the time of sending the deed away as a precaution in case of its loss, and bearing an indorsement by him stating it to be a true copy and executed and witnessed by persons whose handwriting he knew, held to be indamissible as "any one may make a copy of a deed; it is not like a letter copied into a regularly kept book" [*Kerin* v. *Davoren*, 12 Ir.Ch.R. 352. In the above cases the copies were both produced from proper custody].

Where the appointment of parish surveyors was required to be made by magistrate's warrant under seal, but had for some years been irregularly made without any written evidence except an entry thereof in the minute book of the magistrate's clerk (deceased);—held that such entries were inadmissible without proof of search for the original warrants (whose existence might perhaps be presumed), and of a practice to make such entries; and *qu.*, even then, whether the latter could be received as secondary evidence of the warrants (*R.* v. *Pembridge*, Car. & M. 157).

(*b*) See *The Henry Coxon*, *ante*, 274; *Farrel* v. *Maguire*, *ante*, 291; and *Ryan* v. *Ring*, *inf.*

A. sues a company for rescission of contract to take shares, on the ground of untrue statements in the prospectus, and tenders a report on the property obtained by the Board from B., an expert, which contains statements conflicting with those in the prospectus. B. had been incapacitated through illness, from making his report until a month after his examination of the property. Held, that the report not having been made contemporaneously was inadmissible [*Re Djambi Rubber Estates*, 107 L.T. 631, C.A., *cp. Sturla* v. *Freccia* *infra*. It was also inadmissible because chiefly containing matters of opinion (*ante* 289); nor was it receivable as an admission by the company's agent (*ante* 247), or as having been adopted by the Directors (*ante*, 262].

(*c*) The question being whether A. was arrested in a certain parish;—a certificate annexed to the writ by a deceased sheriff's officer stating the fact, time, and place of the arrest, returned to him by the sheriff, held inadmissible, on the ground that the duty merely required the fact and time, but not the place, of the arrest to be

Admissible.

Inadmissible.

returned (*Chambers* v. *Bernasconi*, 1 C.M. & R. 347. Although the principle of this decision, *i.e.* that such declarations are only evidence of facts which it is the writer's duty to record, and not of incidental matters, is now established, yet its stringent application in the above case has been frequently criticised).

The question being whether A. and B. were married;—an entry in a baptismal register made by a Roman Catholic parish priest (deceased), recording the baptism of C. as "born of A. and B. *his wife*"—is not admissible, as the entry was not contemporaneous with the marriage, which was a collateral fact, and one of which the writer had no personal knowledge [*Ryan* v. *Ring*, 25 L.R.Ir. 184; see also *Sturla* v. *Freccia*, 5 App. Cas. 623, where the duty of a government committee, whose members were deceased, being to report as to the fitness of A. for the post of consul, a statement of the date and place of A.'s birth, and other details of his personal history, was rejected, as the statement of these facts was not necessary to the performance of the duty. The report was also held inadmissible as a declaration on a question of pedigree (*post* 316), and as a public document (*post*, 362)].

To prove the delivery of certain coal;—the duty being for the workman who delivered it to give an account at the end of the day of all coal delivered during the day to a foreman (deceased), who, being unable to write, got the entries made for him by a clerk,—an entry so made held inadmissible, for though made by the direction of the foreman, yet the latter had no personal knowledge of the deliveries (*Brain* v. *Preece*, 11 M. & W. 773).

The question being whether a certain notice to quit had been properly served, and an entry of its service having been made by a deceased clerk (see *Stayplton* v. *Clough*, cited *ante*, 292), proof of a subsequent oral declaration by A. that he had served it on the wrong person, held inadmissible (*id*).

CHAPTER XXV.

DECLARATIONS AS TO PUBLIC OR GENERAL RIGHTS.

Declarations made by deceased persons of competent knowledge, *ante litem motam,* are admissible in proof of ancient rights of a public or general nature.

[Tay. ss. 607-634; Best, s. 497; Ros. N.P. 48-51; Steph. art. 30; Thayer, Cas. Ev., 2nd ed. 418-20. Evidence of this description is frequently included under the general term *Reputation* (*post,* chap. xxxv.); and is admissible for or against the Crown, as well as an ordinary party (*A.-G.* v. *Emerson,* 1891, A. C. 649)].

Principle. The grounds of admission are (1) *death;* (2) *necessity,* ancient facts being generally incapable of direct proof; and (3) the guarantee of truth afforded by the *public nature of the rights,* which tends to preclude individual bias, and lessen the danger of misstatements by exposing them to constant contradiction.

History. The admission of statements under the present head long antedates any formal rule against hearsay. In old days when jurors informed themselves as to disputed facts by inquiry out of court (*ante,* 209), this was probably the most common example of the reception of hearsay evidence. Thus, in 1456, a jury based their finding of a prescription thereon (Y.B. 34 Hen. VI. 36, 37). The earliest examples, after the establishment of the hearsay rule and by way of exception to it, are (1684) *Mossam* v. *Ivy,* 10 How. St. Tr. 602, 610-13; (1695) *Stayner* v. *Droitwitch,* Skin. 623; and (1722) *Somerset* v. *France,* 1 Strange, 654, 659. Originally, however, such evidence was receivable whether the prescription was public or private; but by the end of the eighteenth century this had become doubtful (*Morewood* v. *Wood,* 14 East, 328 *n*), and finally, in *Dunraven* v. *Llewellyn,* 15 Q.B. 791, its admission was definitely confined to cases involving public or general rights merely [Thayer, Cas. Ev., 2nd ed. 418-20; *id.* Prelim. Tr. on Ev. 520].

(1) **What are Matters of Public and General Interest.** (*a*) The interest involved must be of a pecuniary nature, or one affecting the legal rights or liabilities of the community (*R.* v. *Bedfordshire,* 4 E. & B. 535; *cp. ante,* 262).

Public Rights are those common to all members of the State—*e.g.* rights of highway and ferry, or of fishery in tidal rivers.

General Rights are those affecting any considerable section of the community —*e.g.* questions as to the boundaries of a parish, or manor.

Declarations by deceased persons as to *private rights* are inadmissible, since these are not likely to be so commonly or correctly known, and are more likely to be misrepresented (*Dunraven* v. *Llewellyn,* 15 Q.B. 791). Where, however,

the question is whether a right is public or private (*R.* v. *Bliss,* 7 A. & E. 550; *R.* v. *Berger, post,* 284-5); or the private right is identical with a public one (*Thomas* v. *Jenkins,* 6 A. & E. 525), such declarations are receivable.

Competency and Identity of Declarants. (*b*) In the case of *public rights,* all being concerned may generally be presumed competent, so that the absence of peculiar means of knowledge goes, strictly speaking, to weight and not admissibility; but in the case of *general rights* the competency of the declarants must be proved (*Crease* v. *Barrett,* 1 C.M.R. 928-9; *Rogers* v. *Wood,* 2 B. & Ad. 245; *Devonshire* v. *Neill,* 2 L.R.I. 159-60; *Mercer* v. *Denne,* 1905, 2 Ch. p. 560; *Assheton-Smith* v. *Owen,* 75 L.J.Ch. pp. 188, 192); and this qualification applies also to competency with respect to maps, surveys, &c., (*A.-G.* v. *Horner,* 1913, 2 Ch. 140, 156, C.A., overruling *dicta* to the contrary of Cave, J., in *R.* v. *Berger,* 1894, 1 Q. B. 823, 827, and *Vyner* v. *Wirrall Council,* 73 J. P. Rep. 242; see *post,* 297, 303-5). This may be either shown extrinsically (*e.g.* by proof of residence in, or other connection with, the locality); or presumed from the circumstances under which the declarations were made (*Freeman* v. *Phillipps,* 4 M. & S. 486; *Newcastle* v. *Broxtowe,* 4 B. & Ad. 273; *Mercer* v. *Denne, sup.*). Where, however, the circumstances show that the declaration is made otherwise than upon the declarant's own knowledge, it will, even when relating to a public right, be inadmissible (*Devonshire* v. *Neill, sup.; cp. Bidder* v. *Bridges,* and *Giant's Causeway Co.* v. *A.-G., post,* 305).

The identity of the declarant must also be established, and in the case of documents, the signatures or handwriting proved; unsigned or unauthenticated documents, even though produced from proper custody, are inadmissible (*Devonshire* v. *Neill, sup.* pp. 157-60).

Lis Mota and Interest. (c) The declarations must, in order to prevent bias, have been made *ante litem motam—i.e.* before the commencement of any controversy, and not merely before the commencement of any suit, involving the same subject-matter (*Berkeley Peerage,* 1811, 4 Camp. 401, 417; *Butler* v. *Mountgarret,* 7 H.L.C. 633, 639; *Shedden* v. *A.-G.,* 30 L.J.P. & M. 217; in *Davies* v. *Lowndes,* 6 M. & G. 518, Parke, B., remarked that the doctrine of *lis mota* was introduced in the first mentioned case).

Declarations made after the commencement of the situation from which the controversy springs, are admissible if made before any dispute has in fact arisen (*Shedden* v. *A.-G., sup.*); while those made after a dispute has arisen are inadmissible, although the dispute was *unknown* to the declarant, for that is a collateral issue which it might be impossible to prove (*Berkeley Peerage,* and *Shedden* v. *A.-G., sup.*), or was *fraudulently commenced* with a view of excluding the declarations (*Shedden* v. *A.-G., sup.*), or involved *different parties* or related to *different property or claims* (Tay. s. 633).

On the other hand, declarations as to the right will be received although made for the express purpose of *preventing disputes* (*Berkeley Peerage, sup.; Monkton* v. *A.-G.,* 2 Russ. & Myl. 147; *Brisco* v. *Lomax,* 8 A. & E. 198; *Shedden* v. *A.-G., sup.*); or after a *claim has been asserted but finally abandoned* (Hubb. Ev. of Succ. 668); or after the existence of *non-contentious legal proceedings* involving the same right (*Brisco* v. *Lomax, sup.; Gee* v. *Ward,* 7 E. & B. 509); or after the existence of *contentious legal proceedings* involving different rights, or even the same right, if only *collaterally* and not

directly involved (*Freeman* v. *Phillipps, sup.; Devonshire* v. *Neill,* 2 L.R.I. 132, 156-7).

Interest. Declaration made in direct support of a claim contemplated to be brought by the declarant, or otherwise obviously to subserve his own interest, will be rejected (*Brocklebank* v. *Thompson,* 1903, 2 Ch 344, 351-3; and see *Plant* v. *Taylor, post,* 317); but if no dispute has arisen, or claim been contemplated, the fact that the declarations tend to support his own title, or that the declarant stood, or believed he stood, in *pari jure* with the party relying on them, affects their weight only and not their admissibility (*Doe* v. *Davies,* 10 Q.B. 314; *Dunraven* v. *Llewellyn,* 15 Q.B. 791; *Moseley* v. *Davies,* 11 Price, 162).

Particular Facts. (*d*) **Corroboration.** The declarations must relate to the general right, and not to particular facts which support or negative it [*R.* v. *Bliss,* 7 A. & E. 550; *Crease* v. *Barrett,* 1 C.M. & R. 919, 930; *R.* v. *Berger,* 1894, 1 Q.B. 823, 826-7; *Mercer* v. *Denne,* 1905, 2 Ch. p. 565; *Radcliffe* v. *Marsden,* 72 J.P. Rep. 475; *Fowke* v. *Berington,* 1914, 2 Ch. 308, 312-3; Tay. s. 617, who remarks that the latter, not being equally notorious, are liable to be misrepresented or misunderstood, and may have been connected with other facts which, if known, would qualify or explain them]. Declarations are receivable, however, which not only directly negative a general right, but which indirectly do so—*e.g.* by setting up an inconsistent private claim (*Drinkwater* v. *Porter,* 7 C. & P. 181); or by omitting all mention of it where mention might reasonably be expected (*Edgar* v. *Fisheries Comms.,* 23 L.T.N.S. 723; *Portland* v. *Hill,* L.R. 2 Eq. 765; Tay. s. 620).

Corroboration. It is not essential to the admissibility, though it is to the weight, of the declarations, that they should be corroborated by proof of the exercise of the right within living memory (*Crease* v. *Barrett,* 1 C.M. & R. 919).

Form of the Declarations. (*e*) The following are some of the principal forms in which evidence of this nature may be tendered:

Oral Statements by deceased persons of competent knowledge as to the existence or non-existence of the right, *e.g.* statements by perambulators, which, provided they are not confined to particular facts, are evidence either of reputation or as declarations accompanying the exercise of a right (Tay. s. 618; though it is otherwise with entries in parish books regarding the fact that perambulators have taken a particular line, *Taylor* v. *Devey,* 7 A. & E. 409). So, also, provided they do not relate to private rights or particular facts, their *depositions* in old suits in which the same right was incidentally, but not directly, involved (*Freeman* v. *Phillips, post,* 286; *Devonshire* v. *Neill, id.; Crease* v. *Barrett, post,* 286-7; *Evans* v. *Merthyr Tydfil Council,* 1899, 1 Ch. 321; *Mercer* v. *Denne,* 1905, 2 Ch. 538, 559-60).

Old Deeds, Leases, &c., reciting or describing the public right or matter (*Brett* v. *Beales,* M. & M. 416; *Curzon* v. *Lomax,* 5 Esp. 60; *Plaxton* v. *Dare,* 10 B. & C. 17). Mere *copies and abstracts* of such deeds are not generally so receivable, the contents of a document being in the nature of a particular fact, and not provable by reputation (*Doe* v. *Wittcomb,* 6 Ex. 601; 4 H.L.C. 425). When, however, the existence and loss of the originals have been proved, such copies, if produced from proper custody, may be admissible as secondary evidence (*id.*); thus, a Bishop's register of chapter leases has been

received as evidence of reputation respecting the limits of a parish (*Coombs* v. *Coether,* M. & M. 398; Ros. N.P. 217; *post,* 347). *Private Acts* appear to be admissible as reputation on questions of public or general right, and were received as such in *Curzon* v. *Lomax, sup.,* and *Carnarvon* v. *Villebois,* 13 M. & W. 313 (though in the latter case their reception might have been supported on the footing of admissions by parties or privies); but they were rejected (though apparently not on this ground, but rather as public documents) in *Beaufort* v. *Smith,* 4 Ex. 450; see Ros. N.P. 189; and *post,* chap. xxix., p. 336.

Maps, Surveys, and Assessments. *Private Maps* are evidence of reputation, if proved to have been made by (or under the direction, or from the information, of) deceased persons of competent knowledge (*Mercer* v. *Denne,* 1904, 2 Ch. 545-6; affd. 1905, 2 Ch. pp. 561, 568; *Assheton-Smith* v. *Owen,* 75 L.J. Ch. pp. 188, 192; *A.-G.* v. *Horner,* 1913, 2 Ch. 140, C.A., see *ante,* 280; *Smith* v. *Lister,* 72 L.T. 20; *Hammond* v. *Bradstreet,* 10 Ex. 390; *R.* v. *Milton,* 1 C. & K. 58); or to have been recognised or used by such persons for the purpose of defining the general right and not merely particular matters (*Pipe* v. *Fulcher,* 28 L.J.Q.B. 12; *Smith* v. *Lister, sup.; Daniel* v. *Wilkin,* 7 Ex. 429; *Vyner* v. *Wirral Council,* 73 J. P. Rep. 242); and if, where ancient (*i.e.* more than 30 years old), they are produced from proper custody (see *post,* chap. xlii., Ancient documents; in *R.* v. *Norfolk,* 26 T.L.R. 269, however, old maps were admitted without such proof, *sed qu.*). So, a map made under a private Inclosure Act, is admissible providing the Act itself be proved (*R.* v. *Milton, sup.; R.* v. *Berger,* 1894, 1 Q.B. 823). *Public Surveys* are more generally tendered as public documents (*post,* chap. xxxi.), than under the present head. But where *ancient* and produced from *proper custody,* they are also receivable as reputation if made under competent authority (*Freeman* v. *Read,* 4 B. & S. 174; *Smith* v. *Brownlow,* L.R. 9 Eq. 241; 2 Eagle on Tithes, 402-403), or by persons of competent knowledge (*Beaufort* v. *Smith,* 4 Ex. 450, 468, 470; *Daniel* v. *Wilkin, sup.*). As to *modern* public surveys, there is some doubt. A Tithe-map has been admitted as evidence of reputation upon a question of public or general interest (*Smith* v. *Lister, sup.*); but in *Copestake* v. *West Sussex Council,* 1911, 2 Ch. 331, 341, Parker, J., rejected it as proof of the extent of a public right of way, though he thought it might be evidence of what portions of the land were tithable (see *post,* 289). In Ireland an Ordnance Survey map has also been so received (*Giant's Causeway Co.* v. *A.-G., post,* 289), though in England a similar map compiled under statutory authority, and to some extent from competent information, was rejected (*Bidder* v. *Bridges, post,* 305). *Ancient public assessments* (*e.g.* the taxation of Pope Nicholas) are admissible on the same footing (see Eagle on Tithes, *supra,* as to these and similar documents). And an old churchwarden's assessment is evidence of reputation that the land is within the parish (*Plaxton* v. *Dare,* 10 B. & C. 17); as are entries in old Vestry Books, provided they do not relate to private rights or particular facts (*Cooke* v. *Banks,* 2 C. & P. 478; see also *post,* chap. xxx.); so, the books of a deceased steward of a manor showing fines assessed are evidence of a custom to take such fines, at least if coupled with some evidence of their payment (*Ely* v. *Caldecott,* 7 Bing. 433).

Manor Books and Presentments. Entries in Court Rolls (provable by production of the original, or by copy), may be received either as acts or

assertions of ownership (*A.-G.* v. *Emerson, ante,* 112, the case of a demise by copy of court roll); or as public documents (*post,* 354), or as evidence of reputation (*Roe* v. *Parker,* 5 T. R. 26, 31-2; Tay. s. 623; Ros. N.P., 17th ed., 212; see also *Portland* v. *Hill,* 2 L.R. Eq. 769, *Johnstone* v. *Spencer,* 30 Ch. D. 581; *Coote* v. *Ford,* 17 T.L.R. 58, and *Foljambe* v. *Smith,* 91 L.T. 312; in none of which, however, were the grounds of admission stated). So, the draft of a surrender has been received, though no entry appeared on the roll (*Doe* v. *Calloway,* 6 B. & C. 488); and even an *unsigned* custumal, not properly a Court Roll, but preserved therewith and purporting to be made with the assent of the tenants (*Denn* v. *Spray,* 1 T.R. 466; *cp.* however, *post,* 290.) So, presentments by a manor jury as to matters within their jurisdiction are receivable (*Roe* v. *Parker,* 5 T.R. 26; *Evans* v. *Rees,* 10 A. & E. 151; *Richards* v. *Bassett,* 10 B. & C. 657); though not, it has been held, as to matters *to be done* (*Coote* v. *Ford,* 17 T.L.R. 58; but a presentment by a jury of the repairs to be done to a road at the public expense and a memo. of repairs done under it, has been admitted to show that the road was a public one, *Giant's Causeway Co.* v. *A.-G.,* cited *post,* 305); as well as the depositions of manor tenants (if not relating to particular facts) taken in an authorised inquiry (*Crease* v. *Barrett,* 1 C.M. & R. 919). As to manor assessments, see *Ely* v. *Caldecott, sup.;* and as to statements by perambulators, *ante,* 296.

Verdicts, Judgments, and Awards. When juries were summoned *de vicineto* and assumed to be personally acquainted with the subject in controversy, their verdicts were properly evidence of reputation; but at the present day neither verdicts nor judgments can strictly be so classed. Whether admissible as in the nature of reputation, or as amounting to acts done in the exercise of a right (*ante,* 111), however, the rule is now established that on questions of public or general, but not of private, interest, the verdict, judgment, or order, even *inter alios,* of a competent tribunal whether Superior Court (*post,* 306, 426, 428), Duchy, Manor or Survey Court, or Statutory Commission (*post* chap. xxxi.), is admissible, not, however, as evidence of any particular fact, but as an adjudication upon the state of facts and question of usage at the time (*Pim* v. *Currell,* 6 M. & W. 234, 266; *Neill* v. *Devonshire,* 8 App. Cas. 147, 164-5, 185-6; Tay. ss. 624-637). As to Depositions, see *ante,* 296.

It does not affect the admissibility (though it may the weight) of a verdict when tendered under this head, that it was not succeeded by judgment; or of a judgment, that it went by default (*Neill* v. *Devonshire, sup.*); or was recent (*Carnarvon* v. *Villebois,* 13 M. & W. 313); or not followed by execution or satisfaction (*id.;* Tay. s. 624). And verdicts and judgments standing upon a different footing from ordinary declarations, depositions, or entries by private persons, the conditions as to death and *lis mota* do not, and indeed cannot, apply to them (Greenleaf, s. 139; Stark. Ev., 4th ed., 190, note *c;* *Carnarvon* v. *Villebois, sup.;* *R.* v. *Brightside Bierlow,* 13 Q.B. 933; *Rogers* v. *Wood,* 2 B. & Ad. 245; *Brisco* v. *Lomax,* 8 A. & E. 198; *Reed* v. *Jackson,* 1 East, 355).

Such judgments, however, must not be *interlocutory* (*Pim* v. *Curell, sup.*), nor *collusive* (*Neill* v. *Devonshire, sup.*); and mere *awards* have, for no very intelligible reason, been altogether rejected as evidence of reputation (*Evans* v. *Rees,* 10 A. & E. 151; *Rogers* v. *Wood,* 2 B. & Ad. 245; *R.* v. *Cotton,* 3 Camp. 444).

Claims, informations, or indictments not followed by verdict or judgment, are not admissible as evidence of reputation (*Lancum* v. *Lovell,* 6 C. & P. 437; *Devonshire* v. *Neill,* 2 L.R. Ir. 132, 165, *per* Palles, C.B.); though they may be as acts of ownership (*ante,* 111, 129). Thus, old Bills and Answers in Chancery have been admitted on the latter ground to show claims made to a public right and abandoned (*Malcolmson* v. *O'Dea,* 10 H.L.C. 611-13; *Miller* v. *Wheatley,* 28 L.R. Ir. 144, 163); and an indictment for non-repair of a highway is similarly admissible, whether submitted to or prosecuted to conviction (*R.* v. *Brightside Bierlow,* cited *ante,* 133; and *cp. Blandy-Jenkins* v. *Dunraven, ante,* 129).

EXAMPLES.

Admissible.

(*a*) The following have been held to be matters of *public* or *general interest*:

Questions as to the boundaries of a county, town, parish, manor, or hamlet (*Nicholls* v. *Parker,* 14 East, 331 *n*).

Proceedings against the lord of a manor for causing, or suffering, the destruction of a sea-bank whereby a royal castle was injured (*Mercer* v. *Denne,* 1904, 2 Ch. pp. 542-3; 1905, 2 Ch. pp. 559-60).

The existence of a highway (*Crease* v. *Barrett,* 1 C.M. & R. 919; *Pipe* v. *Fulcher,* 1 E. & E. 111; *R.* v. *Berger,* 1894, 1 Q.B. 823; *A.-G.* v. *Horner* (No. 2), 1913, 2 Ch. 140, 153-5, C.A., or of a right to tolls on a public road (*Brett* v. *Beales,* M. & M. 416).

A claim by one of the public to fish in a tidal river (*Neill* v. *Devonshire,* 8 App. Cas. 35).

The question whether certain landowners were liable to repair a bridge or sea-wall (*R.* v. *Sutton,* 8 A. & E. 516; *R.* v. *Bedfordshire,* 4 E. & B. 535; *R.* v. *Leigh,* 10 A. & E. 398; *Hudson* v. *Tabor,* 2 Q.B.D. 290).

A custom of electing the church-wardens of a parish (*Berry* v. *Banner,* Pea. R. 156).

Inadmissible.

(*a*) The following have been held to be matters of a *private nature*:

Questions as to the boundaries of two private estates (*Clothier* v. *Chapman,* 14 East, 331 *n*); or the boundary of a waste over which some tenants only of a manor claimed a right of common (*Dunraven* v. *Llewellyn,* 15 Q.B. 791).

The existence of a private right of way over a field (*Reed* v. *Jackson,* 1 East, 355); the preliminary fact that there *was* a way, whether public or private (*Pipe* v. *Fulcher* and *A.-G.* v. *Horner opposite*); or the *boundary* of a highway on a charge against an adjoining landowner of obstructing the highway [*R.* v. *Berger,* 1894, 1 Q.B. 823. In this case the evidence tendered was a map attached to an old Inclosure Award, showing the highway as existing at the date of the award, though the commissioners had no jurisdiction over the defendant's land. In rejecting it, Cave, J., remarked that though reputation was admissible to prove whether a road was a highway or not, it was not evidence of particular facts (*i.e.* of the boundaries of the highway) from which an inference might be drawn as to individual rights].

A claim by an individual to a several fishery in a non-tidal river (*Re De Burgho's Estate,* 1896, 1 I.R. 274).

The question whether the sheriff of a county, or the corporation of a city, was liable to execute criminals (*R.* v. *Antrobus,* 2 A. & E. 793).

A custom of electing the master of a grammar school (*Withnell* v. *Gartham,* 1 Esp. 322).

The birthplace and age of an applicant for the post of foreign consul in London, stated in a confidential report to a foreign government made by a committee (deceased) appointed to enquire as to his fitness (*Sturla* v. *Freccia,* 5 App. Cas. 623, 640-1).

The rights of a particular church, or chapel, *e.g.* whether it was a parish church or not (*Carr* v. *Mostyn,* 5 Ex. 69, 87; *cp. Fowke* v. *Berrington,* 1914, 2 Ch. 308, 312-13).

Admissible.

A right to a pew (*Price* v. *Littlewood*, 3 Camp. 288; but see, as to this case, *post*, 347).

A custom of descent (*Denn* v. *Spray*, 1 T.R. 466), or of heriot (*Damerell* v. *Protheroe*, 10 Q.B. 20), in a manor.

The existence of a parish or district modus (*Moseley* v. *Davies*, 11 Price, 162; *Rudd* v. *Wright*, 1 Phil. & Arn. Ev., 10th ed. 171).

A right of common to all tenants of a manor (*Dunraven* v. *Llewellyn*, 15 Q.B. 791; *Warrick* v. *Queen's Coll.*, 40 L.J. Ch. 780; *Smith* v. *Lister*, 72 L.T. 20); or a question whether land was subject to the commonable rights of the commoners of certain *parishes* (*Evans* v. *Merthyr Tydfil Council*, 1899, 1 Ch. 241, 251, C.A.).

A lord's prescriptive right of free-warren over the entire manor (*Carnarvon* v. *Villebois*, 13 M. & W. 313); or his claim to the minerals under a certain district (*Barnes* v. *Mawson*, 1 M. & S. 77; *Crease* v. *Barrett*, *sup.*).

(*b*) *Competency, &c., of declarants.* To prove a custom of a manor;—declarations by deceased tenants of, or even by mere residents in, the manor are admissible (*Dunraven* v. *Llewellyn*, 15 Q.B. 791).—So, to prove a custom of mining, declarations by deceased owners of the surface are receivable, for they were more likely to become adventurers than persons living at a distance (*Crease* v. *Barrett*, *sup.*).

To prove that a public building was within the hundred of B.;—ancient orders made by Justices at Quarter Sessions for the county so describing it, are admissible without proof that the justices resided in the hundred or county,—their competency being presumed from their office (*Newcastle* v. *Broxtowe*, 4 B. & Ad. 273).—So, competent knowledge will be presumed from the declarants having been called as witnesses in an ancient suit (*Freeman* v. *Phillipps*, 4 M. & S. 486; in *Rowe* v. *Brenton*, 8 B. & C. 736, 765, answers to interrogatories put to tenants at the Assession Court, 1 Eliz., were allowed to be read, without the questions, after proof of loss of, and search for, the latter, though obscurity caused thereby might affect the weight of the evidence); or becoming parties to an Inclosure Act (*Carnarvon* v. *Villebois*, 13 M. & W. 313); or to Conditions of Sale (*Williams* v. *Goodchild*, cited 2 Eagle on Tithes, 440).

As to what is, or is not, competent knowledge in the case of map-makers, see *infra*, 303-5.

(*c*) *Lis Mota and Interest.* The question in an action being as to the boundaries between two manors;—the verdict of a jury of a Duchy Court in former non-contentious proceedings on the joint petition of previous owners of the two manors

Inadmissible.

A right of presentation to a living (*R.* v. *Eriswell*, 3 T.R. 707, 723, *per* Ld. Kenyon; *contra*, *Meath* v. *Belfield*, 1 Wils. 215).

The existence and nature of a farm modus (*Wells* v. *Jesus Coll.*, 7 C. & P. 284; *Pritchett* v. *Honeyborne*, 1 Y. & J. 135; 1 Phi. & Arn. Ev. 10th ed. 172).

A private right of common to individual tenants of a manor (*Dunraven* v. *Llewellyn*, *sup.*; *Williams* v. *Morgan*, 15 Q.B. 782); or the right of all the tenants to cut and sell wood (*Blackett* v. *Lowes*, 2 M. & S. 494).

A lord's prescriptive right to all wreck within the manorial boundaries (*Talbot* v. *Lewis*, 1 C.M. & R. 495; *Stacpoole* v. *The Queen*, Ir.R. 9 Eq. 619).

(*b*) *Competency &c. of Declarants.* The question being as to the boundaries of a county;—declarations by deceased law officers and dignitaries of the Crown, who had no personal knowledge of the subject except what they derived from an irregular judicial inquiry, are inadmissible (*Rogers* v. *Wood*, 2 B. & Ad. 245; *post*, 290).

The question being as to a public right of fishery in a tidal river;—a paper dated 1733 found amongst the plaintiff's muniments of title, and purporting to be an account of weirs and nets in the river in question and in whose possession, but *not signed*, and the handwriting of which was not proved, held inadmissible (*Devonshire* v. *Neill*, 2 L.R. 1, pp. 157-60; see *infra*).

Depositions made in answer to an information by the A.-G. against the lord of a manor for causing the destruction of a sea-bank and so injuring a royal castle, held inadmissible, competent knowledge by the deponents not being either imputable from the circumstances, or proved *aliunde* [*Mercer* v. *Denne*, 1905, 2 Ch. pp. 559-60, C.A.; though the deponents resided in the locality, *see* p. 544, *cp. Evans* v. *Merthyr Tydfil*, 1899, 1 Ch. p. 248].

(*c*) *Lis mota and Interest.* The question being as to a right of common in a manor;—declarations as to the right made by deceased manor tenants during a former (although irregular) inquiry, as to the same right, are inadmissible, being *post*

Admissible.

which alleged that disputes as to the boundary were likely to arise, is admissible (*Brisco* v. *Lomax*, 8 A. & E. 198; and see *Gee* v. *Ward*, 7 E. & B. 509).—So, depositions in an ancient suit brought to decide the possession of a fishery, as between two *private* claimants, are admissible in a subsequent suit involving the right of the *public* as against the descendants of one of them (*Devonshire* v. *Neill*, 2 L.R.Ir. 132).—So, the question being as to the mode of assessment of a customary fine—depositions showing this and made in an ancient suit against a former lord, but in which suit only the *amount* of the fine, and not its mode of assessment, was in question, were held admissible, the *lis mota* being different (*Freeman* v. *Phillips*, 4 M. & S. 486).

(*d*) *Particular Facts.* The question being whether a road was public or private;—declarations by deceased residents in the neighbourhood that it was public (*Crease* v. *Barrett*, 1 C.M. & R. 928-9), or that it was private (*Drinkwater* v. *Porter*, 7 C. & P. 181), are admissible.—So, to prove that the boundary of a town extended to a certain spot, declarations by deceased inhabitants that it extended thither are receivable (*see Ireland* v. *Powell*, Pea. Ev. 16).

The question being as to a right of common;—declaration by deceased manor tenants that they possessed unlimited right of common, but for convenience had agreed to use it in a restricted manner, held admissible to prove the general right, and to negative a prescription for the restricted one (*Chapman* v. *Cowlan*, 13 East, 10).

To disprove a manorial custom;—an old deed, purporting to state the manor customs, and made between a former lord and certain of the copy-holders, but which omitted the alleged custom, is receivable [*Anglesey* v. *Hatherton*, 10 M. & W. 218; and omission from an ancient customary was held conclusive against the custom (*Portland* v. *Hill*, 2 L.R. Eq. 765)].

Inadmissible.

litem motam (*Richards* v. *Bassett*, 10 B. & C. 657).

A., the lord of a manor, sues B. for trespass in using an alleged churchway over A.'s lands. To prove that the way was confined to certain of A.'s tenants—*i.e.* to those "above wall"—and was not common to all the parishioners, A. tenders a memo. in the handwriting of C., a former lord, and coming from proper custody, that "About 1763, soon after I came to the estate, I called it at three or four churches that there was no road through the demesne, but to . . . tenants above wall to church, which I hope will be remembered for the good of the family." Held, inadmissible (1) as expressing not a common opinion or report, but merely a private one, privately kept, as to a particular fact, viz. the publication of the notice; (2) as being obviously in C.'s own interest (*Brocklebank* v. *Thompson*, 1903, 2 Ch. 352).

(*d*) *Particular Facts.* The question being whether a road was public or private;—declarations by a deceased resident in the neighbourhood that he had seen repairs done upon it (*R.* v. *Bliss*, 7 A. & E. 550); or proof that he had planted a tree near the road, stating at the time that he did it to show where the boundary had been when he was a boy (*id. ante*, 72):—are inadmissible as relating to particular facts. So, to prove that a town extended to a certain spot, declarations by deceased inhabitants that houses formerly stood at that spot, are inadmissible (*Ireland* v. *Powell*, *opposite*, cited in *R.* v. *Bliss*, *sup.*). And see *R.* v. *Berger*, *sup.* 284-5; and *A.-G.* v. *Horner*, *inf.*).

The question being as to a right of common;—declarations by deceased manor tenants that "the commons belong to the tenants unstinted, who have always enjoyed the same at a yearly rent of 33*s*. 4*d*.," have been rejected (*Crease* v. *Barrett*, 1 C.M. & R. 919).

The question being whether a custom to dry nets on the foreshore of Walmer Castle had existed from time immemorial,—old surveys, War Office plans, and depositions taken in a suit by the Crown against the owners of the manor for allowing the destruction of a bank protecting the Castle from the sea, all showing that in the seventeenth century the land in question was below high-water mark, and so that the custom could not have been immemorial, held inadmissible as relating to particular facts and not to reputation (*Mercer* v. *Denne*, 1905, 2 Ch. pp. 560-1, 564-5, 567-8; *A.-G.* v. *Horner*, and *Clode* v. *L.C.C. infra*, 303-4).

The question being whether an old track across a moorland was a public packhorse way;—Evidence that an aged witness had

Admissible.

(e) *Form of the Declarations.* The following forms are admissible:—*Leases, Particulars of Sale, &c.* To prove the boundary of a manor;—an ancient lease, granted by a former lord, in which the boundaries were described, is receivable (*Doe* v. *Wittcomb*, 6 Ex. 601; *Brett* v. *Beales*, M. & M. 416).

To prove lands tithe-free, an old catalogue and particulars of sale in which they were so described have been received (*Williams* v. *Goodchild*, cited 2 Eagle on Tithes, 440).—So, to prove that a road was not a highway, a document signed by several deceased residents in the locality at a public meeting called to consider the question of repairing the road, and which document stated that the road was not a highway (*Barraclough* v. *Johnson*, 8 Ad. & E. 99).—So, a paper, preserved among the muniments of a manor, purporting to be signed by several deceased copyholders, has been admitted to prove a right of common (*Chapman* v. *Cowlan*, *sup.*).

Private Acts. To prove the existence of a manor;—an old Private Act under which it had been sold, and wherein it was so described, held admissible (*Curzon* v. *Lomax*, 5 Esp. 60).

So, to prove a lord's right of free-warren as against copy-holders of the manor;—recitals in an old Inclosure Act, and a proviso therein preserving the right, have been received [*Carnarvon* v. *Villebois*, 13 M. & W. 313. In this case, as the recitals showed that the copy-holders were interested, they were tendered and received at the trial as *admissions* against the latter. On appeal, however, they appear to have

Inadmissible.

heard her mother, long deceased, say that "when it was fine and clear you could hear the bells coming down very plain from the top of the hill to the bottom,"—Held inadmissible as relating to a particular fact [*Radcliffe* v. *Marsden*, U.D.C. (1908) 72 J.P. Rep. 475, *per* Channell, J.]

The question being whether certain ruins, adjoining a parish church near Worcester, were part of the parish church, or only a separate conventual church in which the parishioners had been allowed to worship — statements contained in Habington's Survey of Worcestershire, written before 1647, from the personal observation of the author, were tendered as reputation to show the physical condition of the church at that date. Held, inadmissible as relating, not to a reputed parish church, but merely to the condition of the particular building [*Fowke* v. *Berington*, 1914. 2 Ch. 308, 312-3; it was also rejected, for the same reason, as a public history (*post*, 381)].

As to *copies* of documents, see *Doe* v. *Wittcomb*, *infra*.

(e) *Form of the Declarations.* The following forms are inadmissible:—*Leases, &c.* To prove the boundary of a manor;—a statement by a deceased steward that there existed an old lease describing the boundary, and an entry in his books purporting to state the substance of the lease, held inadmissible, as being reputation not of the boundaries but of the contents of the lease—*i.e.* of a particular fact (*Doe* v. *Wittcomb*, *opposite*).

Private Acts. To prove a lord's right to toll on all coal exported within the manor;—a general saving of such right contained in certain Private (Harbour and Canal) Acts affecting the manor, held inadmissible [*Beaufort* v. *Smith*, 4 Ex. 450. In this case the Act does not appear to have been tendered as *reputation*, but merely as a public document, on which ground it was properly rejected (*post*, 336)].

Admissible.

Inadmissible.

been received as *reputation, i.e.*, "as some recognition of the right upon a subject-matter upon which evidence of reputation would be admissible" *per* Parke, B.A., 322)].

Maps, surveys, plans, and pictures. To prove the boundaries of a parish;—a map, thirty-four years old, made by a surveyor, who testified that he had compiled it from information received from a deceased parishioner who had shown him the boundaries, is admissible [*R.* v. *Milton*, 1 C. & K. 58; *Smith* v. *Lister*, 72 L.T. 20. In *Pollard* v. *Scott*, Pea. R. 19, however, a map made by the directions of former churchwardens was rejected; *sed qu.*, unless upon the ground that no proof of their death was given (*see* 1 Phil. & Arn. Ev., 10th ed. 182; Tay s. 662)]. So, to prove a public right of way over a manor—a map used by a deceased steward to define the public ways of the manor, is admissible (*see Pipe* v. *Fulcher*, 28 L.J.Q.B. 12); as also, to prove that a road was a highway repairable by the inhabitants at large, is a map used by those concerned (*Vyner* v. *Wirral Council*, 73 J.P. Rep. 242). And manor boundaries may be shown by a manor map which is proved to have been used by parish officers for assessment purposes (*Smith* v. *Lister*, *sup.*).

An old county map, published in 1797 by a King's Geographer, and a map dated 1826, made by a well-known surveyor, both being produced from the British Museum—held admissible as reputation that a certain way was a public road, though it was not shown that the surveyor had any local knowledge or from whom he obtained his information, the judge remarking that although he may not have been an inhabitant, no doubt he derived his information from persons in the vicinity [*Trafford* v. *St. Faith's R.D.C.* 74 J.P. Rep. 297, *per* Neville, J., *sed qu.* both as to the competency of the surveyor and the custody from which the map came. This case was doubted by Hamilton, L.J., in *A.-G.* v. *Horner*, *opposite*].—So, also, on an indictment for non-repair of a bridge, an ancient map purporting to have been made by one C., a person of repute in connection with surveys, proof being given of the custody from which it came. *Semble*, the map would have been admissible without proof of custody. The Court also admitted, without proof of custody, two maps purporting to have been made by the King's Geographer, but refused to admit a copy of an old minute-book produced from the custody of the bridge reeves of another bridge in the same district (*R.* v. *Norfolk*, 26 T.L.R. 269).

Maps, &c. To prove the boundaries of a parish;—an old map, not signed, but produced by the representatives of a deceased rector from an old box of his papers relating to the parish, is inadmissible (*Earl* v. *Lewis*, 4 Esp. 1).—So, to prove the boundaries of a county;—a map of the county, republished in 1766 with *corrections and additions* by the sons of K. from a map published by the latter thirty years earlier, who then took an accurate survey of the whole county, is inadmissible, the new editors not being proved to have personal knowledge nor to be connected with the district, so that it might be presumed [*Hammond* v. *Bradstreet*, 10 Ex. 390. Nor does the fact of its production from the custody of a county magistrate (living) who had bought it twelve years previously, vouch for its authenticity (*id.*)].—So, to prove a public right of way over a manor;—a map made by a deceased steward showing the lines of a road, but with nothing to indicate whether it was public or private, is inadmissible; and the fact that it was used by him to define, not the alleged public road, but merely the boundaries of the copyholds, is not sufficient to render it receivable (*Pipe* v. *Fulcher*, *opposite*).

The question being whether there were public highways around the Spitalfields Market 1682 when a Royal Charter was granted therefor;—Two old maps dated 1677 and 1681, produced from the British Museum and prepared and publicly sold by the King's Cosmographer, and a map dated 1703, produced from the Guildhall library and called Gascoigne's Map of Stepney,—but as to all of which there was nothing to show that the map-makers had any special knowledge of the locality, or any special duty to make them, or were publishing them otherwise than as a private speculation,—were tendered by A. to show the physical features of the locality at these respective dates (*e.g.* that the market site was then a vacant space with some trees, that buildings existed on one side of a street only, and that there were no buildings at certain other points);—Held inadmissible (1) as not made by persons of competent knowledge; and (2) as relating to particular facts [*A.-G.* v. *Horner* (No. 2) 1913. 2 Ch. 140 C.A.].

To prove that certain buildings existing before 1862, had been erected on new foundations and so were illegal,—Two old maps, called Horwood's maps, dated 1793 and 1819, and published, not as official documents, but as a private speculation to

Admissible.

To prove the boundaries of a manor;—a public survey of the manor taken under the authority of the Crown, or of the Duke of Cornwall, while it belonged to either (*Smith* v. *Brownlow*, L.R. 9 Eq. 241), or under the authority of Parliament during the Commonwealth, is admissible (*Freeman* v. *Read*, 4 B. & S. 174; the Court in this case remarking that it was sufficient for the purposes of *reputation* if taken under the *de facto* authority of a usurper). So, as to *signed* presentments of a manor jury (*Beaufort* v. *Smith*, 4 Ex. 450; Daniel v. *Wilkin*, 7 Ex. 429, 437-8).

To prove that certain land was part of the waste of a manor; a Tithe Commutation map, made fifty-one years before, has been admitted as *reputation* [*Smith* v. *Lister*, 72 L.T. 20, *per* Charles, J. A private map, made by a deceased surveyor, conversant with the place, and recognised by the parish for rating purposes, had been received, and the Tithe map was admitted "substantially on the same grounds," though presumably compiled on the information of third persons. It had, however, been acted on for the past three years, and from this, a still earlier user by competent persons might possibly be presumed. In *A.-G.* v. *Antrobus*, 1905, 2 Ch. 188, a similar map was tendered as reputation, but though *Smith* v. *Lister* was cited,

Inadmissible.

serve as guides to various London areas, which showed that at those dates there were no buildings on the site in question;—Held, inadmissible (*Clode* v. *L.C.C.*, 1914, 3 K.B. 852, following *A.-G.* v. *Horner*, *sup.*; affirmed as to this point, *sub nom. L.C.C.* v. *Clode*, 1915 A.C. 947).

To disprove an immemorial custom to dry nets on a foreshore;—a map made sixty-seven years before the trial, prepared for the purposes of a new harbour, and signed "C. Labelye, engineer, late teacher of mathematicks in the Royal Navy," who stated it to have been made with the assistance of "several able pilots" and "Mr. P., master" of the Royal Navy—held inadmissible to show the true high-water mark at the spot, C. L. being on the facs of it not a person competent to make it *quoad* these marks at that spot (*Mercer* v. *Denne*, 1904, 2 Ch. 544-6; affd. 1905, 2 Ch. pp. 561, 568). So, the question being as to the limits of a harbour, old terriers and surveys stating the high-water mark, and made in 1777 by "W.W." land surveyor," were rejected (*Assheton-Smith* v. *Owen*, 75 L.J.Ch. p. 188, *per* Kekewich, J., because they were *unsigned* and no proof was given by whom, or for what purpose, or by what authority they were made; p. 192, *per* Williams, L.J., the competency of the declarants not being proved *aliunde*).

To prove the boundaries of a manor;—surveys taken by former lords (*e.g.* the Earl of Leicester, *temp.* Eliz., and General Oliver Cromwell, 1650), and founded upon *unsigned* presentments of jurors, are inadmissible [*Daniel* v. *Wilkin*, and *Beaufort* v. *Smith*, *opposite*. *Aliter* if the presentments had been signed by a manor jury (*id.*; overruling on this point, *Evans* v. *Taylor*, 7 A. & E. 617)].

A Tithe map is not admissible as evidence in a case of disputed boundaries between private owners [*Frost* v. *Richardson*, 103 L.T. 22, *affd.* C.A., 416. *Semble*, *per* Eve, J., that an Enclosure map might be evidence against the owner of land comprised in the enclosure award].

A Tithe map has been rejected as evidence of the extent of a public right of way, since the compiler's duty was only to enquire what lands were tithable; though it might be evidence that certain parts of the adjoining land were not then enclosed, or used for such purposes as to make them tithable [*Copestake* v. *West Sussex*, C.C., 1911. 2 Ch. 331. The map here, however, was apparently tendered as a *public document* and not as *Reputation*, for which

Admissible.

the map was received not on this ground, but as a *public document* (*post* 359)].

To prove a public right of way;—an Ordnance Survey map, original and produced from proper custody, proved to have been made and signed sixty-five years before by an Engineer officer, now presumably dead, held admissible as reputation, being "the opinion of a person who had an opportunity of acquiring knowledge on the spot which, on the cases, may be acquired by hearsay from other people" [*Giant's Causeway Co.* v. *A.-G.* (1898), 5 New Ir. Jurist Rep. 301 (1905); 118 L.T. Jo. 544; *per* Chatterton, V.C. The question was apparently not raised or discussed on appeal. In 38 Ir.L.T.Jo., p. 107, it is stated that, although at one time such maps were held not to be evidence, yet now, having regard to the lapse of time, they have in several cases been held admissible as evidence of reputation in Ireland]. An Ordnance map of 1837, obtained from the Board of Agriculture, is admissible to show the condition of a district (*N. Stafford Ry.* v. *Hanley*, 73 J.P. 477, C.A.) So, a map annexed to the Provisional Order of a Commission under the Commons Act, 1876, ss. 7, 36, is admissible but not conclusive evidence of the boundaries shown thereon (*Collis* v. *Amphlett*, 144 L.T. Jo. 215, C.A.)

Manor Books and Presentments. To prove a custom in the tenants of a manor to take hedge-boote, &c., an entry in the Court rolls as follows: "We present our custom is to have hedge, housefire, plough and cart boote without leave of the lord, and timber for repair with his leave,"—is admissible as a presentment of the custom (*Coote* v. *Ford*, 17 T.L.R. 58).

To prove that a certain road was a public one, a presentment for its repair by the grand jury of the county, 80 years old, followed by a memo. in the presentment book that the sum presented for had been expended, held admissible, though no affidavit of the work having been done, as required by statute, was forthcoming (*Giant's Causeway Co.* v. *A.-G.*, *sup.*)

So, the question being whether A., a landowner, was liable to repair a neighbouring public bridge;—the record of an old presentment, *temp.* Edw. IV., in proceedings against the owners of other neighbouring land, in which the jury stated they did not know who were liable to repair the bridge, and finding that it was built, of alms, sixty years before, is admissible (*R.* v. *Sutton*, 8 A. & E. 516).

Inadmissible.

latter purpose evidence of particular facts, such as what parts of the land were then unenclosed, would be inadmissible].

To prove a right of common; — an Ordnance Survey map, held inadmissible as reputation [*Bidder* v. *Bridges*, 34 W.R. 514, affd. on other grounds, 1886, W.N. 148. No public inquiry had there been held, but local J.P.'s had appointed certain men to point out the boundaries. Tracings of the maps thus produced were tendered. As to such derived information, see also *Devonshire* v. *Neill*, *ante*, 295].

Old maps and plans prepared by direction of the Board of Ordnance in 1641-47 and tendered as reputation were also rejected because relating to particular facts (*Mercer* v. *Denne*, 1904, 2 Ch. p. 544; 1905, 2 Ch. p. 561).

To prove a public right of way to the Giant's Causeway:—old engravings of the locality, prepared on behalf of a learned public society in Dublin and publicly hung in the hall of the latter, held inadmissible as reputation [*Giant's Causeway Co.* v. *A.-G.*, *opposite*. But pictures and engravings are evidence as to matters of general history, *post*, 381].

Manor Books, &c. To prove that A. had a freehold and not only a right of common over land;—a former presentment of the manor jury purporting to decide this question, is inadmissible, either as a presentment, for they had no jurisdiction to inquire into the freehold; or as reputation, being *post litem motam* (*Richards* v. *Bassett*, 10 B. & C. 657).

To prove a custom in the tenants of a matter to destroy rabbits;—a copy of the Court Rolls containing the following entry;—"We present that any person shall have liberty to destroy the rabbits by guns, dogs, or otherwise, without molestation";—held inadmissible, not being a presentment of an existing custom, but merely of a license to do future acts (*Coote* v. *Ford*, *opposite*).

Verdicts, &c. On a question as to the mutual rights of a city and county;—an old decree finding the rights, and made by the Lord Treasurer, the Lord Chancellor, and the law officers, constituting an informal legal tribunal, but having no personal knowledge of the matter except what they acquired during the inquiry, is inadmissible (*Rogers* v. *Wood*, 2 B. & Ad. 245).

The question being as to a public right of fishing;—an ancient writ reciting

Admissible.

Verdicts and decrees. In an action against a trespasser, who justified under a public right of way over the land; a verdict obtained against a former trespasser, who justified under the same right of way, is admissible (*Reed* v. *Jackson*, 1 East, 355; *Petrie* v. *Nuttall*, 11 Ex. 569); so, a similar judgment obtained only four years before against another trespasser, though no execution or satisfaction was shown (*Carnarvon* v. *Villebois*, 13 M. & W. 313).

So, orders of Commissioners of Sewers, requiring certain landowners to repair seawalls, are evidence of reputation to fix such liability (*R.* v. *Leigh*, 10 A. & E. 398).

Inadmissible.

claims which would tend to negative the right, and directing inquiry to be made into them, and possession to follow the result, but upon which no verdict or judgment was given, held inadmissible (*Devonshire* v. *Neill*, 2 L.R.Ir. 165-6).—So, on a claim of toll, an ancient information, *quo warranto*, or indictment in respect of the claim, but upon which there was no finding by a jury, has been rejected (*Lancum* v. *Lovell*, 6 C. & P. 437, 439-40).

CHAPTER XXVI.

DECLARATIONS AS TO PEDIGREE.

Declarations by deceased relatives, made *ante litem motam*, are admissible to prove matters of family pedigree.

[Tay. ss. 635-657; Best, s. 498; Ros. N.P. 44-48; Steph. art. 31; Hubback, Ev. of Succession, 648-711; Wigmore, E. ss. 1480-1503.

Principle. The grounds of reception are—(1) *death*, (2) *necessity*, such inquiries generally involving remote facts of family history known to but few, and incapable of direct proof; and (3) the *peculiar means of knowledge and absence of interest to misrepresent* of the declarants—members of the family having the greatest interest in seeking, the best opportunities of obtaining, and the least motives for falsifying, information on such subjects (Tay. s. 635).

The above principle, or rather group of principles, has been variously stated: 'The law resorts to hearsay of relations upon the principle of interest in the person from whom the descent is to be made out. . . . It is evidence from the interest of the declarant in knowing the connexions of the family.' (*Vowles* v. *Young* (1806), 3 Ves. 140, *per* Ld. Erskine, L.C.). 'The principle is that the declarations are the natural effusions of a party who must know the truth, and who speaks upon an occasion when his mind stands in an even position, without any temptation to exceed or fall short of the truth.' (*Whitelocke* v. *Baker* (1807), 13 Ves. 514, *per* Ld. Eldon, L.C.). 'I suppose the ground is that they were matters relating to a long time past and that it was necessary to relax the strict rules of evidence for the purpose of doing justice' (*Sturla* v. *Freccia*, 5 App. Cas. 623, 641, *per* Ld. Blackburn).

History. In tracing pedigrees, family tradition appears to have been resorted to long before the establishment of the hearsay rule. Indeed, before jury-trial itself was developed, such matters were "tried" by witnesses, who stated circumstantially the sources of their knowledge, which included family hearsay and reputation. Thus, in the thirteenth century, a witness, in proving another person's age, gave as the basis of his testimony the fact that the mother had recorded the age in the records of a Priory, which records he had seen (Pl. Ab. 293, col. 1). Later on, when the rule against hearsay was established, such evidence continued to be received by way of exception to that rule, one of the earliest cases of the kind being *Herbert* v. *Tuckell*, 1663, T. Raym. 84. Originally, however, the use of such evidence was characterised by a much greater latitude than at present, both as to the issues involved (*id.*), and the persons from whom the hearsay proceeded (*Annesley* v. *Anglesea*, 1740, 17 How. S. T. 1166, 1179, 1181; *Morewood* v. *Wood*, 1791, 14 East, 330 *n*; *R.* v. *Eriswell*, 1790, 3 T. R. 707). Its restriction to purely genealogical questions

appears to date from *R.* v. *Erith,* 1807, 8 East, 539; its limitations to declarants who were members of the same family, and not merely friends or neighbours, from *Johnson* v. *Lawson,* 1824, 2 Bing. 86; and the requirement of *ante litem motam* from the *Berkeley Peerage* case, 1811, cited *ante,* 295 [Thayer, Pr. Tr. Ev. 520; *id.* Cas. Ev., 2nd ed., 383; Wigmore, Ev. ss. 1483, 1503].

Matters of Pedigree. Genealogical Purpose. Particular Facts. (*a*) It is not easy to define, save by enumeration, what are "matters of pedigree," or what is a "genealogical purpose." But the terms appear to be confined primarily to issues involving *family succession* (testate or intestate), *descent, relationship* (by consanguinity or affinity, with its respective degrees), and *legitimacy,* or, as it is said, to cases in which the pedigree to which the declarations relate is in issue and not to cases in which it is only relevant to the issue (Steph. art. 31); and, secondarily (contrary to the rule applicable to public and general rights, *ante,* 296, 301-2), to such particular incidents of family history as are immediately connected with, and required for the proof of, those issues—*e.g.* the *birth, marriage,* and *death* of members of the family, with the respective *dates,* either absolutely or relatively, and *places,* of those events (Tay. 643-646; Steph. art. 31), *age, celibacy, issue* or *failure of issue* (Tay. s. 642; Hubback, 69, 204, 648-650), as well, probably, as *occupation, residence,* and similar incidents of domestic history necessary to identify the individuals in question (Hubback, 468, citing *Hood* v. *Beauchamp; Shields* v. *Boucher,* 1 DeG. & S. 40; *Rishton* v. *Nesbitt,* 2 M. & R. 554; and see *Lovat Peerage,* 10 App. Cas. 763). Mr. Taylor remarks that *R.* v. *Erith,* 8 East, 539, has repeatedly been cited as an authority for the proposition that even on a strict question of pedigree, hearsay evidence of *locality,* or in other words the declarations of deceased persons respecting the *places* where their relatives were born, and where they married, resided, went to, or died, cannot be received; but, as was pointed out in *Shields* v. *Boucher, sup.,* the case decides no such point, as Ld. Ellenborough carefully rested his judgment on the fact that no question of relationship was involved. Had, therefore, the evidence there tendered been required for some genealogical purpose it is possible the court would have arrived at a different conclusion, since hearsay evidence of locality has on several occasions been admitted to elucidate matters of strict pedigree (*Hood* v. *Beauchamp,* Hubb. Ev. of Suc. 468; *Shields* v. *Boucher, sup.; Rishton* v. *Nesbitt, post,* 297; *Monkton* v. *A.-G.,* 1 DeG. & Sm. pp. 147-151), [Tay., 8th ed., ss. 646-7; *post,* 314-5]. On the other hand, when such incidents, although inferentially tending to prove, are not immediately connected with, the question of pedigree (Tay. s. 644); or when they are not required for some genealogical purpose (*Haines* v. *Guthrie,* 13 Q.B.D. 818), they will be rejected.

Particular Facts. It is sometimes said that such declarations, in analogy to the rule as to public and general rights (*ante,* 296), are only receivable to show family reputation, and not to prove particular facts (*Plant* v. *Taylor,* 7 H. & N. 211, 226, *per* Pollock, C.B.; *Shields* v. *Boucher,* 1 DeG. & S. 40, 51, *per* Knight Bruce, V.C.; *Isaac* v. *Gompertz,* Hubb. 650, *per* Ld. Cottenham), but this is not now sustainable, and even in the two cases first cited, the proposition was immediately qualified by instances to the contrary (*Berkeley Peerage,* 4 Camp. 415, 416; Tay. s. 643). Indeed, all matters of pedigree may be said to consist of particular facts (Hubb. 650).

Declarants must have been Blood Relations or their Consorts. Illegitimates Excluded. (*b*). The declarations are only receivable from persons legitimately connected by blood with the person or family whose pedigree is in question, or from the husbands or wives (whether the marriage was subsisting or not) of persons so connected; and must not proceed from mere relatives of such husbands or wives (*Shrewsbury Peerage,* 7 H.C.L. p. 23); nor from friends, servants, or neighbours of the family (*Johnson* v. *Lawson,* 2 Bing. 86), nor from the family solicitor (*Re Palmes,* 1901, W.N. 146). When a deceased declarant, himself competent, has spoken of another person as being his relative, it will be presumed that he intended thereby a legitimate relative (*Smith* v. *Tebbitt,* L.R. 1 P. & D. 354). Indeed, it seems doubtful whether the *legitimate* members of a family may by their declarations, impeach the legitimacy of their reputed relations. Thus, declarations by a deceased uncle that his nephew was illegitimate, have been rejected on the ground that they concerned one who though *de facto* related was *de jure* a stranger (*Crispin* v. *Doglioni,* 32 L. J. P. & M. 109; *Plant* v. *Taylor,* 7 H. & N. 211; Tay. s. 636); while a direct assertion by a deceased parent of his child's illegitimacy would seem to be open to the further objection that, as the ground of illegitimacy might be non-access during marriage, it would infringe the rule against bastardising offspring (*ante,* 198; *Murray* v. *Milner,* 12 Ch. D. 845, 849). On the other hand, declarations by a father indirectly establishing his child's illegitimacy by impeaching the validity of his marriage, or stating the birth to have preceded it, have been received (*Goodright* v. *Moss,* Cowp. 592; *Murray* v. *Milner, sup.; Re Turner,* 29 Ch. D. 985; *Payne* v. *Bennett,* 20 T.L.R. 203). So, with declarations by a deceased husband as to his wife's illegitimacy (*Vowles* v. *Young,* 13 Ves. 140; *Doe* v. *Harvey,* R. & M. 297). The declarations of deceased *illegitimate* relatives are wholly inadmissible to prove the condition of their family, since a bastard being *filius nullius* can have no relations (*Doe* v. *Barton,* 2 M. & R. 28; *Doe* v. *Davies,* 10 Q.B. 314). Mr. Taylor considers it very doubtful whether the declarations of a deceased person even as to his *own* illegitimacy are receivable, except as admissions against himself, or those who claim under him by title subsequent to the declarations (Tay. ss. 636-7; Hubb. 649-50). But such evidence has in several cases been received without this restriction [*Cooke* v. *Lloyd,* Pea. Ev. App. xxviii.; *Proc.-Gen.* v. *Williams,* 31 L.J.P. & M. 157; *Queen's Proctor* v. *Fry, per* Hannen, J., 1878, cited 53 L.T. p. 709; *Re Perton,* 53 L.T. 707, where Chitty, J., held such statements admissible, not only for or against those claiming the bastard's estate, since in such cases, being *filius nullius,* he may be said to constitute the whole of the family, but generally, as declarations against pecuniary and proprietary interest, *ante,* 282; *contra, Haslam* v. *Cron, id.,* is probably not sustainable.]

Relationship must be proved independently. The declarant's relationship must be shown *aliunde,* and cannot be established by his own statements [*Berkeley Peerage,* 4 Camp. 419; *Monkton* v. *A.-G.,* 2 Russ. and Myl. 156-7; *A.-G.* v. *Kohler,* 7 H.L.C. pp. 657, 660; *Proc.-Gen.* v. *Williams;* 31 L.J.P. 157, where strict proof of this condition was required; *Hitchens* v. *Eardley,* L.R. 2 P. & D. 248, where the legitimacy of the declarant being both in issue and necessary to be proved in order to admit his declarations, *prima facie* evidence only was required. The precise degree, however, need not be shown; it is

sufficient if he was in some manner related by blood or marriage (*Vowles* v. *Young,* 13 Ves. 147). And if the question be as to the supposed relationship between two branches of the same family, proof that the declarant is related to either will suffice, otherwise it would be necessary first to prove the very fact that the declarations were afterwards tendered to establish [*Monkton* v. *A.-G., sup.* 155-7; *Smith* v. *Tebbitt,* L.R. 1 P. & D. 354; Tay. s. 640; Wigmore, s. 1491, who adds that it is immaterial which branch claims the inheritance; in some jurisdictions in America, however, proof of the declarants' membership of the family whose inheritance is in dispute is required, see 28 Harv. L. Rev. 107].

Competent Knowledge. Hearsay upon Hearsay. Contemporaneousness. Indirect and Negative Evidence. (c) It is not necessary that the declarant should have had personal knowledge of the facts stated; indeed, if this were otherwise, the main object of relaxing the hearsay rule would be frustrated, since most family information is obtained at second hand. It is sufficient, consequently, if his information purported to have been derived from other relatives, or from general family repute, or even simply from "what he has heard," provided such "hearsay upon hearsay" does not directly appear to have been derived from strangers (*Shedden* v. *A.-G. & Patrick,* 30 L.J.P. & M. 217; *Lovat Peerage,* 10 App. Cas. 763, 768; Tay. s. 639); while, if the declarant's information expressly purport to have been derived either wholly or in part from incompetent sources, the declarations so founded will be excluded (*Davies* v. *Lowndes,* 6 M. & G. p. 527; *Lovat Peerage,* 10 App. Cas. 763.) The declarations need not refer to contemporaneous events; statements as to matters occurring six generations before have been received (Hubback, 659; *Monkton* v. *A.-G.,* 2 Russ. & Myl. pp. 157-8; *Davies* v. *Lowndes, sup.*).

It is not necessary that the declarations should be *direct* or *express,* it is sufficient if they speak of the rights and benefits to which the party would be entitled in virtue of his birth and relationship; thus the status of a member of the family might be conveyed by saying that "he would have the property and be a gentleman" (*Isaac* v. *Gompertz,* cited Hubback, 651; *Doe* v. *Randall, post,* 96). And the evidence may be *negative* as well as positive, *e.g.* the omission of particular persons from mention or benefit in family wills and settlements, and (especially in proving the exhaustion of remoter members of the family) unanswered advertisements and ineffectual enquiries [*Greaves* v. *Greenwood,* 2 Ex.D. 289; *cp.* the presumption of death as to persons not heard of for 7 years, *post,* chap. xlviii.]

Lis Mota and Interest. (*d*) The declarations to be admissible must have been made *ante litem motam, i.e.* before the commencement of any controversy, actual or legal, upon the same point. [*Berkeley Peerage,* 4 Camp. 401; *Butler* v. *Mountgarret,* 7 H.L.C. 633, 639, where the existence of the *lis* was shown by the contents of the declaration (a letter) which were inspected by the judge to determine the point; *Shedden* v. *A.-G.,* 30 L.J. P. & M. 217; and see fully *ante,* 295-6]. As to the degree of *interest* which will exclude, the authorities are somewhat conflicting. Declarations in direct support of a claim contemplated to be brought by the declarant (*Slane Peerage,* 5 C. & F. 39-40; Hubback 668-9; Tay. s. 630, citing *Zouch Peerage*), or otherwise obviously made to subserve his own interests (*Plant* v. *Taylor,* 7 H. & N. 211; *Dysart Peerage,*

6 App. Cas. 489; *ante,* 296, *post,* 317), have been rejected. But declarations made before any controversy arose, or claim was contemplated, though tending directly to support the title of the declarant, or of another in *pari jure* with him, have been received (*Doe* v. *Tarver,* Ry. & M. 141); as also have those made to induce a third party to claim property or rank to which the declarant himself had no title, and which claim was in fact never prosecuted (Hubback, *sup*).

Form of the Declarations. (*e*). The following are some of the principal forms in which hearsay upon matters of pedigree may be tendered: *Oral statements; family correspondence*; recitals or descriptions in *Deeds, Settlements, and Wills* (even if cancelled or invalid); or entries in *almanacs, prayer-books, and missals.* Such declarations must, if modern, be proved to have been *made, written,* or *signed* by (or by the direction of) a deceased relation, or to have been *acknowledged* or treated by him as correct (*Hood* v. *Beauchamp,* 8 Sim. 26; *Re Perton,* 52 L.T. 707). In the case of deeds, proof of execution by a relation seems indispensable (*Slaney* v. *Wade,* 1 My. & Cr. 338; *Fort* v. *Clarke,* 1 Russ, p. 640; Hubback, 675; Tay. s. 651). And even where a document is ancient, its mere production from the family archives will not dispense with proof that it was made or recognized by some member of the family (*Fitzwalter Peerage,* 10 C. & F. 193; Tay. s. 654; as to proof of ancient handwriting, see *ante,* 109, *post,* 338, 399). So, the original deed or will must, if in existence, be produced, though if lost or destroyed secondary evidence will be received; and probate of a will is for this purpose, secondary evidence only (Hubback, 677; Ros. N.P. 46; *post,* 560).

Family Bibles stand upon a somewhat different footing, not because of the sacred nature of the volumes, but from the customs of using them as family registers. Entries therein are receivable on the grounds of publicity and family acknowledgment, without proof of identity, relationship, or (presumably) death (*Berkeley Peerage,* 4 Camp. 401; *Monkton* v. *A.-G.,* 2 R. & M. pp. 162-3; *Hubbard* v. *Lees,* L.R. 1 Ex. 255; *cp. Payne* v. *Bennett,* 20 T.L.R. 203). The mere fact that the book is a Bible, however, is not sufficient; it should be shown to be a family Bible, in the sense of having been handed down and preserved as such in the family, and should come from the custody of a member thereof (*Hubbard* v. *Lees, sup.;* Martin, B., remarking, "It is in the nature of a record, and being produced from proper custody is itself evidence without proof of handwriting or authorship. To require such would be to mistake the distinctive character of the evidence, for it derives its weight not from the entries having been made by a particular person, but that, being in that place, they are taken to be assented to by those in whose custody the book has been"). See, too, *Splents* v. *Lefevre,* 11 L.T. N.S. 114, in which the Ir. Ex. Ch. rejected entries in a Bible partly from the absence of such preliminary proof, and partly because the entries had been made by a living person, it being said that the entries must be made or sanctioned by, or brought to the knowledge of, *deceased* members of the family. *Sed qu.* as to this qualification in the case of family Bibles.

Inscriptions on *tombstones, coffin-plates, mural tablets, hatchments, family portraits, rings, and pedigrees* are also admissible. If these are proved to have been made by, or under the direction of, a deceased relation, they will be received as *his* declarations; if they have been publicly exhibited, they will

be admitted on the presumption of family acknowledgment, though their authors be alive (*inf.;* Tay. s. 652; Hubback, 684-694.) The value of mural and other funeral inscriptions as evidence depends on the authority under which they were set up, and the distance of time between their erection and the events they commemorate. Where immovable, defaced, or destroyed, they are provable by secondary evidence (*post,* 547-8; Tay. s. 653; Hubback, 690-694). *Armorial Bearings* may also be included under this head; but their weight depends wholly on their antiquity, since corrective authority in such matters ceased to be exercised by the Heralds after the Revolution. [The first Herald's visitation was in 1528, the last in 1686.]

Family Tradition, Repute, Treatment, and Recognition. The tradition and repute prevailing in the family as to any genealogical event may also be proved, and will be received as presumptive evidence thereof (as to marriage, see further *post,* 384). So, family conduct and treatment—*e.g.* the tacit recognition of relationships; the distribution of property; the omission of particular persons from mention or benefit in family wills and settlements (*Greaves* v. *Greenwood,* 2 Ex.D. 289, cited *ante,* 310)—are admissible as showing acknowledgment or the reverse by the family, though such facts fall, more properly, under the head of original evidence, than of hearsay, since they are not used as declarations to prove the truth of the matter stated, but merely as relevant conduct, nor are they confined solely to matters of pedigree (*ante,* 116-7, 134-5), When a document or inscription has been *privately* kept, independent proof must be given of its acknowledgment by the family as an authentic memorial of pedigree before it will be admissible (*see,* however, *Re Waite,* 123 L.T.Jo, 298); but where it has been *publicly* preserved in the family, such acknowledgment may be presumed [Hubback, 685; Tay. s. 654]. Such documents, however, must not, as we have seen, purport to be compiled from incompetent sources (*Davies* v. *Lowndes,* 7 Scott, N.R. 211).

Repute, Treatment, and Recognition by Strangers. In the case of *Marriage,* the repute and conduct need not be confined to the family, reputation among, and treatment by, friends and neighbours being receivable (*Doe* v. *Fleming,* 4 Bing. 266; *Re Thompson,* 91 L.T. 680; *ante,* 117; *post,* 384). A witness deposing to the existence of such a general reputation must not, however, state what some particular individual has said on the subject; and if it appears that his testimony is based merely on the declarations of such person, the evidence ceases to be admissible as general reputation, and can only be received if the declarant was a deceased member of the family (*Shedden* v. *A.-G.,* 30 L.J.P. & M. 217, cited, *post,* 316). Recognition by the Sovereign has been admitted to prove the *legitimacy* of a peer (Hubback, 698); and the conduct and statements of the paramour to prove the *illegitimacy* of a child born in wedlock (*Morris* v. *Davies,* 5 C. & F. 163; *Aylesford Peerage,* 11 App. Cas. 1; *Burnaby* v. *Baillie,* 42 Ch.D. 282; such statements, however, though receivable as part of the *res gestæ,* are no proof *per se* of their truth, *ante,* 77). So, the conveyance of property by a stranger to a member of the family who was only entitled to it as such, has been admitted in proof of the latter's relationship to the family (*Slaney* v. *Wade,* 7 Sim. 595; *ante,* 117).

Judgments, Decrees, and Verdicts in matters of pedigree bind the parties or privies thereto; but if, *inter alios,* they are inadmissible either as evidence of the facts found, or as family reputation (Hubback, 705; *post,* 425-30),

though they may be received to show the subject-matter of the suit, and the character in which the parties sue, defend, or obtain property (*Davies* v. *Lowndes*, 7 Scott, N.R. 211; *Lyell* v. *Kennedy, inf.; post*, 404-5). As to *Probates*, see *ante*, 311. *Answers in Chancery* are admissible when the facts of pedigree are not in dispute, but only incidentally mentioned (Hubback, 681-683; *Lyell* v. *Kennedy*, 14 App. Cas. 437). If they have been *filed* they will be admissible though not signed or sworn (*Shrewsbury Peerage*, 7 H.L.C. p. 32); though when sworn, but not filed, they have been rejected (*Wharton Peerage*, 12 C. & F. 295). To make an answer evidence, however, the *Bill* must always be put in, though the latter is not evidence *per se* unless made so by the answer (*Lyell* v. *Kennedy, sup.; Boileau* v. *Rutlin*, 2 Ex. 665). As to answers by guardians of infants, see *Eccleston* v. *Petty*, Carth. 79, and *Slane Peerage*, Min. Ev. p. 28. Recitals of relationship in a *case for the opinion of counsel* drawn on behalf of a deceased member of the family by his solicitor, though receivable as admissions (*ante*, 234), have been rejected as declarations by such member on the ground that statements for counsel are frequently made to obtain a favourable opinion in order to drive persons to a reference (*Slane Peerage*, cited Hubback, 684-685). As to *Private Acts*, see *post*, 336.

As to *Parish Registers, Herald's Books, Inquisitions*, and the like, to which recourse is frequently had in cases of pedigree, and which are admissible, not as the declarations of deceased relatives, but as public documents, see *post*, chaps. XXX.-XXXI. A description in a marriage register, implying that the parents of the bridegroom were legitimately married, has been accepted as *prima facie* proof of this fact (*Wigley* v. *Treasury Sol.*, 1902, P. 233; no reasons are given, but perhaps the evidence was received as a declaration by the son.)

EXAMPLES.

Admissible.

(*a*) *Matters of Pedigree.* On a claim to freehold property by B. as heir-at-law to A.;—the death of A. and of any of his relations entitled in priority to B. may be proved by family repute as being matters of pedigree (*Doe* v. *Griffin*, 15 East, 293; *Betty* v. *Nail*, 6 Ir.C.L. 17). The same species of proof is admissible on an application by B., as next of kin of A., to administer the latter's personal estate (*Re Thompson*, 12 P.D. 100; *Wigley* v. *Treasury Sol.*, 1902, P. 233).—So, where A. had devised lands to his son B. for life, then to B.'s sons, C., D., and E., in succession;—in an action by E. to recover the lands, the deaths of B., C., and D. may be similarly proved (*Palmer* v. P., 18 L.R.Ir. 192). So, to prove which of two trustees was the survivor, in tracing the descent of the trust estate to the heir of such survivor (*Smith* v. *S.*, 1 L.R. Ir. 206).

Inadmissible.

(*a*) *Not Matters of Pedigree.* In an action for use and occupation by a reversioner against a tenant *pour autre vie*, who had held over after the death of the *cestui que vie*;—the death of the latter cannot be proved by the declarations of deceased relatives, not being a matter of pedigree (*Whittuck* v. *Waters*, 4 C. & P. 375).

So, in an action for goods sold, to which the defence is infancy;—the latter fact cannot, for the same reason, be proved by an affidavit of the infant's deceased father made in a previous Chancery action to which the plaintiff was not a party (*Haines* v. *Guthrie*, 13 Q.B.D. 818). In a settlement case the declarations of a deceased father as to the place where his child was born, are not receivable to prove the birth settlement of the latter, this not being a matter of pedigree [*R.* v. *Erith*, 8 East, 539; approved in *R.* v. *Rishworth*, 2 Q.B. 496, cited, *ante* 226. In the former case, the child being a bastard, the declarations of his putative father would also have been inadmissible, even on a question of pedigree, though this point was not raised

Admissible.

To prove which was the eldest of three sons born at one birth;—a declaration by their deceased father that he had for the purpose of distinction christened them Stephanus, Fortunatus, and Archaicus, according to the order of names in St. Paul's First Epistle to the Corinthians: and a declaration by their deceased aunt that she had for the same purpose tied strings round the arms of the second and third children at their birth, are admissible (Vin. Ab. Ev. T. b. 91).

On an issue from Chancery, tried at law, as to whether Mrs. Eliz. A., deceased, was the daughter of John H. of Kinver, Staffs., paternal uncle of Richard H., whose estate the plaintiff claimed as a daughter of Mrs. A., the following questions to, and answers by, a witness were *allowed*:—(1) Have you heard Mrs. Eliz. A. say what was her maiden name? She said it was H. (2) What her father's name was?—John H. (3) What he was? The following were *disallowed*:—(1) Have you heard her say where her family came from? (2) Where she came from? (3) Where she was married? (4) Of what place her father was?—The jury having found that Mrs. Eliz. A. was the daughter of one John H., but that there was no evidence of *what* John H., Knight Bruce, V.C., on a motion for a new trial, expressed a strong opinion that the whole of the above questions were unobjectionable; and that, generally, on a genealogical enquiry, the following facts were admissible: — Births, marriages, deaths (with their dates); legitimacy or illegitimacy; consanguinity and affinity (with their degrees); whether a man's grandfather was said to be related to some other man; of what parents he was said to have been born; whether his mother was said to be illegitimate (*see ante* 309), or to have brought a child into the world before or after a marriage, or what her name was said to have been, or what her father was; the original seat of the family, its former residences, possessions, local or other distinctions, advancement or decay; with such statements as 'my father was J. S. of the Hill, not of the Dale, his mother came from Suffolk; my sister married a man of the same name, it is true, but he was born and bred in Berkshire, as he often told me, and he died there' [*Shields* v. *Boucher* (1847), 1 De G. and Sm., 40].

On a question of pedigree, to show that the family concerned had had relatives living at Blackburn, declarations by a deceased member, made when leaving his

Inadmissible.

(Tay. 8th ed. s. 645 *n*)]. Nor, for the same reason, are declarations by deceased relatives as to the age of the insured, admissible in an action on a life-policy (*Splent* v. *Lefevre*, 11 L.T. N.S. 114).

The question being as to the legitimacy of A.;—a declaration by A.'s deceased aunt that she had suckled A., coupled with proof that her own child was born subsequent to the marriage of A.'s parents, held inadmissible [*Isaac* v. *Gompertz*, Hubback, 650-1, *per* Ld. Cottenham, because stating "a particular fact"; but Mr. Hubback suggests the more satisfactory ground that the fact was at the time wholly immaterial, and only subsequently became one from which legitimacy was inferable by argument. Mr. Taylor remarks that the distinction between this case and that in Vin. A.C. *opposite* is clear, since in the former the fact of suckling the child had no direct bearing on its *age* or legitimacy, but was only a species of circumstantial evidence from which these facts might be inferred; whereas in the latter the christening and the strings were from the first intended to show their relative seniority].

Admissible.

home at Manchester, that he was going to visit his relations at Blackburn,—Held admissible [*Rishton* v. *Nesbitt*, 2 Moo. & Rob. 534. They had been objected to as too vague, no individuals being specified; and also as relating to *place* (see *ante* 308). Rolfe B. remarked, they were not evidence that he *did* go to Blackburn, or that any one named N. (his relative) lived there; but of a tradition in the family that they had relatives there, so that if shown *aliunde* that there were N.'s at Blackburn, this was connective evidence. In *Shields* v. *Boucher sup.* p. 45, the A.-G. conceded that such declarations would be admissible as *res gestæ* (*ante* 79)].

(*b*) *Who May Be Declarants.* A. claims property as cousin and heir-at-law of John F., who died seised of it in 1769, leaving a son, James F., under whose descendants A. claimed. A. having proved the relationship of John F., evidence that the latter's widow (deceased) had stated (1) that the estate would go to James F.; and (2) that her husband told her on his death-bed that James F. would have the estate, and that after his death it would go to his heir:—Held admissible to prove that James F. was a member of the family in question. It was objected that declarations of John did not prove that James was the heir of John, but only that *a* James was to have the estate; and that James might have been related without being heir-at-law (*Doe* v. *Randall*, 2 Moo. and P. 20; *Shrewsbury Peerage*, 7 H.L.C. pp. 23, 26). So, the declarations of the deceased husband of a member of the family but who was not otherwise related to it, are admissible (*Doe* v. *Harvey*, 1 Ry. and Moo. 296; *Shrewsbury Peer., sup.*); even as to his wife having been illegitimate (*Vowles* v. *Young*, 3 Ves. 140).

In *Proc. Gen.* v. *Williams opposite*, the Crown tendered declarations by B. that she had no relations and that pointed to her illegitimacy. A. objected that declarations by an illegitimate as to any relations except her own children, were inadmissible. Held, B.'s declarations might be received [Here each side adopted as the ground of admission the hypothesis of his opponent which he denied. The same device was employed in *Re Perton*, 53 L.T. 707, where similar declarations were admitted; *ante* 309. The declarations of a deceased person as to his own age and birthplace are also admissible (*Sturla* v. *Freccia*, *opposite*)

Samuel T. having by his will declared that he had no relatives living, and that John T., a legatee, was not a relative, left his estate to charity. The gift being valid, A., claimed the property as next of kin, and tendered a genealogical narrative and pedigree by John T. (then deceased) whom there was some evidence to show was related to A. and to the T. family in which the writer alleged that George T. (his

Inadmissible.

(*b*) *Who May Be Declarants.* In a pedigree case, to prove that B. and C. were cousins of A., a member of the family, declarations by A.'s father-in-law (deceased) that B. and C. were A.'s cousins, is inadmissible (*Shrewsbury Peerage*, 7 H.L.C. p. 23).

The question being whether Francis L., or Henry W., was heir-at-law to Henry L., a deceased intestate;—Declarations by a lady, deceased, who though not a member of the L. family had been engaged to Henry L.'s father, and with whom Henry L. had resided for 23 years and was the only person in his confidence, that Francis L. was Henry L.'s heir,—Held inadmissible [*Johnson* v. *Lawson* (1824) 2 Bing. 86. Similar declarations by a former housekeeper (deceased), to Henry L. were also rejected].

A. as nephew and next of kin of B., deceased, claims her estate, alleging B. was the legitimate daughter of A.'s grandfather. The Crown denies B.'s legitimacy. It having been proved that A.'s father and mother lived together as husband and wife, A. tenders the declarations of his mother (deceased) as to the fact and place of their marriage. Held, inadmissible, without further proof of the marriage (*Proc. Gen.* v. *Williams*, 31 L.J. P. 157; see further as to this case, *opposite*).

A., by the law of Portugal, claims property as the natural son of B., deceased a domiciled Portuguese. C., the defendant, B.'s sister, denies that A. is B.'s natural son. A declaration by D., a deceased brother of B., that A. was the natural son of B.,—Held inadmissible [*Crispin* v. *Doglioni* (1863) 32 L.J.P. 109. In answer to the contention that members of the family have the best opportunity of knowing the state of the family, Sir C. Cresswell remarked that a family is not likely to know of the peccadilloes of its members and therefore the reputation that there was no such issue would be worthless].

On the hearing of a petition under the Legitimacy Declaration Act 1858, by William P.S., who claimed to be the lawful son and heir of William S. and Annie W.,

Admissible.

father) and Samuel T., the testator, were descended from the same grandfather and were cousins. The Crown objected that though John T. was shown to be related to George T., it was not shown that either he, or George T., was related to Samuel T. Held that relationship to one branch of the T. family was sufficient and that the narrative was admissible [*Monkton* v. *A.-Gen.* (1831) 2 Russ. and Myl. 147, *per* Ld. Brougham L.C.—The narrative was found among John T.'s private papers and was stated by him to be derived from hearsay and enquiries in the family and from Samuel T., and that he hoped to revise and make it more correct. On appeal it was held that, even if the narrative was admissible, as to which no opinion was expressed, the whole evidence was insufficient to show that John T. or A. was related to the testator (*Robson* v. *A.-G.*, 10 C. & F. 471, 498-504)].

(c) *Competent Knowledge, &c.* See *Monkton* v. *A.-G.*, and *Re Perton, sup.;* and *Sturla* v. *Freccia* and *Davies* v. *Lowndes, opposite.*

Inadmissible.

his wife, alleged to have been married in New York in 1790;—the petitioner called his sister to prove that she knew a Mrs. R. who, though not a member of the family had mixed in society with her parents in New York. She was then asked in what terms Mrs. R. had spoken of them and whether as respectable persons and reputed to be married. Held, inadmissible [*Shedden* v. *A.-G.* 30 L.J. P. & M. 217, 231-2. Sir C. Creswell remarked that a witness from New York might be called to say that the reputation there was that they were man and wife (see *post* chap. xxxv., Reputation); but not what a particular person not a member of the family, said was the reputation; that is getting into a different class of evidence and requires a member of the family].

A., the daughter of Antonio M., Genoese Consul in London in 1790, having died intestate in 1871, her estate is claimed by B., who alleges that M. was a native of, and baptized at, St. Ilario in 1735, and by C., who alleges that the Consul was one Antonio Maria M., born at Quarto in 1744. To prove the latter fact C. tenders a confidential report on the fitness of M. for the proposed Consulship made in 1790 by a Committee appointed by the Genoese Government, in which it was stated that "Consul M. is a native of Quarto, aged about 45." Held not admissible as a declaration by deceased persons on a question of pedigree [*Sturla* v. *Freccia* 5 App. Cas. 623, 641-2 *per* Ld. Blackburn, who remarked that had it been shown that M. himself had told the Committee where and when he was born, that would clearly be evidence if believed to be genuine; or if for the purposes of the report they had asked him, the statement would be evidence that M. had said it; or if they had asked other members of the family who had said it, that might be evidence,—it might be a question how that could be shown, but if shown by admissible evidence it might itself be admissible as coming from a member of the family.—The report was also rejected (2) as a declaration made in the course of duty (*ante*, 293), (3) as one relating to a public or general right (*ante* 299); or (4) as a public document (*post*, 362)].

(c) *Competent Knowledge, &c.* To prove the descent of A.;—a pedigree in the handwriting of one of A.'s ancestors, purporting to be derived (1) *partly* from "parish registers, wills, monumental inscriptions, family history and records" (not shown to be lost); and (2) *partly* from personal knowledge and the information of other deceased relations, held inadmissible as to the former but admissible as to the latter part (*Davies* v. *Lowndes*, 7 Scott, N.R. 208-15. Had the incompetent sources not been *expressly disclosed* the first portion would apparently also have

Admissible.

(*d*) *Lis Mota and Interest.* In an action by B. to recover land as heir-at-law to A.; an affidavit stating B.'s relationship to A. and made by a deceased relative in a previous non-contentious proceeding in Chancery, in which an inquiry was directed as to who was A.'s heir and next of kin, held admissible, such a proceeding not constituting a *lis mota* (*Gee* v. *Ward*, 7 E. & B. 509; *aliter* as to sworn or unsworn affidavits in contentious proceedings on the same issue, *Hill* v. *Hibbitt*, 19 W.R. 250 *note*). On a similar claim;—declarations by B.'s mother that certain other members of the family had died without issue, held admissible, although the declarant was entitled to an interest in remainder upon the death of such persons without issue (*Doe* v. *Tarver*, Ry. & M. 141).

In an ejectment suit,—to prove the legitimacy of A. (deceased), a witness testified that A., in answer to inquiries, had handed him a paper, saying, "This is my mother's marriage certificate." Held, that the statement and certificate were admissible; as also a recital by A. in a deed, *ante litem motam*, that A. was the daughter and heiress-at-law of B. (her father) [*Doe* v. *Davies*, 10 Q.B. 314].

(*e*) *Form of the Declarations.* A declaration as to pedigree contained in a draft will, never signed or executed by the testator, but in his handwriting, is admissible (*Re Lambert*, 56 L.J. Ch. 122); or in a will executed but afterwards cancelled (*Doe* v. *Pembroke*, 11 East, 504; *cp. ante*, 235; and *Breton* v. *Cope*, Peake, R. 44).

On a question of pedigree to prove that A. was the son of B.—a notarial protest, and the record of proceedings in an action on a bill of exchange (the action not involving any question of pedigree), in which A. was sued as (and by his defence admitted to be) the son and representative of B., held admissible, if coupled with some proof *aliunde* connecting A. with the family (*Lyell* v. *Kennedy*, 14 App. Cas. pp. 450-1).

An entry relating to pedigree made in a missal, amongst numerous similar entries, and proved to be in the handwriting of a deceased parent, held admissible (*Slane Peerage*, Hubback, 673). As, also, one made in a birthday-book as to a deceased donor's own age, which book he had given to another relative (*Baker* v. *B.*, 1906, Times, July 30).

Inadmissible.

been receivable, although dating back to a remote antiquity).

(*d*) *Lis Mota and Interest.* The question being as to the legitimacy of A.;—declarations made after the following letters had passed in the family, held inadmissible as *post litem motam*:

(1) A letter from A., written after his parent's death, to B., his reputed uncle (who was in possession of the family property in default of lawful issue of A.'s father), saying, "What I want is to establish my legitimacy, though whether I have a right to the estate I know not"; (2) a letter from B. to another member of the family telling him of A.'s claim, and adding, "The estate I cannot give up, as it is entailed on my children" (*Frederick* v. *A.-G.* L.R. 3 P. & D. 270).

The question being whether B. was the legitimate son of A. by his second wife, and proof having been given that A.'s first wife was alive at the time of his second marriage;—a declaration by A. (deceased) that the husband of his first wife was living when A. married her, is inadmissible, as obviously in A.'s own interest [*Plant* v. *Taylor*, 7 H. & N. 211; and *cp. Dysart Peerage*, *ante*, 77-8].

In a Peerage Case, A. (deceased) is alleged to have married B. in 1785 and again in 1796, having a son X. *before* and a son Y. *after* the second marriage. To prove the legitimacy of X., evidence is tendered that, in a suit to perpetuate testimony filed by X. in 1799, A. swore that his first marriage with B. was valid and that X. was legitimate. Held, inadmissible as *post litem motam* (*Berkeley Peerage*, 4 Camp. 401).

(*e*) *Form of the Declarations.* To prove that A. is the son of B.;—a recital of that fact in a deed by which C. (a stranger) assigned property to A. as B.'s son, is inadmissible as a declaration, C. being a stranger; though *aliter* to show A.'s enjoyment of property, as B.'s son, the Court remarking that although the deed could not be rejected to prove the fact of the grantee's enjoyment of the property as legitimate, yet its recitals were not evidence of the grantee's pedigree (*Slaney* v. *Wade*, 7 Sim. 595; 1 My. & Cr. 338; and see *Fort* v. *Clarke*, 1 Rus. 604).

An entry relating to pedigree made in a prayer-book alleged to have belonged to the family in question, but respecting which no proof was given as to who made the entry, held inadmissible (*Tracy Peerage*, Hubback, 673).

CHAPTER XXVII.

DYING DECLARATIONS IN CASES OF HOMICIDE.

In trials for murder or manslaughter, the dying declarations of the deceased, made under a sense of impending death, are admissible to prove the circumstances of the crime.

[Tay. ss. 714-722; Best, s. 505; Russ. Cr., 7th ed. 2084-94; Ros. Cr. Ev., 13th ed. 29-34; Archb. Cr. Pl., 23rd ed. 321-4; Steph. art. 26; Whart. Cr. Ev. 276-304; Wigmore, Ev. ss. 1430-52.]

Principle. The grounds of admission are: (1) *death;* (2) *necessity,* for the victim being generally the only eye-witness to such crimes, the exclusion of his statement would tend to defeat the ends of justice; and (3) the *sense of impending death,* which creates a sanction equal to the obligations of an oath (*R.* v. *Woodcock,* 1 Leach, 500, 504; *R.* v. *Perry,* 1909, 2 K.B. 697). In the former case, Eyre, C.B., remarked: 'The general principle on which this species of evidence is admitted is that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone; when every motive to falsehood is silenced and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn and so awful is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice.'

History. This "exception" to the rule against hearsay, like most of the others, existed long before the rule itself, an example of such evidence occurring in 1202 (1 Sel. Pl. Cr., Seld. Soc. 11, 27; see also Plac. Ab. 104, col. 2; and *cp.* Glanville, l. 2, c. 3). One of the earliest instances of its admission, after the establishment of the rule, occurs in *R.* v. *Pembroke,* 1678, 6 How. St. Tr. 1333-4. Down to the opening years of the nineteenth century, however, dying declarations were admissible in *all* cases, civil as well as criminal; a laxity which in the case of civil proceedings was not finally curtailed until 1836 (*Stobart* v. *Dryden,* 1 M. & W. 615, 626.) [Thayer, Pr. Tr. Ev. 519-20; *id.,* Cas. Ev., 2nd ed., 349, 360; Salmond, Essays, 82; Wigmore, Ev. s. 1430.]

Homicide of Declarant. (*a*) The declarations are not admissible upon charges other than *homicide;* or as to homicides other than that of *the declarant.*

The latter part of this limitation was somewhat infringed in *R.* v. *Baker,* 2 M. & Rob. 53. In that case B. and C. had both died from eating a cake into which A. was accused of putting poison. On A.'s trial for B.'s murder, the dying declarations of C. (made after B.'s death) that she, C., had made the cake in the prisoner's presence, and had put nothing bad into it, were received, upon the ground that the two deaths by the same poisoning were

all one transaction. The point would, however, have been reserved, but the prisoner was acquitted. In *R.* v. *Hind,* 8 Cox, 300, in which *R.* v. *Baker* was cited, Pollock, C.B., held, adopting the doctrine of *R.* v. *Mead,* 2 B. & C. 605, that the true rule confined the declarations to charges involving the homicide of the *declarant;* and in America the preponderance of authority is to the same effect (Wigmore, s. 1433).

Condition at Time of Declaration. (*b*) The deceased must be proved to the satisfaction of the judge to have been, at the time of making the declaration, in *actual danger of death,* and to have *abandoned all hope of recovery* (*Sussex Peerage,* 11 C. & F. 108, 112, *per* Ld. Denman; *R.* v. *Cleary,* 2 F. & F. 850; *R.* v. *Perry,* 1909, 2 K.B. 697). If these conditions concur, it is immaterial that he lingered for several days, or even weeks (*R.* v. *Bernadotti,* 11 Cox, 316; *R.* v. *Craven,* 1 *Lew.* 77), or that he subsequently entertained hope (*R.* v. *Austin,* 8 Cr. App. R. 27; *R.* v. *Hubbard,* 14 Cox, 565, not following on this point *R.* v. *Fagent,* 7 C. & P. 238, and *R.* v. *Megson,* 9 C. & P. 420).

Questions of admissibility arise chiefly with respect to the mental condition of the declarant. There must be a "settled hopeless expectation of death," not qualified by any prospect of recovery, however slight (*R.* v. *Jenkins,* L.R. 1 C.C. 187; *R.* v. *Perry, sup.; R.* v. *Austin, sup.;* as well as a belief, not, indeed, in an instant or immediate death (as held in *R.* v. *Osman,* 15 Cox, 1, *per* Lush, L.J.; and *R.* v. *Mitchell,* 17 Cox, 503, *per* Cave, J.), but in an imminent and impending, as distinguished from a deferred, one (*R.* v. *Perry, sup.; R.* v. *Austin, sup.*).

The declarant's mental condition may be inferred from his own statements at the time and including those whose admissibility is in question (*R.* v. *Austin, sup.*); his conduct, as in taking leave of his friends, giving directions for his funeral, &c. (*R.* v. *Spilsbury,* 9 C. & P. 190); the opinions of medical or other attendants expressed to him (*R.* v. *Mitchell, sup.; R.* v. *Austin, sup.*); the serious nature of the injury received (though it seems doubtful if this alone is sufficient, *R.* v. *Cleary,* 2 F. & F. 850; *R.* v. *Morgan,* 14 Cox, 337; *R.* v. *Bedingfield, id.* 341); and other attendant circumstances.

Competency. Credibility. Corroboration. The declarant must have been competent as a witness; thus imbecility or tender age will exclude the declaration (*R.* v. *Drummond,* 1 Lea. C.C. 338; *R.* v. *Pike,* 3 C. & P. 598; *R.* v. *Perkins,* 9 C. & P. 395); though not, now, want of religious belief (*post,* 451).

And his credibility may, perhaps, be impeached in the same manner as that of a witness. [There is no express English authority, but see last-mentioned cases; also Steph. art. 135; Ros. Cr. Ev. 34; and 2 Russ. Cr., 7th ed. 2092. In America, however, the rule is established, evidence of the declarant's bad character, inconsistent statements, or previous conviction being receivable (Wigmore, s. 1446).] So, where the deceased is an accomplice, as in an abortion case, the declaration should be corroborated (*R.* v. *Sadler,* 1911, 75 J.P.Jo. 256, *per* Darling, J.); otherwise an uncorroborated declaration may be sufficient to warrant conviction (*R.* v. *Fitzpatrick, post,* 322).

Subject-matter and form, &c., of the Declaration. (*c*) The declarations are only admissible to prove the *cause of, and circumstances of the transaction*

resulting in, death, and not *previous or subsequent transactions,* although relevant to the issue. [*R.* v. *Mead,* 2 B. & C. 605; *R.* v. *Hind,* 8 Cox, 300; *R.* v. *Murton,* 3 F. & F. 492; Steph. art. 26. In America, also, the declarations are restricted to the *res gesta,* those relating to independent transactions being excluded, as not falling within the principle of necessity on which such evidence is received (Wigmore, s. 1434).]

Nor must they, in general, include matter inadmissible from the mouth of a witness—*e.g.* hearsay or irrelevancy (Tay. s. 720; 1 Greenleaf, s. 159, note *a*). As to opinions, there seems more doubt. It is usually said these are inadmissible (*R.* v. *Sellers,* Carrington, Cr.L. 233; Tay. s. 720); but in *R.* v. *Scaife,* 1 Moo. & Rob. 551, and *R.* v. *Oneby,* cited 1 Atkyns, p. 38, opinions favourable to the prisoner were admitted; and this is the general practice in America (Wigmore, s. 1447, who concedes, but criticises, the rule). In any case, opinions as to identity, or other matters admissible from the mouth of a witness, are receivable.

The declarations should be *complete,* conveying the whole of what the declarant intended to say: An unfinished statement, or one which the declarant intended, but was prevented from, qualifying, being inadmissible (Tay, s. 721; Wigmore, s. 1448). Moreover, it has been held that the *actual words* of the deceased must be proved, and not merely their *substance;* and that if *questions* were put, both these and the *answers* must be given to enable the Court to see how much was suggested by the examiner and how much spontaneously produced by the declarant (*R.* v. *Mitchell,* 17 Cox, 503; *R.* v. *Smith,* 65 J.P. 426; *R.* v. *Fitzgerald,* Ir. Cir. Rep. 168); this strictness, however, has not been required in other cases (*R.* v. *Smith,* 10 Cox, 82, C.C.R.; *R.* v. *Whitmarsh,* 62 J.P. 680, 711, *per* Darling and Bigham, JJ.; *R.* v. *Bottomley,* 118 L.T.Jo. 88; 38 L.Jo. 311; *per* Lawrance, J.; and in *R.* v. *Fitzpatrick,* (1910), 46 Ir. L.T.R. 173 C.C.C.R. it was unanimously held by six judges that the form of question and answer only affected weight and not admissibility).

Miscellaneous. The declarations may be oral or written; and they are not rendered incompetent (though their weight may be impaired) by being made in response to leading questions (*R.* v. *Smith,* 10 Cox, 82; *contra, R.* v. *Mitchell, &c., sup.*), or earnest solicitation (*R.* v. *Fagent,* 7 C. & P. 238; *R.* v. *Reason,* 1 Str. 499; *R.* v. *Whitworth,* 1 F. & F. 382); or through having been taken as depositions, and proving inadmissible as such (*R.* v. *Woodcock,* 1 East P.C. 356; *R.* v. *Quigley,* 18 L.T. 211); or through third persons being implicated in the statement (*R.* v. *Bottomley, sup; cp. ante,* 269).

They are also evidence either for, or against, the prisoner (*R.* v. *Scaife, sup.*).

EXAMPLES.

Admissible.

(*a*) A. is indicted for the murder of B.;—a dying declaration by B. that A. had murdered him is admissible (*R.* v. *Mosley,* 1 Moody, C.C. 97).

Inadmissible.

(*a*) A. is indicted for the murder of B.;—a dying declaration by C. that he and not A. had murdered B. is inadmissible (*R.* v. *Gray,* Ir. Cir. Rep. 76).

A. is indicted for robbing B.;—a dying declaration by B. as to the circumstances of the robbery is inadmissible (*R.* v. *Lloyd,* 4 C. & P. 233).

Admissible.

(*b*) Declarations have been received after proof of the following expressions by the deceased:

"Be quick, or I shall die" (*R.* v. *Bernadotti*, 11 Cox, 316). "I am dying, look to my children" (*R.* v. *Goddard*, 15 Cox, 7). "I am getting worse; I am going to die" (*R.* v. *Pickersgill*, cited Ros. Cr. Ev., 13th ed. 32). "I have seen the surgeon to-day and he has given me some little hope that I am better; but I do not myself believe that I shall ultimately recover . . . . I cannot recover" [*R.* v. *Reaney*, 7 Cox, 209, C.C.R. In this case much atress was laid on the word "ultimately" as a reason for rejecting the declaration; but it was held that it did not, under the circumstances, import a belief in a long deferred as opposed to an impending death]. "Doctor, am I dying?" "You are in a very critical condition." "Doctor, I know I am dying" (*R.* v. *Harvey*, 115 C.C.C. Sess. Pap. 13, 16, *per* Hawkins, J.). "I am dying; I don't think I shall get better" (*R.* v. *Bottomley*, 118 L.T.Jo. 88; 38 L.Jo. 311).

A doctor told deceased he thought there was little hope of her living, and thought she was going to die, to which she replied: "I know I shall never get better; what will become of my poor children?" A deposition by the deceased, taken under 30 & 31 Vict. c. 35, s. 6, though held inadmissible as such, because no notice had been given to the prisoner, was received as a dying declaration (*R.* v. *Quigley*, 18 L.T. N.S. 211).

A doctor considered the case hopeless; and afterwards a magistrate, who was sent for, explained this to the deceased, though he did not tell the latter that death was imminent. Held, the declaration was admissible (*R.* v. *Leppard*, 68 J.P.Rep. 353, *per* Ridley, J.).

The deceased himself had, at the time of making a declaration, no hope of recovery, although his doctor had a hope and had expressed it to him; his declaration admitted (*R.* v. *Mosley*, 1 Moo. C.C. 97; *R.* v. *Whitworth*, 1 F. & F. 382; see also *R.* v. *Howell*, 1 C. & K. 689; and *R.* v. *Peal*, 2 F. & F. 21).

Inadmissible.

A. is charged with feloniously procuring B.'s miscarriage. A dying declaration by B. as to the circumstances of the case is inadmissible (*R.* v. *Hind*, 8 Cox, 300).

The question being whether a bond, executed by A., whose signature was attested by B. (deceased) was forged;—a dying declaration by B. that he had forged A.'s signature is inadmissible [*Stobart* v. *Dryden*, 1836, 1 M. & W. 615. *Contra*, formerly, see *Wright* v. *Littler*, 1761, 1 W.Bl. 349, and *Aveson* v. *Kinnaird*, 1805, cited *ante*, 83].

(*b*) Declarations have been rejected after proof of the following expressions by the deceased:

"I am aware that I am seriously ill" (*R.* v. *Smith*, 65 J.P. 426). "I think myself in great danger." (*R.* v. *Errington*, 2 Lew. C.C. 148). "I was in hopes of getting better; but as I am getting worse, I think it my duty to mention what has taken place" (*R.* v. *Megson*, 9 C. & P. 420). "I think I shall not recover, as I am very ill" (*R.* v. *Spilsbury*, 7 C. & P. 187). "I think I shall never get over it" (*R.* v. *Qualter*, 6 Cox, 35). "I don't think I shall ever get up again . . . I don't think I shall be long with you . . . I hope I shall get well, but do not think so . . . I feel sure I shall never get up alive again. . . . I give the following directions in case I die" (*R.* v. *Gloster*, 16 Cox, 471). "I feel that I have received such an injury that I shall never recover"; and, upon the doctor trying to cheer him, "I feel satisfied I shall never recover (R. v. *Van Butchell*, 3 C. & P. 631). "I have no hope of recovering unless it be the will of God" (*R.* v. *Murphy*, Ir. Cir. R. 38).

A doctor having told the deceased that there was "little or no hope of her recovery," the latter, on being asked if she understood her position, replied that she did—a declaration then made rejected (*R.* v. *Mitchell*, 17 Cox, 503).—So, where the deceased, having asked his doctor if the wound was necessarily mortal, was told that a recovery was just possible and in one such case had taken place, whereupon the deceased had replied, "I am satisfied" (*R.* v. *Christie*, Carrington, Cr.L. 232).

The deceased having been told by the doctor that she would not recover, replied, "I hope, doctor, you will do what you can for me for the sake of my family"; her declaration then made rejected (*R.* v. *Crockett*, 4 C. & P. 544).

The deceased having made a statement which was taken down in writing by a third person, concluded, "I make the above statement with the fear of death before me, and with no hope of recovery." Afterwards, on the statement being read over to her she corrected it to "with no hope

Admissible.

The deceased (a boy of eleven) being badly wounded, asked the doctor if he should recover. The latter replied, "In all probability you will not recover. . . . You may recover, it is impossible for me to say, but I don't think you will be alive by the morning." The deceased made no reply, but his countenance changed and he appeared distressed. A declaration then made, held admissible (*R.* v. *Perkins*, 9 C. & P. 395).

The deceased, on whom an illegal operation had been performed, and who had just said to her sister; "Oh Gert, I shall go. But keep this a secret. Let the worst come to the worst";—made a statement implicating the accused. Held admissible (*R.* v. *Perry*, 1909, 2 K.B. 697). So, where, after a similar illegal act, the deceased was in a nursing home and about to be operated on, but was found to be dying, and one Dr. said, "the operation will not take place now, you are too weak," and another Dr. said, "You are very much worse, I am afraid you are dying" and suggested that a magistrate should be sent for, the deceased, assenting, then made a statement implicating the accused,—Held, admissible as showing that, at the time of the declaration, she had abandoned hope; although an hour later, hope apparently reviving, she remarked to an attendant, "Isn't it rotten, they won't operate on me till to-morrow" (*R.* v. *Austin*, 8 Cr. App. R. 27, following *R.* v. *Perry*, *sup.*)

A declaration made by the deceased just before she expired, and after the exclamation: "I am dying!" Held admissible [*R.* v. *Cowle*, 71 J.P. Rep. 152, *per* Grantham, J., distinguishing *R.* v. *Abbott*, *opposite*].

A constable asked the deceased, on the 27th February, "Do you believe you are going to die?" to which he answered, "I do." "Have you the fear of death before you?" "I have." "Are you without hope of recovery?"—"I am.' The deceased then signed a statement implicating the prisoner, but which was not elicited by question and answer, and died on the 20th March. It was objected that being begun in that form, it was inadmissible. Held (1) the questions and answers as to his state of mind were no part of the dying declaration; (2) that even if they were, they only affected its weight not its admissibility; and (3) that the declaration was sufficient, without other evidence, for conviction [*R.* v. *Fitzpatrick* (1910), 46 Ir. L.T.R. 173, C.C.R. The third point is noticed in 129 L.T.Jo. 281].

(c) A. is charged with the murder of B.;—a dying declaration by B. that "I don't think A. would have struck me if I hadn't provoked him" (*R.* v. *Scaife*, 1

Inadmissible.

at present of my recovery": declaration rejected (*R.* v. *Jenkins*, L.R. 1 C.C. 187).

The deceased, who lived a few hours after the wound was inflicted, made a statement, at the conclusion of which he exclaimed, "Oh, God, I am dying fast!—I am too far gone to say any more." He had said nothing before this as to his condition, nor was there anything to show he was aware of it. Held, the statement was inadmissible, as he apparently only discovered his condition *after* he had made it (*R.* v. *Nicolas*, 6 Cox, 120).

The deceased being in a collapsed condition, the doctor told her it was impossible she could recover. She seemed to put this off, and said, "I shall be all right." The doctor then repeated that she was going to die and very soon, whereupon she seemed to understand this and accept the situation. Declaration excluded (*R.* v. *Butler*, 142 C.C.C. Sess. Pap. p. 1624, *per* Jelf, J.).

The deceased repeated several times, "I am dying," and the doctor testified she was not likely to recover; but there being nothing to show that this expression might not have merely been the result of pain, and not of belief as to her condition, held the statement was inadmissible (*R.* v. *Abbott*, 67 J.P. Rep. 151, *per* Kennedy, J.).

The deceased, who was apparently in great agony, said she thought she was going to die. A little later she asked to see her baby, repeating that she thought she was going to die. A statement then made, held inadmissible. (*R.* v. *Neill Cream*, 116 Sess. Pap. C.C.C. p. 1424).

(c) A. is charged with the murder of B.; a dying declaration by B. made to a magistrate, the latter asking her questions and a witness taking down the answers

Admissible.

Moo. & Rob. 551); or, "I met my death after the manner of swordsmen" (*R.* v. *Oneby*, cited 1 Atkyns, p. 38), is admissible.

Deceased made a statement, when not in a dying condition, which was written down some hours afterwards by a witness. On the following night the statement was read over to the deceased, who was then dying, by another witness, who sometimes put questions from it in a leading way, and sometimes took the deceased's own words. Held, the statement was admissible (*R.* v. *Smith*, 10 Cox, 82, C.C.R.).

A magistrate having before him an earlier statement, made by the deceased, but not when dying, repeated portions of it in his own words to her when dying, wrote down such portions and asked her if they were correct, to which she said "Yes," and signed the paper, which ended thus: "The statement I previously made and have now heard read over to me is true." Held admissible (*R.* v. *Whitmarsh*, 62 J.P. 680, 711, *per* Darling and Bigham, JJ.).

Inadmissible.

(only), which deceased then signed with her mark;—held inadmissible, as not sufficiently containing the actual words of the deceased, the answers only being given, and there being nothing to show that the questions were not leading ones (*R.* v. *Mitchell*, 17 Cox, 503, 505, *per* Cave, J.; followed in *R.* v. *Smith*, 65 J.P., 426, *per* Bruce, J.).

The deceased made a statement, when not in a dying condition, which her father wrote down and took to a magistrate, asking him to swear the deceased. The magistrate thereupon went to the latter, and having questioned her as to its truth, paragraph by paragraph, swore her to it. Held inadmissible (*R.* v. *Fitzgerald*, Ir. Cir. Rep. 168, *per* Crampton, J., who remarked that the statements should have been taken down from the deceased's own lips to avoid the danger of an assent to what she did not intend).

CHAPTER XXVIII.

DECLARATIONS BY TESTATORS AS TO THEIR WILLS.

On questions involving the factum, contents, or interpretation of a will, the declarations of the testator are, subject to the qualifications stated below, admissible to show his state of mind.

Principle. The declarations included in this chapter are treated in the present connection for convenience, and because they are sometimes regarded as forming an exception to the hearsay rule on account of the (1) *death,* (2) *peculiar means of knowledge,* and (3) *absence of interest to misrepresent* of the declarant [Ros. N.P. 55; Steph. art. 29, citing *Sugden* v. *St. Leonards,* 1 P.D. 154. Prof. Thayer remarks that Sir J. Stephen has erroneously founded an exception to the hearsay rule upon this case, Cas. Ev., 2nd ed. 619 *n;* see *infra;* 26 Harv. L. Rev. 158-160, and Wigmore Ev. s. 1736].

Original Evidence. When however, as commonly happens, such declarations are tendered, not to prove the facts stated, but to show the knowledge, intention, sanity, or other mental state of the testator, it is misleading to consider them as exceptions to the hearsay rule. Their admissibility does not depend on all or any of the conditions above mentioned. They are original evidence receivable either (1) as part of the *res gesta* (*Johnson* v. *Lyford,* L.R. 1 P. & D. 546; *Staines* v. *Stewart,* 2 S. & T. 320; *Newton* v. *N.,* 5 L.T. 218, 225; *Kirk* v. *Eddowes,* 3 Hare, 509, 522; in which case they should have been made contemporaneously with the testamentary act, *ante,* 58-62); or more usually in this connection, (2) as presumptive evidence of the mental condition which they indicate (*ante,* 61-4), in which case, it is, in general, immaterial to admissibility, as distinguished from weight, whether they were made before, at, or after such act, or whether in form they expressed a future intent, or asserted a past fact. Thus, a *post*-testamentary declaration by a testator that he had burnt or cancelled his will, has been admitted, not to prove either fact, but to show a continuous intent to destroy (*Keen* v. *K.,* L.R. 3 P. & D. 100; *Drake* v. *Sykes,* 23 T.L.R. 747, C.A.), and a declaration by a testatrix that she had left her property to a particular person, not as evidence thereof, but in one case to identify the constituent papers of her will (*Gould* v. *Lakes,* P.D. 1), and in another to solve an equivocation (*Doe* v. *Allen,* 12 A. & E. 451). In the same way post-testamentary declarations, though hearsay in form, have been received as presumptive evidence of the mental capacity of the testator (*Sutton* v. *Sadler,* 3 C.B.N.S. 87, 99), or as exhibiting his inclinations and intentions when the will was impeached for fraud or forgery (*Doe* v. *Allen,* 8 T.R. 147; *Doe* v. *Hardy,* 1 M. & R. 525; *Priestman* v. *Thomas,* 1883, Times, Nov. 19), or as showing his intentions on a question whether a legacy was cumulative or substitutional

(*Wainewright* v. *W.*, 71 L.T. 265; *Jenner* v. *Ffinch*, 5 P.D. 106; *Hubbard* v. *Alexander*, 3 Ch.D. 738).

Hearsay. On the other hand, declarations by testators, when tendered to prove the truth of the testamentary facts asserted, have, with the one well-known exception mentioned below, been uniformly excluded as hearsay. Thus, they have been rejected to prove the execution or revocation of the will (*Doe* v. *Palmer*, 16 Q.B. 747; *Atkinson* v. *Morris*, 1897, P. 40; *Keen* v. *K.*, and *Drake* v. *Sykes*, *sup.*); the date of alterations therein (*id.*; *Re Hardy*, 30 L.J.P. 142; *Re Adamson*, L.R. 3 P. & D. 253); the date of execution of an incorporated paper (*Van Straubenzee* v. *Monck*, 3 S. & T. 6); the fact of the appointment of an executor (*Re Murphy*, 7 L.R.Ir. 561); the gift of a legacy to a particular legatee (*Gould* v. *Lakes*, and *Doe* v. *Allen*, *sup.*); the amount of advances made to the latter (*Smith* v. *Conder*, 9 Ch.D. 170; *post*, chap. xlvii.); or the communication of a secret trust to an executor (*Re Downing*, 60 L.T. 140; *post*, 580-1).

In *Sugden* v. *St. Leonards*, 1 P.D. 154, however, the majority of the C.A. held that *post*-testamentary declarations were admissible to prove the contents of a lost will, as exceptions to the hearsay rule, *i.e.* as statements by a deceased person with peculiar means of knowledge, and without interest to misrepresent. This ruling, which was dissented from by Mellish, L.J., and seriously doubted in *Woodward* v. *Goulstone*, 11 App. Cas. 469, and by the C.A. in *Atkinson* v. *Morris*, *sup.*, appears to be contrary to principle; though it is conceived that had such declarations been tendered, not as hearsay proof of the contents of the will, but merely as original evidence of a continuous intention on the part of the testator, they might have been supported on the analogy of *Gould* v. *Lakes*, *Keen* v. *K.*, *Drake* v. *Sykes*, &c., *supra*, and *post*, 329, 338. As was remarked, indeed, by Ld. Fitzgerald in *Woodward* v. *Goulstone*, *sup.*, at p. 486, "however such statements were dealt with in *Sugden* v. *St. Leonards*, the true ground upon which they ought to be received, if received at all, was not fully discussed." *Sugden* v. *St. Leonards* is criticised by Prof. Thayer as a case "remarkable for many ill-considered dicta as to the hearsay exceptions and as to the rules of evidence in general; see especially the opinions of Jessel, James and Cockburn. Mellish, L.J., states the sounder doctrine, and his decision is consistent with the authorities. The view put forward by some of the judges that if evidence is admitted for one purpose, it may be used for any other, is not to be accepted; and the remarks of Jessel, M.R., as to the hearsay rule are peculiarly loose and inaccurate" (2 Harv. L. Rev. 94).

Parol Evidence. Declarations of Intention. Courts of Probate and Courts of Construction. Even, however, when declarations by testators are tendered, not as hearsay, but strictly as original evidence, they may still, especially when taking the form of direct expressions of intent, be inadmissible under the general rules regulating parol evidence as affecting written documents (*post*, 575, 610-2); and the matter is further complicated by the consideration that, although courts of probate usually deal with the factum of the will and courts of equity with its construction, or interpretation, yet each has sometimes to exercise the functions, and observe the rules of evidence, of the other. "The truth is," as was remarked by Sir J. P. Wilde, in *Guardhouse* v. *Blackburn*, L.R. 1 P. & D. 109, "that the rules excluding parol evidence have no place

in an enquiry in which the court has not got before it some ascertained paper beyond question binding and of full effect." Thus, while, in cases involving the *factum* of the instrument (*e.g.* its execution, validity, constituent parts, or revocation), even direct expressions are receivable, in those involving its *interpretation*, they are uniformly excluded, except for the purpose of solving an equivocation (*Guardhouse* v. *Blackburn, sup; Jenner* v. *Ffinch*, 5 P.D. 106; *Chichester* v. *Quatrefages*, 1895, P. 186.) So, where, in order to determine the *factum* of one instrument, a court of probate has to construe another, as on questions whether a later will revokes an earlier, and an ambiguity is apparent on the face of the instruments, declarations of intent are admissible (*Jenner* v. *Ffinch, sup.; Wainewright* v. *W.*, 71 L.T. 265; *Re Tonge*, 66 L.T. 60; as to simultaneous documents, see *Townsend* v. *Moore*, 1905, P. 66, 80); though where there is no ambiguity it is otherwise (*Re Palmer*, 58 L.J.P. 44). On the other hand, in Chancery, although the probate is usually conclusive as to the *factum* of the instrument (*post*, 431-2; *Re Bywater*, 18 Ch. D. p. 22), it is not always so; thus, on an issue directed as to the forgery of the will (*Priestman* v. *Thomas*, 1883, Times, Nov. 15), or on a question of substitutional legacies to show, in opposition to the probate, that two identical codicils were executed as duplicates and not distinct instruments (*Hubbard* v. *Alexander*, 3 Ch.D. 738), such evidence has been received; while where the codicils were not identical, the matter was treated as one of construction merely, and the evidence rejected (*Wilson* v. *O'Leary*, 7 Ch. Ap. 448.) So, though a court of construction may accept the decision of a court of probate as to the date of alterations in a will partly involving real estate, it is not necessarily bound thereby (*Re Cruttenden*, 30 W.R. 57).

(1) **Factum of Will: Execution, Identity, Constituent Papers, Validity.** (*a*) The declarations of a testator are not admissible as exceptions to the hearsay rule to prove the *execution* of his will, even though both parties claim under the testator (*Atkinson* v. *Morris*, 1897, P. 40; *Doe* v. *Palmer*, 16 Q.B. 747). They may, however, be received as original evidence to support or rebut a presumption of due execution, arising from a partial compliance with the statute (*Clarke* v. *C.*, 5 L.R.Ir. 47; *Harris* v. *Knight*, 15 P. D. 170). So, his declarations of intention, either before, at, or after the execution, are admissible as original evidence to *identify* the will (*Re Nosworthy*, 4 S. & T. 44). And, although a statement in the will itself that a given document is, or is not, part of the will, is conclusive (*Re Lewis*, 32 T.L.R. 313); yet failing this, declarations of intention by the testator are admissible, as original evidence to show what papers *constitute* the will (*Gould* v. *Lakes*, 6 P.D. 1; *Re Hutchinson*, 18 T.L.R. 706). And similar evidence is receivable to show whether the alleged will was signed *animo testandi*, or under a misapprehension (*id.; Dunn* v. *D.*, L.R. 1 P. & D. 277; *Re Hunt*, 3 *id.* 260), or for some collateral object (*Lister* v. *Smith*, 3 S. & T. 282), or whether an instrument in form a deed, was executed as a will (*Re Slinn*, 15 P.D. 156; *Hawksby* v. *Kane*, 47 Ir. L.T. R. 96). And declarations, both by the testator and attesting witnesses, are similarly admissible to show whether the latter signed *animo attestandi* or otherwise (*Griffiths* v. *G.*, L.R. 2 P. & D. 300; *Re Sharman*, 1 *id.* 661). So, where the question was whether legacies given by two similar codicils were substitutional or cumulative, *i.e.* whether the documents were executed as duplicates or distinct instruments, such evidence

was as we have seen admitted, not only by a court of probate (*Wainewright* v. W., *sup.*, but, even in opposition to the probate, by a court of construction (*Hubbard* v. *Alexander, sup.;* while where the instruments were dissimilar, the evidence was altogether rejected (*Wilson* v. *O'Leary, sup,*). Whether, in the case of a conditional will, the condition must appear on the face of the document, or may be proved by the oral declarations of the testator, appears doubtful (*Newton* v. *N., post,* 314; *O'Leary* v. *Douglass,* 3 L.R.Ir. 323; *cp. Re Spratt,* 1897, P. 28); but where the words used in the will are ambiguous, evidence both of surrounding circumstances and declarations by the testator may be given (*Vines* v. *V.*, 1910, P. 147, following *Re Bryan,* 1907, P. 125; *sed qu.* whether *Re Bryan* goes to this length.) The above rule holds also where the will is impeached for *incompetency, undue influence, fraud,* or *forgery,* declarations by the testator being receivable as original evidence to establish or rebut these allegations (*Sutton* v. *Sadler,* 3 C.B. N.S. 87, 99; *Doe* v. *Allen,* 8 T.R. 147; *Doe* v. *Hardy,* 1 Moo. & Rob. 525.; *Doe* v. *Palmer, sup.*); while, if tendered as direct assertions of such invalidity, &c., they will be rejected as hearsay (*Provis* v. *Reed,* 5 Bing, 425). Irrespective, of course, of the special rules affecting declarations by testators, those of third persons, whether parties or not, and whether deceased or not, may be admissible upon such issues under the general law. Thus, on a question of undue influence, declarations made by the person alleged to have exercised the influence, though he be deceased and not represented in the suit, are receivable (*Radford* v. *Risdon,* 28 T.L.R. 342). And as to conspiracy with regard to wills see *ante,* 92-4.

(2) **Contents. Alterations. Mistakes. Secret Trusts.** (*b*) Declarations by testators have been received as secondary evidence of the *Contents* of a lost will; those *prior* to execution as original evidence (*Sugden* v. *St. Leonards,* 1 P.D. 154, 242, 251), and those *subsequent* as exceptions to the hearsay rule (*id.;* but see remarks *ante,* 325). Declarations *contemporaneous* with its execution (*Johnson* v. *Lyford,* L.R. 1 P. & D. 546), or with its production to a third party (*Hanks* v. *Tottenham,* 10 Ir. Jur. N.S. 277), has also been received as part of the *res gesta, i.e.,* as original evidence to prove the contents.

So, declarations of intent either prior to, or contemporaneous with, execution are admissible as original evidence to rebut the presumption that *Alterations* in the will were made after its execution (*Doe* v. *Palmer, sup.; Re Tonge, post,* 332; or after the execution of any codicil confirming it, *Re Sykes,* L.R. 3 P. & D. 26). As to subsequent declarations, these, on the general principles stated *ante,* 324-6, would seem to be admissible if tendered merely as original evidence of continuous intent (*Re Tonge, post,* 332; and *cp. Gould* v. *Lakes, Keen* v. *K.,* &c., *ante,* 324; and *Re Fletcher, ante,* 85, 154), but not if tendered as hearsay evidence of the facts stated (*Doe* v. *Palmer,* &c., *ante,* 325). And in a court of probate to establish *Mistake,* not only extrinsic to the will, as in its execution or revocation, but intrinsic, as in the introduction of words without the knowledge or approval of the testator, his declarations both before and after the execution are receivable (*Morrell* v. *M.,* 7 P.D. 68; in *Brisco* v. *Hamilton,* 1902, P. 234, a solicitor's letter was received to show his client's ignorance). Although, however, inserted words may be struck out on this ground, omitted words may not be supplied, since this would, in effect, be to make a new parol will for

the testator, in evasion of the statutory formalities (*Re Schott,* 1901, P. 190; and see a discussion of the principle and cases on this point in 26 Harv. L. Rev. 212, 236); and where the mistake, as in ordinary cases of misnomer or misdescription, involves neither *factum* nor *equivocation,* no declarations of intent will be receivable (*Charter* v. *C.,* L.R. 7 H.L. 364; see Mistake, *post,* 584, 624). On the other hand, it has been held that in the Chancery Division words must be expunged or supplied by construction alone, and not by evidence (*Re Bywater,* 18 Ch.D. 17, 22; 26 Harv. L. Rev. 212).

On the grounds above stated, declarations by a testator are admissible as original evidence to establish a *Secret Trust* not disclosed in the will (*O'Brien* v. *Tyssen,* 28 Ch.D. 372; *post,* 580-1); though his assertions that he has communicated it to the party bound, have been rejected as hearsay (*Re Downing,* 60 L.T. 140).

(3) **Construction and Interpretation. Presumptions.** As to the distinction, if any, between Construction and Interpretation, see *post,* 605. In order to *identify the persons or things referred to* in the will, declarations by the testator showing his knowledge, ignorance, likes, dislikes, or habits of speech concerning them are admissible; but not his *direct declarations of intent,* except in the case of an "equivocation" (see fully *post,* chap. xlvi.); nor will directions even in the will itself, that if any doubt arises as to the identity of a legatee, it is to be determined by the trustees, bind the Court (*Re Raven,* 1915, 1 Ch. 673). As to direct declarations to rebut presumptions, see *post,* chap. xlvii.; and as to when the original will may be looked at for purposes of construction, *post,* 431, 538, 560.

(4) **Revocation.** (*c*) (1) *By Destruction animo revocandi.* The destruction of a will cannot be proved by the hearsay declarations of the testator (*Atkinson* v. *Morris,* 1897, P. 40, C.A.; *Drake* v. *Sykes,* 23 T.L.R. 747, C.A.); but after that fact has been established *aliunde,* his declarations, made at or about the time, have been received as part of the *res gestæ* to show the intent with which the act was done, *e.g.* a mistaken belief that the will was invalid (*Giles* v. *Warren,* L.R. 2 P. & D. 401), or that another was thereby revived (*Cossey* v. *C.,* 82 L.T. 203), or an intent to make a fresh one (*Dixon* v. *Treasury Sol.* 1905, P. 42), cases usually referred to as "dependent relative revocation." So, where, from the will not being forthcoming at death, a presumption of destruction *animo revocandi* arises (*Allen* v. *Morrison,* 1900, A.C. 604), declarations by the testator not confined to the *res gesta,* but made at any time before death, are receivable in rebuttal, not as direct proof of the facts stated, but as presumptive evidence of the intent (*Finch* v. *F.,* L.R. 1 P. & D. 371; *Keen* v. *K.,* 3 *id.* 105; *Drake* v. *Sykes, sup; Whiteley* v. *King,* 17 C.B.N.S. 756).

(2) *By a later will, or codicil.* When an intent to revoke can clearly be gathered from the later will or codicil itself, no declarations or other parol evidence can be given (*Newton* v. *N.,* 12 Ir. Ch. R. 118, 128; *Re Palmer,* 58 L.J.P. 44); but where on the construction of the later instrument the point is doubtful, evidence both of surrounding circumstances and declarations of intent is admissible either in a court of probate (*Jenner* v. *Ffinch,* 5 P.D. 106; *Wainewright* v. *W.,* 71 L.T. 265; *Chichester* v. *Quatrefages,* 1895, P. 173; *Re Bryan,* 1907, P. 125; *O'Leary* v. *Douglass,* 3 L.R. Ir. 323; *cp. Townsend* v. *Moore,* 1905, P. 66, 80), or one of construction (*Hubbard* v. *Alexander,* 3 Ch.D. 738; *Re Churchill,* 1917, 1 Ch. 206, in which case, though surrounding

circumstances were looked at, evidence of subsequent declarations was rejected to show the intent of a revoking codicil; see *ante*, 73).

EXAMPLES

(*a*) *Execution, Identity, Constituent Papers, and Validity of Will.*

Admissible.

Execution. The testator left a holograph will with an attestation clause stating merely that it was "*signed in the presence of*" two marksmen (deceased) whose names he had written opposite their marks, but there was nothing to show that they were all present together. Held, that declarations made by him on his death-bed to the same effect as the will, and acknowledging its validity, were admissible, amongst other circumstances, as presumptive evidence that, since he knew of and had complied with the other statutory formalities, he probably also knew of and had complied with that (*Clarke* v. *C.*, 5 L.R.Ir. 47, C.A. In *Harris* v. *Knight*, 15 P.D. 170, C.A., where the will was lost and there was no attestation clause, similar declarations were received on the same point; and *cp. Re Malins*, 19 L.R.Ir. 231).

Identity. A testatrix executed two inconsistent wills on different sides of the same paper;—evidence by one of the attesting witnesses that, after executing one side, the testatrix said, "this is my will" and then asked witness if there was anywhere else she ought to sign, and that the witness, seeing writing on the other side, said she had better execute that too;—held admissible to identify the first will, and show that the second was not signed *animo testandi* (*Re Nosworthy*, 4 S. & T. 44; *cp. Re Hunt*, L.R. 3 P. & D. 250).

Constituent Papers. The question being whether certain papers formed part of a will;—declarations made by the testatrix *before* executing the alleged will that she intended to leave her property in a manner which corresponded with the dispositions contained in such papers; and declarations *after* the execution that she believed she had effected this intention in her will, held admissible in identification [*Gould* v. *Lakes*, 6 P.D. 1; *Re Hutchinson*, 18 T.L.R. 706. Although the former case nominally followed *Sugden* v. *St. Leonards*, *ante*, 325, Hannen, J., states what, it is submitted, is the truer ground of admission, viz., that the *post*-testamentary declarations were received "to show what was the state of the testatrix's mind and intentions," and "that her mind continued, after the will, in the same state as it was before"; *cp. Lewis* v. *L.*, 1908, P. 1].

Validity. A., a testator, having left B. a legacy by his will, executed a codicil, revoking the legacy. Declarations by A. to his solicitor that it was not to revoke

Inadmissible.

Execution. The question being whether a testator had executed a (lost) will;—a copy thereof sent by him from abroad enclosed in a letter in which he stated that he "had duly made the original":—held inadmissible as hearsay to prove that fact (*Re Ripley*, 1 S. & T. 68; *Atkinson* v. *Morris*, cited *post*, 333; *Eyre* v. *E.*, 19 T.L.R. 380).

Admissible.	*Inadmissible.*
the legacy, but only to be used by the solicitor to induce B. to give up a certain house, held admissible to negative the *animus testandi* (*Lister* v. *Smith*, 3 S. & T. 282).	
A. executes a deed-poll which disposes of all her property and is attested by two witnesses. A declaration by A. "that she hadn't mentioned it in the paper, but would like B. to have £10 *after her death*," —held admissible, to show that the deed was intended to be signed as a will (*Re Slinn*, 15 P.D. 156; *cp. Re Colyer*, 14 *id.* 48).	
Cumulative or Substitutional Provisions. A testator executed a codicil in 1890 and another, almost identical, but containing no revocation clause, in 1892. Amongst his papers was found a copy of the former, altered so as to form the draft of the latter, and indorsed, "8 Aug. 1892. I have signed and declared the within altered codicil. The unaltered one of 1890 in my box at the bank is superseded and cancelled." Held, it being doubtful on the face of the instruments whether they were cumulative or substitutional, the declarations were admissible to show the testator's intentions [*Wainewright* v. *W.*, 71 L.T. 265, *per* Jeune, J., following *Hubbard* v. *Alexander*, 3 Ch.D. 738, where probate having been granted of two codicils, identical except in dates and witnesses, Bacon, V.-C., admitted declarations by the testator to an attesting witness that "they were duplicates," not as construing the codicils, but to show that they were not intended to be distinct instruments; *cp. Atkinson* v. *Morris*, *post*, 314].	*Cumulative or Substitutional Provisions.* A testator executed a codicil in 1867 and another containing no revocation clause in 1868, probate being granted of both. Six of the legacies in the two documents were identical, three were to the same persons but of different amounts, and each codicil had one legacy not in the other. Evidence that the testator after executing the first codicil wrote to his solicitor for a copy of it, which the solicitor sent with a letter advising him to re-copy the codicil as the signature was in an inconvenient place:—Held inadmissible, the question being purely one of construction, and there being nothing to displace the rule that legacies given by distinct instruments are cumulative and not substitutional [*Wilson* v. *O'Leary*, 7 Ch. App. 448; *Re Pinney*, 46 S.Jo. 552. In *Chichester* v. *Quatrefages*, 1895, P. 186, Jeune, P., said, "it was argued before me that if both documents were admitted to probate, a court of construction would hold some at least of these identical gifts to be cumulative. The question, however, of construction of identical gifts in documents admittedly intended to be read together, is not the same as that of the inference to be drawn from such identity as to the existence of such intention"].
Mental Capacity. In ejectment by heir against devisee, the question being whether the testator, at the time of executing his will, was mentally incompetent from prolonged intemperance;—declarations made by him at various times up to his death (1) as to the dispositions he had made of his property, which corresponded with those in his will; and (2) as to the nature and amount of the property he took under his father's will, which corresponded with the latter;—held, admissible as throwing back light on his capacity at the date of execution (*Sutton* v. *Sadler*, 3 C.B. N.S. 87, 99; *cp. Bootle* v. *Blundell*, 19 Ves. 494, 506).	
Fraud or Forgery. A testator, a few days after executing a will in favour of A., asks to have a duplicate of it, whereupon another will in favour of B. is substituted, which he is fraudulently persuaded to sign. A. may prove that, when the testator was about to sign the second will, he asked the person who brought it, "whether it was the same will as the former," and was told that it was (*Doe* v. *Allen*, 8 T.R. 147). Declarations by	*Fraud or Forgery.* A., under a devise from B., claims land held by C. as B.'s heir-at-law. C.'s defence is that B.'s will was not duly executed. C. may not prove declarations by B. that "A. drew up a paper and got me to sign it—but it isn't valid. My land goes to C.," although both A. and C. claim under B. (*Provis* v. *Reed*, 5 Bing. 435).

Admissible. *Inadmissible.*

the testator before the execution of the will that he intended to leave his property to A. or to B. would also be admiasible in aupport or rebuttal of the will (*Doe* v. *Hardy*, 1 Moo. & Rob. 525).

In an action in Chancery to set aside a compromise of a probate action on the ground that the will, which the compromise assumed to be valid, was in reality forged;—letters from the testator *before* the date of the alleged will as to the provisions he was about to make by his will; and letters *after* it as to those which he had made, both of which were at variance with the alleged will;—held admissible, as showing his intentions and disproving the will (*Priestman* v. *Thomas*, 1883, Times, Nov. 19).

(*b*) *Contents. Alterations. Mistakes.*

Contents. To prove the contents of a (lost) will;—verbal instructions for the will given by the deceased testator; a draft authenticated by him; and declarations as to the provisions he was about to make in it;—held admissible, in corroboration of the testimony of a witness who swore she had seen and read the will:—*per* Jessel, M.R., and Mellish, L.J., as affording a probability that the testator had, in fact, made the dispositions which his declarations showed it was his intention to make; *per* Cockburn, C.J., as exceptions to the hearsay rule.—Declarations *after* the execution of the will as to the provisions he had made therein, and that his daughter (the chief beneficiary under the will) would be wealthy and a landed proprietress and enjoy the same comforts and style as she was then doing;—also held admissible by a majority of the court (*diss.* Mellish, L.J.), as exceptions to the hearsay rule [*Sugden* v. *St. Leonards*, 1 P.D. 154, C.A., followed, *inter alia*, in *Re Ball*, 25 L.R.Ir. 556, *Flood* v. *Russell*, 29 *id.* 95 and *Re Turner*, Times, Feb. 8, 1912; but see *ante*, 325].

Alterations. A testator left a will, on the face of which a devise of land "To A. in fee." was crossed out and the words, "To A. for life, and afterwards to B. in fee," were substituted. In order to rebut the presumption that the alteration was made after the execution of the will;—held, that declarations of the testator, *before* the execution, that he intended to make a provision for B.," were admissible as raising a logical inference that the alteration was made before execution (*Doe* v. *Palmer*, 16 Q.B. 747; *Dench* v. *D.*, 2 P.D. 60; *Re Duffy*, I.R. 5 Eq. 506; *Moore* v. *M.*, 6 *id.* 166; *Re Thorn*, 39 Ir.L.T.Jo. 205).

A., having made a will, afterwards executed additional dispositions on a printed will-form, which contained a revocation

Alterations. A. leaves a legacy of £200 to B., which is erased, but legible in the will. To show that the erasure was made *after* execution, a post-testamentary declaration by A. that "she had given a legacy to B. but that since he and his wife had quarrelled with, and used her unkindly, she had scratched it out,"—held inadmissible (*Re Hardy*, L.J.P. & M. 142; *Doe* v. *Palmer*, *opposite*, *semble per* Lord Campbell, C.J.,)

Admissible.

clause. This document he put into an envelope, which he endorsed: "To my executors; to be opened at the same time as my will." When opened the revocation clause was found to have been struck out in pencil. Held, the endorsement was admissible to show that the document was intended merely as a codicil, and that the striking out was made before its execution (*Re Tonge*, 66 L.T. 60).

Mistakes. A. by his will after giving certain legacies, left "the rest to my mother." Evidence was received that he had neither mother nor grandmother, but in dictating the will to a young nephew had said "the rest to your mother" which the boy by mistake wrote down as "*my* mother" without A.'s knowledge. Held, that the word "my" might be struck out and the Court of Probate acting as one of construction, might on the evidence issue the grant to the nephew's mother [*Re Wrenn*, 1908. 2 L.R. 370; *cp. Thorn* v. *Dickens*, 1906, W.N. 54; see *post*, 584-6, 624-6].

A testator appointed "Fred A." his executor. Evidence that he only knew one A., whose initials were "W. C.," but whom he always called "Fred" *and had asked to be his executor;*—held admissible, probate being granted to "W.C.A. described in the will as Fred A." (*Re Baskett*, 78 L.T. 843). So, where the testator had appointed "Wm. M.";—evidence that he only knew a "Thos. M.," who was a deacon of his chapel; that he told the attesting witness who drew the will, that "*he wished Mr. M., a deacon of his chapel, to be his executor*"; but that the witness by mistake put the wrong Christian name, —was admitted (*Re Brake*, 6 P.D. 217; *post*, chap. xlvi., Rule iii. Examples) [*Sed qu.* as to the direct declarations of intent in both these cases, the question being one apparently of mere misdescription. *Cp. Re Douce* and *Re Clarke*, cited *post*, chap. xlvi., p. 650].

A. by will, left "all his *forty* B. shares" to his nephews. In a Probate action evidence that (1) in the instructions for his will he had written "all his B. shares," but by mistake the word "forty" had been inserted in the engrossment, which had not been read over by him before execution; and (2) that *after* the execution and down to his death he had spoken of having left the whole of his B. shares to them;—held admissible, and the word "*forty*" ordered to be struck out (*Morrell* v. *M.*, 7 P.D. 68; *Re Thompson*, L.R. 1 P. & D. 8; *Re Schott*, 1901, P. 190).

Inadmissible.

Mistakes. A. devised "all his real estate in the County of Limerick and City of Limerick" to trustees. He had no real estate in the County of Limerick, but had some in the County of *Clare* and City of Limerick. Evidence was tendered that A. had written and intended Clare, but that by mistake of the draughtsman, 'County of Limerick' had been substituted for 'County of Clare.' Held, inadmissible (1) as an attempt to add a new devise, omitted by mistake from the will, in contravention of the statute; and (2) that the case could not be treated as one of misdescription, since there was neither an imperfect, nor any, description of the Clare estates in the will [*Miller* v. *Travers*, 8 Bing. 244; see fully as to mistakes and misdescriptions, *post*, 584-5, 642, 655].

A., by will, makes a gift to commence "after his four daughters have attained twenty-one, or died," and later in the will directs the first payment thereunder to be made "six months after his death." In a Chancery action,—held, evidence that the latter words were inserted in the will by mistake, contrary to the express instructions of the testator, and not known or approved by him, was not admissible, though it might have been in a probate action; but that on the construction of the two clauses the direction, being inconsistent with the gift, must be disregarded (*Re Bywater*, 18 Ch.D. 17, 22 C.A.).

A testator appointed "Matthew Carrol of R." his executor. Evidence that there was no such person, but that there was a Thomas Carrol of R. who was the testator's intimate friend, was received; but not his instructions for the will in which Thomas was named, nor a statement to the latter that he had appointed him his executor (*Re Murphy*, 7 L.R.Ir. 561, following *Charter* v. *C.*, *infra.*).

A testator appointed his "son Forster Charter" his executor. A dead son had been so called; but his only two living sons were William Forster Charter and Charles Charter; the will, however, had been drawn by the vicar, who was imperfectly acquainted with their names. Held, that though the testator's treatment and habits of speech as to both sons might be proved, yet as there was only a misdescription, and not an equivocation, his declarations showing that he intended

Admissible.

Inadmissible.

Charles and not William, were inadmissible [*Charter* v. *C.*, L.R. 7 H.L. 364; see fully *post*, chap. xlvi., Rule iii.; *Re Chappell*, 1894, T. 98; *aliter* if there had been an equivocation].

(*c*) *Revocation.*

A testator having executed a will, a friend on reading it over, told him "it was not legal because certain particulars had not been set out." Thereupon the testator tore up the will, saying, "Well, then it's of no use." Held, these statements were admissible as showing that he had no *animus revocandi* (*Giles* v. *Warren*, L.R. 2 P. & D. 401). So, where a testatrix, whose will was found after her death, torn and with the signature erased, told a witness, nine months after she had received the will back from her solicitor, that she had destroyed it, but would make another if she recovered, and if not she would die intestate, these declarations were received as showing an *animus revocandi* (*North* v. *N.*, 25 T.L.R. 322).

A., having executed three wills, the last of which revoked all former wills, told his wife he had been unjust to her in the third, and desired to destroy it, wishing his property to go by the first. Afterwards he tore up the third will in the presence of a witness, to whom he repeated this statement. Held, these facts were admissible to show it was not an absolute, but a "dependent relative revocation," conditional on the revival of the first, and so inoperative to revoke the third will (*Cossey* v. *C.*, 82 L.T. 203; *Powell* v. *P.*, L.R. 1 P. & D. 209). So, as to declarations, made after the destruction, to the testatrix's daughter who had been absent at the time, but on returning saw the pieces lying in the grate, that "she had destroyed it intending her former will to take effect. (*Re Weston*, L.R. 1 P. & D. 633).

A., having made his will in favour of his daughter B., and the will not being forthcoming at his death;—declarations made by A. *after* its execution and shortly before his death that he had left all his property to B. as he feared her brother would turn round on her after A. was gone, and that she would find his will in a particular drawer;—held admissible, in rebuttal of the presumption of revocation, to show that A. remained in the same mind from the date of the will till his death (*Finch* v. *F.*, L.R. 1 P. & D., 371). So, subsequent declarations by a testator that he had burnt (*Keen* v. *K.*, L.R. 3 P. & D. 105), or cancelled (*Drake* v. *Sykes*, 23 T.L.R. 747 C.A.), his will have been received, not as evidence of the destruction, but as showing an intention to destroy.

A testatrix having executed two wills, the later of which contained no revocatory

A. executed a will in favour of B. which, after A.'s death, was found with A.'s signature and that of one of the witnesses erased and the words in A.'s handwriting. "Null and void through injustice on the part of B." Declarations by A. that "she had executed her will in duplicate and had destroyed one part with the intention of revoking it;—held inadmissible, as hearsay, to prove either the execution of the duplicate, or its destruction (*Atkinson* v. *Morris*, 1897, P. 40, C.A.; *Staines* v. *Stewart*, 2 S. & T. 320).

A. executed a will in 1858 which he destroyed *animo revocandi*. Afterwards through a different solicitor he executed another will in Jan. 1859. In Feb. 1859 he executed, through his first solicitor, who was ignorant of the second will, a codicil "to my last will of 1858," and after certain alterations confirmed that will. Held, that the first will could not be revived; that on the construction of the codicil the second will was revoked; and that declarations by the testator were inadmissible to show that the second will was only intended to be revoked if the first one was revived (*Newton* v. *N.*, 12 Ir. Ch. Rep. 118; but see *O'Leary* v. *Douglass*, 3 L.R.Ir. 323. *per* Christian, L.J.).

A testatrix having executed two wills, the later of which contained no revocatory

Admissible.

clause, but her property being insufficient to pay the legacies in both;—held, that the intention being doubtful, a document executed by her on the same day as, but earlier than, the second will in which she stated, "I wish the will I made destroyed," was admissible to show that the second will was intended to revoke the first (*Jenner* v. *Ffinch*, 5 P.D. 106).

A testator having in 1890 executed a codicil to his will, and also in 1892 a second codicil in many respects identical therewith;—held, it being doubtful whether the second was in addition to, or in substitution of, the first, evidence of surrounding circumatances, and also of an indorsement by the testator on the second that it "superseded and cancelled the other," was admissible (*Wainewright* v. *W.*, 71 L.T. 265).

Inadmissible.

clause, but, subject to certain legacies, left "the whole of her *other* property" to certain persons;—held, (1) there being no ambiguity on the face of the second will (the word "other" not being sufficient to raise one) and it dealing with the whole of the property, it revoked the first; and (2) that declarations that she intended it to operate as a codicil to the first will were inadmissible (*Re Palmer*, 58 L.J.P. 44).

So, a statement in the handwriting of the testatrix, inserted in the attestation clause of a third codicil, that "the first codicil is cancelled";—held inadmissible, the attestation clause forming no part of the codicil (*Re Atkinson*, 8 P.D. 165).

CHAPTER XXIX.

STATEMENTS IN PUBLIC DOCUMENTS.

THE third class of exceptions to the hearsay rule consists of statements contained in public or official documents, which, subject to the qualifications hereinafter specified, are in general *prima facie*, though not conclusive, evidence of the truth of the facts recorded, even against strangers.

Principle. The general grounds of reception are (1) that the statements and entries have been made by the *authorised agents of the public in the course of official duty;* and (2) that the facts recorded are of *public interest or notoriety.* To which it may be added that it would not only be difficult, but often impossible, to prove facts of a public nature by means of actual witnesses examined upon oath (Greenleaf, s. 483; Tay. s. 1591; Best, s. 219).—As to the *proof* of Public Documents, see *post,* 549-56.

The following are the principal documents of this description:

(1) Statutes, State Papers, and Gazettes.
(2) Public Registers.
(3) Public Inquisitions, Surveys, Assessments, and Reports.
(4) Official Certificates.
(5) Corporation, Company, and Banker's Books.
(6) Published Histories, Maps, Dictionaries, Tables, &c.

STATUTES AND STATE PAPERS. Statements and recitals of public matters contained in *public statutes; Royal proclamations* (*R.* v. *Sutton,* 4 M. & S. 532; *R.* v. *de Berenger,* 3 M. & S. 67; *c.p. R.* v. *Oppenheimer,* 1915, 2 K.B. 755); *Speeches from the Throne; Addresses to the Crown* from either House of Parliament (*R.* v. *Francklin,* 17 How. St. Tr. 636-638; Tay. s. 1661); *State Papers* (*Thelluson* v. *Cosling,* 4 Esp. 266; including, perhaps, *diplomatic correspondence,* (see *R.* v. *Francklin,* 17 How. St. Tr. at 638; *Radcliffe* v. *Union Ins. Co.,* 7 Johns. 38; *Talbot* v. *Seeman,* 1 Cranch. 1, 37, 38); or *Parliamentary Journals* as to all matters properly before either House, whether legislative, ministerial, or, in the H.L., judicial (*A.-G.* v. *Bradlaugh,* 14 Q.B.D. 667; *Jones* v. *Randall,* 1 Cowp. 17; *Root* v. *King,* 17 Cowan, 613; Hubb. Ev. of Succ. 613-15), are in general *primâ facie,* but not conclusive, evidence of the facts recited (*R.* v. *Greene,* 6 A. & E. 548; *R.* v. *Francklin, sup., A.-G.* v. *Bradlaugh, sup.*). A certificate under the hand of the returning officer indorsed on the writ of election, produced from the custody of the clerk of the Crown in Chancery, is the best evidence of the return of a member of Parliament; and the Test Roll, signed by such member, is also, on proof of such

member's handwriting, evidence thereof (*Forbes* v. *Samuel,* 1913, 3 K.B. 706, 719-20, 725). The Return-book, from the same custody as above, has, however, been rejected on the somewhat obsolete ground of not being the best evidence (*id.* at p. 720, and see 82 L.J.K.B. p. 1141; *ante,* 48) *sed. qu.* This book was made evidence by 7 & 8 W. 3, c. 7, s. 5, an Act limited by s. 7 to 7 years, but extended by 12 & 13 W. 3, c. 5, and made perpetual by 12 Anne, c. 16. The last two Acts and s. 7 of the first were repealed by the S.L.R. Act, 1867, so that the original Act still remains in force. Moreover, as this book has always been, and still is, received by the House itself as evidence both of the return of a member and his seniority (May's Parl. Pr., 12th ed., 158-9, 167-8), it would, perhaps, be admissible even at common law in proof of these facts. The register of divisions, made up from the daily tallies and printed by the authority of the House, is evidence of the votes given by members (*Forbes* v. *Samuel, sup.,* at pp. 720-1). Neither *Hansard's Debates,* nor the *Authorized Parliamentary Debates* printed by the Government printer are, however, admissible to prove the questions, answers, and speeches of members, these publications not having the authority of Parliamentary Journals (*McCarthy* v. *Kennedy,* Times, Mar. 4, 1905, *per* Darling, J.).

Private Acts are not evidence against strangers, either of the *facts* recited (*Brett* v. *Beales,* Moo & M. 421-6; *Beaufort* v. *Smith,* 4 Ex. 450; *Cowell* v. *Chambers,* 21 Beav. 619; *Mills* v. *Colchester Corp.,* 36 L.J.C.P. 210; *Polini* v. *Gray,* 12 Ch.D. 411; *Locke-King* v. *Woking Council,* 62 J.P. 167), or as *notice* of such facts (*Ballard* v. *Way,* 1 M. & W. 529; though dealing with a statutory company may imply notice of its regulations, *Cahill* v. *L. & N. W. Ry.,* 30 L.J. C.P. 289). And this is so, although they contain clauses requiring them to be judicially noticed as public statutes, for the effect of such clauses is not to vary the nature or operation of the Acts, but merely to dispense with the necessity of setting them out on the record, as was formerly required in the case of deeds (*Brett* v. *Beales, sup.*). Recitals in such Acts are, however, receivable, *inter alios,* in peerage claims, if passed when it was the practice for the evidence upon which they were founded to be approved by the judges (*Wharton Peerage,* 1845, 12 C. & F. p. 302; *Polini* v. *Gray, sup.*); though not if passed afterwards (*Shrewsbury Peerage,* 1857, 7 H.C.L. 13). This practice only applied to private estate Bills, and was current from 1705 to 1843 (2 Clifford, Private Bills Legislation, 768-9).—As to the admissibility of private Acts as evidence of reputation, see *ante,* 297, 302.

[Tay. ss. 1660-1661; Ros. N.P., 18th ed., 189; Steph. art. 33.]

EXAMPLES.

Admissible.

To prove that certain organised outrages had occurred in various parts of England; —recitals that the outrages had occurred, contained in a public statute, and also in a Royal Proclamation, which offered a reward for the discovery of the perpetrators—are admissible (*R.* v. *Sutton,* 4 M. & S. 532; and see *R.* v. *de Berenger,* 3 M. & S. 67, 69). So, to prove the existence and nature of certain political controversies between the Kings of England and Spain;—entries in the journals of the

Inadmissible.

To prove the existence of a certain Popish plot;—the Journals of the House of Commons recording a resolution as to the existence of such plot is inadmissible [*R.* v. *Oates,* 1685, 10 How. St. Tr. 1163-1167, the reason alleged being that that House, unlike the Lords, was not a court of record and could not administer an oath. But in *Jones* v. *Randall,* 1774, 1 Cowp. 17, Ld. Mansfield implies that this rule had been reversed in his time, remarking that "formerly a doubt was enter-

Admissible.	*Inadmissible.*
House of Lords (or copies of such entries) are admissible (*R.* v. *Francklin*, 17 How. St. Tr. 636-638). And entries in the journals of the Committee of Privileges have been received to show the limitations in a patent of nobility, though the patent itself might have been produced (*Dufferin Peerage*, 4 C. & F. 562).	tained whether the Minutes of the House of Commons were admissible because it is not a court of record"; and see now, *A.-G.* v. *Bradlaugh*, 14 Q.B.D. 667. Starkie Ev., 4th ed. 282, cites *R.* v. *Oates* as an authority merely that Parliamentary Journals are not evidence of particular acts which are no part of the proceedings of the House; and see *Vaux Peerage*, 5 C. & F., p. 541, where a copy of an inscription in the Minutes of one case was held inadmissible in another].
To prove the date of the commencement of a war between two foreign States;—a paper from the Secretary of State's office, transmitted thereto by the British Ambassador at the Court of one of such States, and purporting to be a declaration of war by one of the States, is receivable (*Thelluson* v. *Cosling*, 4 Esp. 266).	The question being whether a certain M.P. sat and voted in the House of Commons while interested in a Government contract, Hansard's Reports of the debates and proceedings therein are inadmissible to prove such sitting (*Tranton* v. *Astor*, 52 L.Jo. 185).
	To prove the title of the lords of a manor to toll on all coal exported within the manor;—a Private Act preserving such right is inadmissible (*Beaufort* v. *Smith*, 4 Ex. 450; *ante*, 288). So, as to a statement in the schedule to such an Act that certain lands are part of the waste of the manor (*Locke-King* v. *Woking Council*, 62 J.P. 167).

GOVERNMENT GAZETTES. The Government *Gazettes* of London, Edinburgh, and Dublin are admissible (and sometimes conclusive) evidence of the public, but not of the private, matters contained therein. [Tay. ss. 1527, 1662-1666; 2 Phil. & Arn, Ev., 10th ed., 138-140; Whart. ss. 671-675.]

At **Common Law**, the *Gazette* is evidence of Acts of State—*e.g.* addresses to the Crown; proclamations for reprisals, public peace, or quarantine (*R.* v. *Holt*, 5 T.R. 436; *A.-G.* v. *Theakstone*, 8 Pri. 89); articles of capitulation for the surrender of an island (*R.* v. *Picton*, 30 How. St. Tr. 493); Privy Council proclamations (*R.* v. *McCarthy*, 1903, 2 I.R. 146) and the like; but it is not evidence of acts of public officials, having slight or no reference to the affairs of Government—*e.g.* the grant of land to a subject (*R.* v. *Holt*, *sup.*); an Order in Council for the division of a parish (*Greenwood* v. *Woodham*, 2 Moo. & R. 363); or the appointment of an officer to the army (*R.* v. *Gardner*, 2 Camp. 513; though see now the Army Act (1881), s. 163, sub-s. *d*).

By **Statute**, the *Gazette* is expressly rendered evidence of various public matters. Thus, by the Documentary Evidence Act, 1868, s. 2, amended by the Documentary Evidence Act, 1882, s. 2, the *Gazette* is made *primâ facie* evidence of any proclamation, order, or regulation issued by His Majesty, the Privy Council, or any of the principal departments of State. And where the *London Gazette*, on April 26th published a proclamation of martial law in Dublin, it was held operative there from that date, although not published in the *Dublin Gazette* until May 9th (*R.* v. *Governor of Lewes Prison*, Times, Feb. 13, 1917, and 33 T. L. R. 222). So, by the Bankruptcy Act, 1914, s. 137, a copy of the *London Gazette* containing any notice inserted therein in pursuance of the Act, is evidence of the facts stated in the notice; and the produc-

tion of such copy containing any notice of a receiving, or adjudication, order is (except on appeal) conclusive evidence of the validity and date of such order (*cp. Exp. French,* 52 L.J.Ch. 48; *Exp. Learoyd,* 10 Ch.D. 3; *Exp. Geisel,* 22 Ch.D. 436; *Bader* v. *Power,* 1910, 2 K.B. 229, C.A.). So, Orders in Council under the Extradition Act, 1870, become, on being published in the *London Gazette,* conclusive evidence that the arrangements therein referred to comply with the Act, and that the Act applies to the foreign State mentioned in the Order (s. 5). And where any Statutory Rules are required by any Act to be published or certified in the London, Edinburgh, or Dublin *Gazette,* a notice therein of such Rules having been made, and of the place where copies of them can be purchased, shall be sufficient compliance with the said requirement [Rules Publication Act, 1893 (56 & 57 Vict. c. 66), s. 3 (3)]. Where, however, the *Gazette* is by statute rendered "conclusive evidence" of given facts, this will not necessarily exclude alternative evidence thereof (*post,* 571).

The *Gazette* is also sometimes receivable to prove *knowledge.* Thus, to show that the captain of a ship knew that a certain port was blockaded, a notice of the blockade in the *Gazette* was held evidence thereof, though the jury in fact negatived such knowledge (*Harratt* v. *Wise,* 9 B. & C. 712). It is usually necessary, however, to give some evidence that the party has probably read the paper, in order to fix him with knowledge of its contents (*ante,* 146); though in the case of *Gazette* notices of *dissolution, &c., of partnership,* such additional evidence need only be given as against persons who have had previous dealings with the firm, and not as against strangers (Tay. s. 1666; Partnership Act, 1890, s. 36). As to *Gazette* notices by carriers restricting their liability, see the Carriers Act, 1830; and by Railway and Canal Companies, see 17 & 18 Vict. c. 31, s. 7.

The *Gazette* will be judicially noticed on its mere production (*ante,* 22), provided the entire paper and not a mere cutting is shown (*R.* v. *Lowe,* 15 Cox, 286). But where a *Gazette* was made evidence of certain facts, if it "purported to be printed by the Queen's printer or by the Queen's authority," a *Gazette* purporting to be printed merely by "authority," was rejected [*R.* v. *Wallace,* 10 Cox, 500; this case is doubted, in Tay. s. 15 *n,* and it would have been otherwise, perhaps, had evidence been given that it was the *Gazette* in which such matters were usually published, or had the particular authority mentioned been proved, *R.* v. *Wallace, sup.*]. In *R.* v. *Raudnitz,* 1869, 11 Cox, 360, where a statute declared that "a copy of the *London Gazette* shall be evidence of any matter therein contained," the mere production of a paper purporting to be such *Gazette* was held sufficient though it did not purport to be printed by any authority; and in *R.* v. *McCarthy,* 1903, 2 I.R. 146, where the Act required that the *Gazette* should "purport to be printed and published by the Queen's authority," a *Gazette* headed "Published by authority," and ending "Printed by the authority of H.M.'s Stationery Office, by A.M.," was received. So, one printed "at Dublin for H.M.'s Stationery Office, by A. & Co." is sufficient as being printed "by the Government Printer" (*Cork C.C.* v. *Harte,* 41 Ir. L.T.R. 206).

CHAPTER XXX.

PUBLIC REGISTERS AND RECORDS.

At *Common law,* public registers are admissible (but not generally conclusive, *post,* 571, 577, 588) proof of the facts recorded therein when (1) the book is required by law to be kept for public information or reference; and (2) the entry has been made promptly, and by the proper officer. By *Statute,* also, the registers, minute-books, records and documents kept by many public or semi-public departments or bodies are frequently made evidence either *primâ facie* or conclusive of the matters therein recorded. [As to Corporation, Company Registers and Bankers' Books, see *post,* chap. xxxiii.]

[Tay. ss. 1591-1595, 1774-1780; Ros. N.P. 125-131, 219-221; Steph. art. 34; Hubback, Ev. of Succ. 469-583; Whart. ss. 639-660; Wigmore, Ev. ss. 1639-58. As to proof of the *contents* of registers by certified or examined copies, &c., see *post,* 554]. As to *mechanical* registers, *e.g.,* gas, electric light, and water meters, see *ante,* 163. As to custody of registers, see *post,* 525.

Principle. The principle upon which entries in a register are received is, that it is the *public duty* of the person who keeps the register to make such entries after *satisfying himself of their truth;* it is not that the writer makes them contemporaneously, or of his own knowledge, for no person in a private capacity can make such entries (*Doe* v. *Andrews,* 15 Q.B. 756, *per* Erle, J.; *cp. Sturla* v. *Freccia,* 5 App. Cas. 623, 644, *per* Lord Blackburn; and *Lyell* v. *Kennedy,* 56 L.T. 647, *per* C.A.).

Public Authority and Benefit. There must be a legal duty to keep the register for the benefit or information of the public; registers kept under private authority, or for the benefit or information of private individuals, are inadmissible (*Henry* v. *Leigh,* 3 Camp. 499; *R.* v. *Debenham,* 2 B. & Ald. 185; *Huntley* v. *Donovan,* 15 Q.B. 96; *Merrick* v. *Wakley,* 8 A. & E. 170; *Irish Society* v. *Derry,* 12 C. & F. 641; *Sturla* v. *Freccia, supra*).

Examples of the former are *parish registers,* which are receivable as being kept under the authority formerly of the common law, and now of statute. The registration of baptisms seems not to be traceable earlier than the fifteenth century, though that of deaths and burials is much older (Blunt's Book of Church Law, 7th ed., App. i. 65).

Examples of the latter are *Nonconformist,* and other *non-parochial registers* which, until the last century, were not kept under legal authority, and could only be received in evidence if admissible upon other grounds (*e.g.* as declarations by deceased persons in the course of duty, *ante,* 290-1). By The Non-Parochial Registers Act, 1840 (3 & 4 Vict. c. 92), and The Births and Deaths Registration Act, 1858 (21 & 22 Vict. c. 25), however, many thousands of

such records kept by Quakers, Presbyterians, Methodists, Baptists, Independents, and some Roman Catholic and Unitarian congregations are rendered admissible in evidence upon proof of *deposit with the Registrar-General and entry in his list* and upon previous notice to the opposite party of the intention to use them, and in civil, but not in criminal cases, certified copies (though not copies made and retained by the various religious bodies, *Re Woodward,* 1913, 1 Ch. 392, cited *post,* 344) thereof are also receivable; though, where the provisions of these statutes have not been complied with, as in the case of the Jews, and many Roman Catholic prelates, who have refused to part with their registers, these old records will still be inadmissible as public documents (see Tay., 10th ed., s. 1504 *n;* 115 L.T. Jo. 319). The same difficulty does not arise with regard to the proof of births, marriages, and deaths of Nonconformists since 1836, or of their burials since 1864, the former being registered under the Births, Marriages, and Deaths Registration Act, 1836 (6 & 7 Will. IV. c. 86), amended by the Births and Deaths Registration Act, 1874 (37 & 38 Vict. c. 88), and the Marriage Act, 1898 (61 & 62 Vict. c. 58), and the latter under the Registration of Burials Act, 1864 (27 & 28 Vict. c. 97, s. 5), amended by the Burial Laws Amendment Act, 1880 (43 & 44 Vict. c. 41, s. 10).

Colonial registers are also receivable upon proof that they are required to be kept by the law either of their own (*Evans* v. *Ball,* 38 L.T. 141), or of this (Tay. s. 1593), country (*post,* 343, 345). *Foreign registers* (which term includes Scotch registers) are evidence of matters properly and regularly recorded therein, when proved by experts, and to the satisfaction of the judge, to have been kept under the sanction of public authority, and to be recognised by the tribunals of their own country (*Lyell* v. *Kennedy,* 14 App. Cas. 437; *Abbott* v. *A.,* 29 L.J.P. & M. 57; *cp. R.* v. *Rigby,* 73 J.P. Jo. 301, 311; Tay. s. 1593).

Proper Officer. Promptness. The entries must be made by, or under the direction of, the person whose duty it is to make them at the time (*Doe* v. *Bray,* 8 B. & C. 813).

Thus, where entries in the books of a public office had been made, not by some specific person in the discharge of his official duty, but indiscriminately by any of the clerks in the office, they were rejected (*Henry* v. *Leigh,* 3 Camp. 499). So, where a baptism had been performed by a minister, an entry of it made in the parish register after his death by his successor was held inadmissible (*Doe* v. *Bray, sup.,* though the entry in this case was made from the information of the parish clerk who had been present).

But where the ceremony has been performed by a substitute, the entry may, it seems, be made either by the substitute (*Zouche Peerage,* Hubback, 482), or by the incumbent (*Doe* v. *Andrews,* 15 Q.B. 756). And entries in a parish register by a parish clerk will be presumed to have been made under the sanction of the minister (*Doe* v. *Bray, sup.; Chandos Peerage,* Hubback, 482), although his private memoranda of the event are inadmissible, as it is not his duty to make them (*id.*).

Where the practice was for a registrar to sign the entries, unsigned entries, though in his handwriting, were rejected (*Fox* v. *Bearlock,* 17 Ch. D. 429; and see *Lancum* v. *Lovell, ante,* 286); though *aliter* if the practice was not to sign them (*Lauderdale Peerage,* 10 App. Cas. 692, 706; *Barrett* v. *Henry, post,* 354).

The entries should also be made *promptly,* or at least without such long delay as to impair their credibility. Thus, an entry made more than a year after the event has been rejected (*Doe* v. *Bray, sup.;* and *cp. Farrell* v. *Maguire,* 3 Ir. L.R. 187, *ante,* 291). Special provision is made by the Births and Deaths Registration Act, 1874, s. 38, as to entries made more than three or twelve months respectively after the event (see *post,* 342, 343).

Originality. Errors. Interest. It is not essential that a register should be a strictly *original document,* for such a rule would exclude nearly all the early parish registers, which were in general mere copies (*Walker* v. *Wingfield,* 18 Ves. 443). Accordingly, a parish register which was transcribed every three months from a day-book, wherein the entries had been made immediately after the events, has been received, although the day-book, which differed from it, had been rejected, the reason assigned being that there could not be two parish registers (*May* v. *May,* 2 Stra. 1073; *Lee* v. *Meecock,* 5 Esq. 177; but see *R.* v. *Head,* Pea. Ev. 92 *n, post,* 372). So, the *verified copies* of registers of baptisms and burials made by the clergy of the Church of England, under 52 Geo. III. c. 146, and required to be annually sent by them to the registrar of the diocese, are themselves regarded as original public documents, and provable by copies (*Walker* v. *Beauchamp,* 6 C. & P. 552; *A.-G.* v. *Oldham,* cited Burn on Parish Registers, 209), as are, also, the *Bishop's transcripts* made before that Act and under the authority of the Canon Law (*id.;* Hubback, 496-502), and the *duplicate registers* of marriages kept under 6 & 7 Will. IV. c. 86. And see as to Indian Registers, *post,* 346.

Errors, erasures, alterations, and minor irregularities affect the weight of the entries, and not their admissibility (*Lyell* v. *Kennedy,* 14 App. Cas. 437, 449; Hubback, 485-488; *cp. post,* Corporation Books), nor the validity of the ceremony (*Re Rutter,* 1907, 2 Ch. 592). As to the correction of errors in registers kept under the Births and Deaths Registration Act, 1836, see s. 44; and as to the admissibility of extrinsic evidence to contradict the register, *post,* 577, 588. So, also, the fact that the entry is in the *interest* of the officers or body keeping the register, affects weight only, not admissibility (*Irish Society* v. *Derry,* 12 C. & F. 641; *Sturla* v. *Freccia,* 5 App. Cas. 623, *per* Lord Blackburn).

Of what Facts Registers are Evidence. A register is evidence of the particular transaction which it was the officer's duty to record, even though he had no personal knowledge of its occurrence (*Doe* v. *Andrews,* 15 Q.B. 756). Thus, entries, made by an incumbent, of parish burials reported to, but not performed by, him are admissible (*id.*); so, of entries of births and deaths under the Births and Deaths Registration Act, 1836, s. 38, as amended by the Births and Deaths Registration Act, 1874, s. 38. But entries of matters which it was *not* his duty to record—*e.g.* entries in a parish register of baptisms or marriages performed in a neighbouring parish (*Lyell* v. *Kennedy, sup.;* and see *Farrell* v. *Maguire,* 3 Ir. L.R. 187, *ante,* 291), or by a predecessor in office (*Doe* v. *Bray,* 8 B. & C. 813), are inadmissible. It is doubtful how far a register can be received to prove *incidental particulars* concerning the main transaction, even where these are required by law to be included in the entry. If such particulars are necessarily within the knowledge of the registering officer they will doubtless be admissible (*Doe* v. *Barnes,* 1 M. & R. 386), otherwise they seem not to be evidence unless expressly made so by statute

(*Huntley* v. *Donovan,* 15 Q.B. 96; *R.* v *Clapham,* 4 C. & P. 39). In a case of pedigree, however, a description in a marriage register pointing to the parents of the bridegroom being legitimately married, was held *primâ facie* evidence of the latter fact (*Wigley* v. *Treasury Sol.* 1902, P. 233).

Registers of Birth (or certified copies thereof) are, on their mere production, evidence both of the *fact* and *date* of birth (*Re Goodrich, Payne* v. *Bennett,* 1904, P. 138; *Wilton* v. *Phillips,* 19 T.L.R. 390; *R.* v. *Weaver,* L.R. 2 C.C. 85; *R.* v. *Taylor,* 96 L.T Jo. 443; *R.* v. *Bellis,* 6 Cr. App. R. 283; *R.* v. *Rogers,* 111 L.T. 1115; and being statutory proof of these facts, an entry thereof by a mother has been received as a confession in a divorce case without corroboration, *Brierley* v. *B.,* 87 L.J.P. 153; 34 T.L.R. 458; *contra, Re Wintle,* 9 Eq. 373, that it is proof only of the fact of birth before the entry is not now law). The register is also evidence of the *place* of birth where this fact has been added under the direction of the Registrar-General (Births and Deaths Registration Act, 1837, s. 8). Entries in registers under the Births, Marriages and Deaths Registration Act, 1836, and the Births and Deaths Registration Act, 1874, are *primâ facie,* but not conclusive, evidence of these facts (*Brierley* v. *B., sup.*), but must purport to be signed by the person bound to inform the registrar thereof, or to be made in pursuance of the provisions of the latter Act as to the registration of births at sea; and further requirements exist when the entries are made more than three or twelve months respectively after the event (see s. 38 of the latter Act). In vaccination cases, also, the justices may require proof of birth by the parents to be supplemented by the certificates for purposes of identification (*R.* v. *Buckingham,* 106 L.T. Jo. 368; see further *infra,* 343).

Independently of the register, proof of the fact and date of birth may of course also be given by some one who was present at the birth (*R.* v. *Nicholls,* 10 Cox, 476); but the affidavit of a deceased parent, if the case is not one of pedigree (*Haines* v. *Guthrie, ante,* 313), or the oral testimony of a father who was absent for a few days at the time, and was only told on his return by the grandmother (*R.* v. *Wedge,* 5 C. & F. 298); or the testimony of the person himself (*post,* 467; though as to his admissions, see *ante,* 236) will not be received.

Registers of Baptism are evidence of the *date* and *place* of baptism (Hubback, 493), but not of the date or place of *birth* (*R.* v. *Clapham,* 4 C. & P. 29; *Wihen* v. *Law,* 3 Stark. 63; *Burghardt* v. *Angerstein,* 6 C. & P. 690), though if it were proved *aliunde* that the child was very young at the former date, the register might afford presumptive proof of its birth in the parish in which it was baptized (*R.* v. *North Petherton,* 5 B. & C. 508; *R* v. *Lubbenham,* 5 B. &. Ad. 968; *R.* v. *St. Katharine, id.* 970 *n; R.* v *Crediton,* 27 L.J.M.C. 265). In *Re Turner, Glenister* v. *Harding,* 29 Ch. D. p. 991, Chitty, J., held that on questions of pedigree this strictness might be relaxed, and the register, though not *per se* evidence of birth, might, in conjunction with other facts, be taken as evidence thereof. It has since been decided, however, that a certificate of baptism is no evidence of age in a pedigree case (*Robinson* v. *Buccleuch,* 3 T.L.R. 472, C.A.; 31 Sol. Jo. 329; *cp.* Steph. arts. 31 *n* and 34 *n*).

Registers of Marriage are evidence of the *fact* and *date* of marriage (*Doe* v. *Barnes,* 1 M. & Rob. 386; *R.* v. *Hawes,* 1 Den. C.C. 270), from which also its

validity may be presumed (Tay. s. 172). And where its celebration *de facto* is shown, a cogent legal presumption will, except in cases of bigamy and divorce, arise in favour of its *validity* (*post,* 679). In the case of *Colonial or Foreign marriages,* however (as to Indian, see *post,* 346), the production of the local statutes or expert testimony is usually, but not always required (*Dent* v. *D.,* 1897, Times, Dec. 16; *King* v. *K.,* 1897, *id.* Nov. 23; *Marshall* v. *M.,* 1907, *id.* May 8; *Brinkley* v. *A.-G.,* 15 P.D. 76; *R.* v. *Naguib,* 1917, 1 K.B. 359; see *post,* 345-7), and this is sometimes exacted even in the case of an Irish marriage (*Darcy Evans* v. *D. E.,* 1902, Times, Oct. 25; *contra, Whitton* v. *W.,* 1900, P. 178; *Guillet* v. *G.,* 27 T.L.R. 416; *Bury* v *B.,* 35 *id.* 220; *post,* 345-6).

Registers of Death are evidence of the *fact* and *date* of death, and of its *place,* where this is added under the direction of the Registrar-General (7 Will. IV. & 1 Vict. c. 22, s. 8; *cp. Re Goodrich, &c., ante,* 342), but not of the cause of death (*Bird* v. *Keep,* L. Jo., July 13th, 1918, C.A.); and the entry, or a certified copy thereof, has been held sufficient evidence of the death without a certificate of burial (*Re Valter's Trust,* 1887, W.N. 128), though it should, in general, be supported by some evidence of the latter fact (*Riseley* v. *Shepherd,* 21 W.R. 702; Williams, V. & P. 125, where, however, *Re Valter's Trust* is not cited). Entries in registers of death under the Acts of 1836 and 1874 must purport to be signed by the person bound to inform the registrar thereof, or to be made upon a coroner's certificate, or in pursuance of the provisions of the latter Act as to the registration of deaths at sea; and further requirements exist where the entry is made more than twelve months after the event (s. 38 of the latter Act). A *register of burial* kept under the Registration of Burials Act, 1864, is "evidence of the burials therein recorded" (s. 5). The entry is required to be made by the registering officer upon the certificate of the person in charge of the burial (Burial Laws Amendment Act, 1880, s. 10). A register of burial is generally evidence of the facts of death and burial (Hubback, 184, 193), but not of the date of death (*id.*), nor of the age of the deceased, though stated therein (*Robinson* v. *Buccleuch, supra*).

Identity. The identity of the parties named in the register must always be proved independently, sufficiently to satisfy the jury. Thus, in the case of *Births,* the testimony of the parents is usually sufficient. But evidence of treatment is also admissible; thus, on a charge of carnal knowledge of a girl under 16 it was shown that justices had made an order charging her upon a union, the clerk of which had satisfied himself as to her identity, that she was an inmate of the poor-law school, where children were not kept after 16, and that she had always been treated as the person named in the certificate (*R.* v. *Bellis,* 6 Cr. App. R. 283; *cp. R.* v. *Rogers,* 111 L. T. 1115). In *Re Bulley,* 1886, W.N. 80, Pearson, J., indeed, allowed a petitioner to identify his own baptismal certificate on coming of age; *sed. qu.,* and see *R.* v. *Rishworth,* cited *ante,* 219, and *post,* 467. In the case of a marriage, identity may be proved by calling the minister, clerk, attesting witness, or others present; or by proof of their handwriting, even without the production of the original register (*Sayer* v. *Glossop,* 2 Ex. 409); or by the help of photographs (*R.* v. *Tolson,* 4 F. & F. 103; Ros. N.P., 18th ed., 125). And in a pedigree case, the mere similarity of names has been held sufficient evidence of identity, for as the jury were satisfied, the Court would not interfere (*Hubbard* v. *Lees,* L.R. 1 Ex. 255;

cp. La Cloche v. *La C.*, L.R. 4 C.P., 325, 333; *contra, Miller* v. *Wheatley,* 28 L.R. Ir. 144). In a bigamy case, evidence that the prisoner had co-habitated with a woman of the same name as that mentioned in the certificate and also spoken of her as his wife, was held sufficient to identify the parties (*R.* v. *Birtles,* 27 T.L.R. 402; *cp.,* however, *R.* v. *Simpson,* 15 Cox, 323). [As to the identity of the author of a document, see *post,* 523; and generally as to identity, *ante,* 136].

The following are some of the principal documents which are admissible or not as official registers:—

Registers of Birth, Baptism, Marriage, Death and Burial. Parish Books.

Admissible.	*Inadmissible.*
Old English parish registers (kept under the canon law) of baptisms and burials before 1812, and of marriages before 1837 (*Doe* v. *Barnes,* 1 M. & Rob. 386).	The Fleet, King's Bench, May Fair, and Mint registers of baptisms and marriages (*Reed* v. *Passer,* 1 Esp. 213; *Doe* v. *Gatacre,* 8 C. & P. 578). These registers though deposited under, are expressly excepted from, 3 & 4 Vict. c. 92 (cited *ante,* 339-40), by s. 20.
Parish registers of baptisms and burials kept under 52 Geo. III. c. 146 (1812), which is still in force.	
Old English non-parochial registers of births, baptisms, marriages, deaths and burials kept by various religious denominations, and deposited under 3 & 4 Vict. c. 92, and 21 & 22 Vict. c. 25 (*ante,* 339-40).	Old English non-parochial registers of births, &c., *not* deposited under the above Act (*Whittuck* v. *Waters,* 4 C. & P. 375; *Re Woodward,* 1913, 1 Ch. 392); *e.g.* an entry of the birth of a dissenter's child in a register kept for the purpose at a public library (*Exp. Taylor,* 1 J. & W. 483); or entries of births, baptisms, marriages, and deaths of Quakers either (1) in registers kept by them *after* July 1st 1837 (these, not being deposited, under the Act, while those prior to that date have been); or (2) in Digests of deposited registers, made by the society in order to facilitate reference thereto, but such Digests not being themselves deposited under the Act, but retained in the possession of the society [*Re Woodward, sup.*].
Civil registers of births and deaths kept under 6 & 7 Will. IV. c. 86, s. 38, extended by 7 Will. IV. & 1 Vict. c. 22, s. 8, and by the Births and Deaths Registration Act, 1874, s. 38.	
Registers of marriages kept under 6 & 7 Will. IV. c. 86, s. 31; the solemnising clergyman of the Ch. of Eng. registering Ch. of Eng. marriages; the secretary of the synagogue, Jewish marriages (who should sign the certificate both as secretary and registrar, *Prager* v. *P.,* 108 L.T. 734); in cases of bigamy, execution of the Jewish marriage *contract* must be proved, the testimony of a witness present at the ceremony not being sufficient (*R.* v. *Althausen,* 17 Cox, 630); and the registering officer of the Quakers. Quaker marriages (see also 6 & 7 Will. IV. c. 85, s. 2; 23 & 24 Vict. c. 18, s. 1; and 35 & 36 Vict. c. 10). Nonconformist marriages may now be solemnised without the presence of the registrar, as provided by 6 & 7 Will. IV. c. 85, s. 20, but in the presence of the person authorised by the trustees, &c., of the particular building (Marriage Act. 1898, ss. 4, 6; registers being kept under s. 7 thereof).	
Registers of burials in *any* burial-ground in England, kept under 27 & 28 Vict. c. 97, s. 5, amended by 43 & 44 Vict. c. 41, s. 10; or of cremation, kept under 2 Ed. VII. c. 8, s. 7.	
Irish registers of marriages kept under 7 & 8 Vict. c. 81, s. 71, amended by and incorporated with 26 & 27 Vict. c. 27, s. 16, 33 & 34 Vict. c. 110, s. 42, and 36 & 37 Vict. c. 16, s. 4 [*e.g.* of a Protestant marriage before the Disestablishment, *Wallace* v. *W.,* 74 L.T. 253; or after it,	Irish registers of marriages, &c., kept before the Acts referred to *opposite* (*Miller* v. *Wheatley,* 28 L.R.Ir. 144; *Stockbridge* v. *Quicke,* 3 C. & K. 305). As to the admissibility of such registers as Declarations by Deceased Persons in the Course of Duty, see *ante,* 291.

Admissible.	*Inadmissible.*
Whitton v. *W.*, 1900, P. 178 (Episcopalian); *Lemon* v. *L.*, 36 T.L.R. 52 (Presbyterian); *Guillet* v. *G.*, 27 T.L.R. 416, in a register office].	
Irish registers of marriages not coming within 7 and 8 Vict. c. 81 or amending Acts *sup.* (*Bury* v. *B.*, 35 T.L.R. 220, where the marriage was between Roman Catholics, and a certified copy of the entry identified by the petitioner, was held sufficient without expert evidence). Registers of births and deaths kept under 26 & 27 Vict. c. 11, s. 5, Ir. are also receivable.	
Scotch parish registers of baptisms, &c., kept before 1855 (*Lyell* v. *Kennedy*, 14 App. Cas. 437, these being admissible on the same footing as foreign registers); and Scotch registers of births, marriages, and deaths kept under 17 & 18 Vict. c. 80, s. 58, and of irregular marriages kept under 19 & 20 Vict. c. 96, s. 2 (these being *prima facie* evidence of a valid marriage, *i.e.* that the sheriff was satisfied as to the prescribed term of residence having been fulfilled, *Aldridge* v. *Aldridge*, 1899, Times, Dec. 8). In *Daniel* v. *D.*, 33 T.L.R. 149, a certificate of a regular marriage under the former Act, and in *Drew* v. *D.*, 1918, P. 175, a certificate of an irregular marriage under the latter (coupled with the testimony of one of the parties) were received as proof of the marriage without expert evidence of Scotch law. In a criminal case, however, the certificate of a Scotch irregular marriage has been rejected without such evidence (*R.* v. *Rigby*, 73 J.P.Jo. 301, 311).	Gretna Green marriage registers (*Bain* v. *Mason*, 1 C. & P. 202, 203 *n*; *Nokes* v. *Millward*, 2 Add. 386; *Patrickson* v. *P.*, L.R. 1 P. & D. 86). But though neither the registers nor certificates are public documents, nor evidence *per se* of marriage, yet they are good evidence of that fact as declarations, since by Scotch law declarations and mutual consent constitute a valid marriage (*Hewitt* v. *Att.-General*, 1910, Times, Oct. 22).
Colonial registers of births, marriages, and deaths, kept under local law (*Coode* v. *C.*, 1 Curt. 755); *e.g.* parish registers, signed by the rector, of births and marriages in Cape Breton in 1810 (*Evans* v. *Ball*, 38 L.T. 141); or of marriages in Nova Scotia (*Dent* v. *D.*, 1897, Times, Dec. 16, on production of expert testimony as to their validity; *King* v. *K.*, 1897, Times, Nov. 23, on production of the local statutes). A marriage in St. Helena has been proved by the St. H. Marriage Ordinance (3) 1851, without expert evidence (*Roe* v. *R.*, 33 T.L.R. 83); in Rhodesia, a certified copy of the parish register (*Browning* v. *B.*, 35 T.L.R. 159; and in the Bahamas by a similar copy, *plus* the local Act *Bonhote* v. *B.*, 89 L.J.P., 140). But *Roe* v. *R.* was not followed in *Brown* v. *B.*, 116 L.T. 702, where expert evidence was required of a Gold Coast Colony marriage. As to registers of R. C., Protestant, Greek Church and civil marriages in Malta, see *R.* v. *Mylius*, Times, Feb. 2, 1911. As to marriages in Norfolk Island, see *Limerick* v. *L.*, 4 S. & T. 252; and in Cape Colony, *Perry* v. *P.*, 89 L.J.P. 192.	
Registers of Church of England marriages in Jersey, as being in the diocese	Registers of baptisms in Guernsey (*Huet* v. *Le Mesurier*, 1 Cox, Ch. 275. In

Admissible.	*Inadmissible.*
of Winchester, are admissible without expert evidence (*Westlake* v. *W.*, 1910, P. 157; *Playfair* v. *P.*, 1908, Times, March 18; *Eden* v. *E.*, 52 Sol. Jo. 483; *Boughey* v. *B.*, 117 L.T. 156); though *aliter* as to civil and other marriages there (*Westlake* v. *W. sup.*) A Church of England marriage in the Isle of Man was allowed to be proved by production of the Bishop's special license and the testimony of the petitioner (*Rohmann* v. *R.*, 52 Sol.Jo. 64).	*Coode* v. *C.*, *sup.*, however, Dr. Lushington intimated that proof was not given, as it might have been, in the first-mentioned case, that Guernsey was part of the diocese of Winchester, and that by ancient custom a register was required to be kept there). A marriage in the Channel Islands, solemnised otherwise than according to the Established Church, must be proved by the testimony of experts in the local law (*Westlake* v. *W.*, 1910, P. 167).
Indian registers of baptisms (*Queen's Proctor* v. *Fry*, 4 P.D. 230), marriages (*Ratcliffe* v. *R.*, 1 S. & T. 467), and deaths, kept under authority of the E. I. Co., and now deposited in the office of the Secretary of State for India. [The above registers are themselves copies.] Registers of marriages kept under 14 & 15 Vict. c. 40, ss. 21 and 22; this Act was repealed by the Statute Law Revision Act, 1875, and Christian marriages are now regulated by Indian Act xv. of 1872.—Registers of marriages compiled by the Secretary of State for India from periodical reports transmitted to him by the various religious denominations in India (*e.g.* of a Catholic marriage in 1889, *Regan* v. *R.*, 67 L.T. 720; and a Protestant one in 1894, *Westmacott* v. *W.*, 1899, P. 183). [These registers, or certificates, are admissible *per se*, without the aid of expert testimony (*id.*; *Braid* v. *B.*, 25 T.L.R. 646; *cp. post*, 554].	
Registers of births, marriages, and deaths on British merchant ships at sea, kept under the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 239-240, 254; on Non-British passenger ships to the United Kingdom, s. 339; and on H.M.'s ships at sea, or on foreign stations (37 & 38 Vict. c. 88, s. 37; 55 & 56 Vict. c. 23, s. 12). As to publication of banns on H.M.'s ships, or certificates in respect of intended marriages, see the Naval Marriages Acts 1908, and 1915.	
Ambassadors' or Consular registers of marriages by British subjects abroad since 1849, kept under the various Foreign or Consular Marriage Acts now repealed by the Foreign Marriage Act, 1892. As to such registers, see ss. 9, 10, 18; by s. 13 they are conclusive of residence, consents, and authority of the marriage-officer; and by s. 16 are of such a public nature as to be admissible on mere production from proper custody. As to marriages between British subjects and foreigners either in the United Kingdom or abroad, see the Marriage with Foreigners Act 1906 (which does not apply to such marriages in the U. K. if between Jews and according to Jewish usages). Where the marriage was in a foreign country by foreign law, its validity here, must be proved by expert testimony (*R.* v. *Naguib*, 1917, 1 K.B. 359). As to marriage in British chapels in Russia, see *Higgs* v. *H.*, 36 T.L.R. 690.	Ambassador's register of baptisms kept at the Embassy Chapel in London (*D'Aglie* v. *Fryer*, 13 L.J.Ch. 398); and a similar register of marriages kept at the Embassy Chapel in Paris (*Leader* v. *Barry*, 1 Esp. 353; *Athlone Peerage*, 8 C. & F. 262; *Dufferin Peerage*, 2 H.L.C. 47).

Admissible.

Foreign registers of births, marriages, and deaths abroad, kept under local public authority (*Lyell* v. *Kennedy*, 14 App. Cas. 437, the case of a Scotch register; *Perth Peerage*, 2 H.L.C. 865, the case of a French register before the Revolution; *Abott* v. *Abbott*, 29 L.J.P.M. & A. 57, the case of a Chilian register).

Bishops' registers have been admitted to prove a right of nomination to a curacy (*Arnold* v. *Bath and Wells* (Bishop), 5 Bing. 316; vicarial endowments (*Tucker* v. *Wilkins*, 4 Sim. p. 262); collations (*Irish Society* v. *Derry*, 12 C. & F. 641); and the date of foundation of a deanery (*R.* v. *St. Peter's*, 12 Ad. & E. 512). So, an enrolment-book of episcopal leases, being a public muniment, has been allowed as secondary evidence of a lease (*Humble* v. *Hunt*, Holt N.P. 601) and a register of chapter leases as evidence of reputation respecting the boundary of a parish (*Coombe* v. *Coether*, M. & M. 398, *ante*, 297). As to bishops' returns, first-fruits' books, and terriers, see *post*, 359).

Monaetic registers have been received as secondary evidence of a lost grant or endowment, in support of ancient possession or Crown title (*Bullen* v. *Michel*, 2 Price, 399; *Williams* v. *Wilcox*, 8 A. & E. 314; see Ros. N.P., 18th ed. 14, 215). And they seem also to have been admitted in a few early cases on questions of pedigree (*Hubback*, 567 *et seq.*).

Vestry books have been received to prove the election of a parish officer, and its regularity (*R.* v. *Martin*, 2 Camp. 100; *Hartley* v. *Cook*, 5 C. & P. 441); ancient parish books, preserved by the churchwardens in the parish chest, to prove who were the surveyors of a highway in the parish 150 years before (*R.* v. *Pembridge*, Car. & M. 157); and, on the question of a right to a pew, as reputation to prove repairs thereto [*Price* v. *Littlewood*, 3 Camp. 288; though in *Sturla* v. *Freccia*, 5 App. Cas. p. 646, Ld. Blackburn doubted this, and also whether the entry there was of a sufficiently public nature to be receivable, intimating, however, that it might be if it were intended for all parishioners who liked to come and see the entry. *Cp.* cases *opposite*].

An entry made in 1678, in a churchbook of a parish, as to an action affecting the parish decided 438 years previously, held admissible as an entry relating to an historical fact in which the parish was interested, and as secondary evidence of the record which might be presumed to have been in existence at the time of the entry (*Bidder* v. *Bridges*, 34 W.R. 514; affirmed 1896, W.N. 146, the objection to the evidence being withdrawn).

Inadmissible.

A Russian register of birth, of which only a certified copy was produced, which copy had been obtained by the child's parents from the Chief Rabbi of the Russian Government (*R.* v. *Wilowski*, 149 C.C.C. Sess. Pap. 335. No reasons were given).

Vestry books have been rejected in favour of the parishioners to prove that they had a right, concurrently with the rector, to elect a parish officer, in the absence of proof that the rector was present at the meetings (*Hartley* v. *Cook*, *opposite*); and also as evidence of reputation to prove repairs to a pew, on the ground that the entry related to a particular fact and not to a general right (*Cooke* v. *Banks*, 2 C. & P. 478). And in an action by churchwardens against the vestry-clerk, to recover church rates misapplied, the vestry books, showing previous similar misapplications sanctioned by the vestry before defendant joined, though held evidence against them, were received not as public books, but as showing their access, knowledge, and acquiescence (*Cooper* v. *Law*, 28 L.J.C.P. 282; *ante*, 145, 258).

An entry made in parish book by a parish officer, as to the giving of a certificate whereby the parish was relieved from the support of a pauper, held not admissible, (1) because the entry was not of a public nature, but concerned merely the particular parish and its rights with relation to another; and (2) because the entry being private, was self-serving (*R.* v. *Debenham*, 2 B. & Ald. 185; *Irish Society* v. *Derry*, 12 C. & F. 641, *per* Parke, B.; *Sturla* v. *Freccia*, *sup. per* Lord Blackburn, and *cp. ante*, 229-30).

Admissible. *Inadmissible.*

An unauthenticated MS. report of the trial, judge's charge, and verdict for the plaintiff in an old action for trespass, 140 years before the trial in which it was tendered, held not evidence for the plaintiff in the later action [*Bridges* v. *Highton*, 11 L.T. 653, *per* Lord Westbury, L.C. overruling decision of the V.-C. No reasons are given]. So, a document, purporting to be a copy of the shorthand notes of a judgment delivered in 1838 by Lord Denman, was held not to be evidence, or allowed to be entered as such by the registrar, although it appears to have been received informally as a record of what the judge said, the copy being produced from the custody of one of the parties to the original suit and strict proof being available of the action and its result, if necessary [*Renshaw* v. *Dixon* (1911) 46 L.Jo. 92; *cp. Sturla* v. *Freccia*, *ante*, 316, *post*, 362]. As to reports of cases, as evidence of the facts reported, see *Shepheard* v. *Bray*, *post*, 430.

Registers and Records of Public Offices.

Registers and official records kept at the Inland Revenue Office [12 & 13 Vict. c. 1, s. 6, which office includes what were formerly the Excise Office, whose registers were also admissible (*Fuller* v. *Fotoh*, Carth. 346; *R.* v. *Grimwood*, 1 Price, 369), and the Stamp Office]; those kept at the Patent Office as to patents and designs (7 Ed. VII. c. 29, ss. 28, 52, 79), and trademarks (5 Ed. VII. c. 15, ss. 50, 51); the Post Office (postmarks are evidence of the dates, &c., appearing thereon, *ante*, 122) and many other Government Offices (Tay. ss. 1595, 1775A, 1778). So, with registers of the proprietors of copyrights [Copyright Act, 1842, s. 11; see *Lucas* v. *Cooke*, 13 Ch.D. 872; *R.* v. *Willetts*, 70 J.P. Rep. 127; International Copyright Acts, 1844, s. 8; 1886, ss. 7, 8; Fine Arts ditto Acts, 1862, ss. 4, 5]; and Newspapers (Newspaper Libel and Registration Act, 1881, s. 15).

The books kept at the Bank of England are evidence to prove the transfer of stock, these books being of national concern (*Mortimer* v. *M'Callan*, 6 M. & W. 58; *Breton* v. *Cope*, Pea. R. 30; *Marsh* v. *Collnett*, 2 Esp. 665). As to the books of other banks, private or not, see the Bankers' Books Evidence Act, 1876, *post*, 375-7).

Registers of Beer and Spirit Licenses, kept under the Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 36, are evidence of the matters required to be entered by that Act; as also are copies thereof purporting to be signed by the Licensing Justices' Clerk (s. 58). There is no similar provision as to the registers of Clubs, or of Con-

Post office registers of the receipt and delivery of telegrams, are not admissible as public records, since they are only preserved for a short time, are not accessible to the public and are not the result of a public enquiry, being merely kept to regulate the work and pay of the postal officials (*Heyne* v. *Fischel*, 110 L.T. 264; 30 T.L.R. 90.)

Admissible.	*Inadmissible.*
victions against Licensees (which are now to be registered and not endorsed), enacted by the Licensing Act, 1902 (2 Ed. VII. c. 28). s. 9. As to production of the license see *post*, 573.	
The books kept at public prisons have been held evidence of the dates of commitment and discharge of prisoners, but not of the cause of their detention [*Salte* v. *Thomas*, 3 Bos. & P. 188. But *quære* whether they were properly admitted as public documents, there being a mere practice, but no legal duty, to keep the registers, the information being often derived from subordinates, and the gaoler keeping them chiefly for his own information and security. See Stark. Ev., 4th ed. 308; and *Merrick* v. *Wakley*, *opposite*].	An attendance register kept by the medical officer of a union under the orders of the Poor Law Commissioners, and intended to operate as a check upon himself, held inadmissible, the entry not being of a public nature (*Merrick* v. *Wakley*, 8 Ad. & E. 170; *Irish Society* v. *Derry*, 12 C. & F. 641, *per* Parke, B.; *Sturla* v. *Freccia*, 5 App. Cas. p. 646, *per* Lord Blackburn).
As to Registers of Minutes of Convictions under the Summary Jurisdiction Act, 1879, s. 22, see *post*, 558.	
As to Registers and Minute-Books of Companies see *post* 373-5; certificates of incorporation and proprietorship of shares, *post* 369-70; and declarations by chairmen as to the passing of resolutions, *post*, 370, 374.	
Minute-books of meetings of creditors, kept under the Bankruptcy Act, 1914, and signed by the chairman either of that or of the next ensuing meeting, are evidence of the validity both of the meetings and the resolutions passed (s. 138 sub-ss. 1 and 2), and of the correctness of the chairman's decision on all incidental questions arising thereat (*Re Indian Zoedone Co.*, 26 Ch.D. 70).	A register of bankruptcy certificates kept under the old law in the office of the Secretary of Bankrupts, but not under the orders of the Lord Chancellor or any public authority; and the entries in which were made indiscriminately by any of the clerks in the office as mere private memoranda for the information of inquirers, held inadmissible (*Henry* v. *Leigh*, 3 Camp. 449).
Registers and enrolment of deeds, wills, and charges affecting land in Yorkshire (47 & 48 Vict. c. 54, ss. 9, 20, 21, 51); Middlesex (7 Anne, c. 20, ss. 6, 12, 19; amended by 54 & 55 Vict. c. 10, by which the duties of the Middlesex Registry have been transferred to the Land Registry); and Ireland (6 Anne, c. 2, Ir.; *Carlisle* v. *Whaley*, L.R. 2 H.L. 391). The registrar's certificates of registration and enrolment are evidence of the fact and date of those events, and that the necessary formalities have been complied with (*Doe* v. *Lloyd*, 1 M & G. p. 684; *post*, 370), but not of the *validity* of the deed, *e.g.* that the necessary majority of assents to a composition deed had been obtained (*Hare* v. *Waring*, 3 M. & W. 362, except in the case of Crown deeds enrolled in the Land Revenue Office under 2 & 3 Will. IV. c. 1, s. 26). As to Certificates of Title to Land, see *post*, 371; and generally as to land certificates, certificates of charges, and office copies of registered leases, see the Land Transfer Act, 1897, s. 8; and as to the effect of registered dispositions. *Cap. & Counties Bk.* v. *Rhodes*, 1903, 1 Ch. 631. [Tay. ss. 1645-1649; Ros. N.P., 17th ed. 145, 213.]	The books of the clerks of markets, kept formerly under 47 Geo. III. (sess. 2), c. 68, s. 29, have been held no evidence of the sales therein recorded, although expressly made evidence by the statute "touching all matters done in pursuance of the Act" (*Brown* v. *Capel*, M. & M. 374).
	A manuscript Book, kept *temp.* Eliz., and purporting to be written by an officer of the Duchy of Lancaster, and preserved and treated as authentic in the Duchy Office, has been rejected to prove the duties of the office as described therein (*Jewison* v. *Dyson*, 2 M. & Rob. 377).

Admissible.

Registers of voters under the Ballot Act, 1872, are conclusive (as well upon the returning officer as upon the Court for the trial of election petitions), of the qualification of the persons named, except where they are prohibited from voting by law (*Stowe* v. *Joliffe*, L.R. 9 C.P. 734). Poll-books or office copies thereof, are also evidence in all courts of law (6 & 7 Vict. c. 18, s. 94).

The Minute-books of Parish Councils, or of committees of parish or district councils, or of parish meetings, required to be kept under the Local Government Act, 1894, are, if date signed, to be received in evidence without further proof; purporting to be until the contrary is shown, meetings whereof minutes have been so made, are deemed to have been duly held, &c. [Sch. I. Part III (1-3)].

Minute-books of the proceedings of Education Committees, or of Managers, required to be kept under the Education Act 1902, are also, if purporting to be duly signed, receivable in evidence without further proof; and until the contrary is shown, such committees or managers shall be deemed to be duly constituted, &c. [Sch. I. A (3-5); B. (8-11)].

Minutes of proceedings at meetings under the Public Health Act 1875, and orders and resolutions passed thereat, if purporting to be duly signed, are receivable in evidence in all legal proceedings; and until the contrary is shown such meetings and proceedings are deemed to have been duly convened, held &c. [Sch. I. r. 1 (10)].

As to minutes of proceedings at meetings of creditors, under the Bankruptcy Act, 1914, s. 138, see *ante*, 349, and *post*, 561.

Documents under the Friendly Societies Act, 1896, if purporting to be signed by the chief or assistant, registrar, or any inspector, public auditor, or valuer, are, in the absence of evidence to the contrary, receivable in evidence without proof of the signature, and documents bearing the seal or stamp of the Central Office, are also receivable without further proof (s. 100).

Inadmissible.

Judicial, Military and Maritime Registers and Records.

The minutes and memoranda of convictions, orders and proceedings of justices under the Summary Jurisdiction Act, 1848, s. 14; and the register of these kept under the S.J. Act, 1879, s. 22, have been held evidence of such matters in the *same*, but not in *other*, courts (*Com. of Police* v. *Donovan*, 1903, 1 K.B. 895); but the admissibility of the latter registers has now been extended by the Cr. Justice Admin. Act, 1914, s. 28, as to which see fully *post*, 558.

Regimental registers and records, kept in pursuance of any statute, or of the

An attestation paper, purporting to be signed by a soldier on his being attested as such, although "evidence of his having given the answers therein recorded"—is no evidence of his place of birth as alleged by him in one of such answers (*Chertsey Union* v. *Surrey Clerk*, 69 L.T. 384).

Admissible.

King's Regulations, or of military duty, and purporting to be signed by the commanding or other officer, whose duty it is to make them, are evidence of the facts stated [Army Act (1881), s. 163, sub-s. 1 (*g*), as are certified copies thereof, sub-s. 1 (*h*); *e.g.* Army registers of births, marriages, and deaths among British officers and men abroad (*e.g.* of a marriage in Burma, *Adams* v. *A.*, 1900, W.N. p. 32); or Muster Rolls, or Pay Lists, kept under 42 & 43 Vict. c. 8, ss. 2, 3.

Medical Sheets, kept under the Army Medical Service Rules, have been received to prove that a military patient was suffering from a venereal disease, and so to establish adultery (*Gleen* v. *Gleen*, 17 T.L.R. 62; but, where the Sec. of State for War objected to their production, as being against public interest, the privilege was upheld, though waived by the patient (*Anthony* v. *A.*, 35 T.L.R. 559; ordinarily, however, no privilege attaches to medical confidences, *ante*, 201-2).

As to Army and Navy Lists, see *post*, 353; and as to certificates of military and naval service, &c., *post*, 371.

The books of the Sick and Hurt Office, kept by a public officer under the authority of the Admiralty, and the register and muster-books of the Navy Office, similarly kept, are evidence of the fact, and date, of the death of a sailor [*Wallace* v. *Cook*, 5 Esp. 117; *R.* v. *Rhodes*, 1 Lea. 24; *Barber* v. *Holmes*, 3 Esp. 190; and see *Huntley* v. *Donovan*, 15 Q.B. 96, 100; the latter books are also evidence of the ship to which he belonged and the amount of wages due to him (*R.* v. *Fitzgerald*, 1 Lea. 20; *R.* v. *Rhodes*, *sup.*)].

The log-book of a man-of-war is evidence of the time of sailing and the motions of the fleet (*Disraeli* v. *Jowett*, 1 Esp. 427), provided it is produced as an official public book from the Admiralty, otherwise it can only be used to refresh the writer's memory [*Rundle* v. *Beaumont*, 4 Bing. 537; *Burrough* v. *Martin*, 2 Camp. 112. In *Heathcote's Divorce*, 1 Macq. H. L. Cas. 277, it was held admissible, but insufficient to prove the whereabouts of a ship's officer at a given time. In *R.* v. *Mylius*, Times, Feb. 2, 1911, however, the log-books and records produced by the Admiralty were held evidence of the movements of ships and presence on board of officers from day to day]. An official letter written at the conclusion of a voyage by the captain of a convoy and produced by the Admiralty, has also been held evidence of the facts stated (*Watson* v. *King*, 4 Camp. 272).

The *official* log-book of merchant ships is by statute made 'admissible in evidence' [Merchant Shipping Act, 1894, s. 239 (6); so, also under the former M. S. Act, 1854,

Inadmissible.

The *ship's* log-book of merchant vessels is only evidence *against*, but not *for*, the owners or writers; though it may be used to refresh the memory or contradict the

Admissible.

s. 285. In Marsden on Collisions, 1910, p. 289, however, the author remarks, 'it is not clear under this section whether the official log-book is evidence or not, as there have been no decisions on the subject'; and statutory provisions on these points are not always to be relied on, see *e.g. post*, 359, 374].

The registers of merchant ships are, by the Merchant Shipping Act, 1894, ss. 64, 695, upon production from proper custody and subject to all just exceptions, *prima facie* evidence of the matters stated, *e.g.* of nationality (*R.* v. *Bjornsen*, 34 L.J.M. C. 180); ownership [*Hibbs* v. *Ross*, L.R. 1 Q.B. 534; and as those in charge are usually employed by the owners, it is also presumptive evidence of their employment, *i.e.* of liability of the owners for their acts (*id.*; *Steel* v. *Lester*, 3 C.P.D. 121; but see *Frazer* v. *Cuthbertson*, 6 Q.B.D. 93; and *cp. ante*, 97, 235-6); and tonnage (*The Recepta*, 14 P.D. 131).

Passenger lists, kept under an old statute (*Richardson* v. *Mellish*, Ry. & M. 66); and crew lists of the vessels cleared at the Custom-house of New York (*R.* v. *Castro*, 1873, Nov. 28, cited Ros. N.P., 18th ed. 131), are evidence of the particulars stated. So, the statutory lists under the Merchant Shipping Act, 1894, s. 255, are admissible to show that a sailor was on board a particular ship (*Re Dodd*, 1897, Times, March 23).

The Custom-house copy of the searcher's report, produced by the proper officer, is evidence of the shipment of the goods specified (*Johnson* v. *Ward*, 6 Esp. 48; see also *Tomkins* v. *A.-G.*, 1 Dow's Rep. H.L. 404).

Coastguard, lighthouse, and lightship journals have been held admissible in the Court of Admiralty to prove the state of wind and weather at a given time [*The*

Inadmissible.

statements of a witness [*The Singapore*, L.R. 1 P.C. 378, 382, where the log (put in on cross-examination) was found to have been altered in a different ink, the original entry alone, which was more unfavourable to the master, being received to contradict his testimony; *The Sociedada*, 1 W. Rob. p. 311; *The Henry Coxon*, *ante*, 290, where the writer was dead; so also, as to the *Engineer's* log (*the Earl of Dumfries*, 10 P.D. 31); *cp.* Admissions by Agents, *ante*, 251-2]. So, where A. was charged with the attempted murder of B., his captain, on the high seas;—entries in the captain's and ship's logs relating to the occurrence were rejected as evidence against A. (*R.* v. *Barnes*, *per* Recorder of Belfast, 1906, Belfast News Letter, May 8. The entries here had not been properly completed, but this was held immaterial).

The registers of merchant ships under the old Acts were not evidence between private persons for private purposes, *e.g.* to prove ownership, except as admissions; though they were evidence for the public purposes of the Acts (*Tinkler* v. *Walpole*, 14 East, 226; *Reusse* v. *Meyers*, 3 Camp. 475; *Flower* v. *Young*, *id.* 240; *Piric* v. *Anderson*, 4 Taunt. 652; *Cooper* v. *South*, *id.* 802; and see *M'Iver* v. *Humble*, 16 East, 169, 174; Stark. Ev., 4th ed. 310).

Lloyd's Register of Shipping was rejected by Denman, C.J., in *Freeman* v. *Baker*, 5 C. & P. 482; but admitted in *Bain* v. *Case*, 3 C. & P. 496, and *Abel* v. *Potts*, 3 Esp. 242. For a description of this book, see *Kerr* v. *Shedden*, 4 C. & P. 531 *n.*

The Sound List of vessels arriving at foreign ports, though transmitted by the British consuls to the merchants at home, and publicly exhibited by the latter, are inadmissible (*Roberts* v. *Eddington*, 4 Esp. 88).

Custom-house registers are not, at common law, admissible against strangers to prove the ownership of a vessel (*Fraser* v. *Hopkins*, 2 Taunt. 5).

And a shipping entry at the Custom-house, made from a note supplied by the shipper, though admissible as a public document for the purpose of entitling the party to the privilege of sailing, is not admissible as secondary evidence of a lost note on a charge of fraud against the shipper, unless the original be proved to have been made or presented by him [*Hughes* v. *Wilson*, 1 Stark, 179. In *R.* v. *Grimwood*, 1 Price, 369, however, an excise book transcribed from the maltster's specimen-paper was held evidence against the latter on a question of fraud].

The Weather Returns, supplied to the Meteorological Office by local correspondents, paid or volunteer, are not admissible to prove the force of a gale at a particu-

Admissible.

Maria das Doreas, 32 L.J.P.M. & A. 163, though the witness who made the entries was in Court and might have been called, (and though said by Dr. Lushington not to be books of such a public nature as would be admissible at common law on their mere production from proper custody); *The Caterina Maria*, L.R. 1 Ad. & Ecc. 53; *The Viatka* (1883, C.A.), cited Pritch. Adm. Dig. 454; *The Peckforton Castle*, 3 P.D. 11, where such a register was preferred to the testimony of the crew.]

Documents (*e.g.* registers, lists, and statements) drawn up in pursuance of the Sea Fisheries Act, 1883 Sch.I., regulating the police of the North Sea fisheries, are admissible in any proceeding, civil or criminal, as evidence of the fact, or matters therein stated; and if evidence contained in any such document was taken on oath in presence of the person charged and subject to his cross-examination, the officer drawing up such document may certify the said facts, or any of them, and such document or certificate if purporting to be duly signed shall be admissible without proof of such signature (s. 17).

Inadmissible.

lar place and time (*Burrows* v. *Bedford School*, 18 T.L.R. 292).

Professional Lists and Calendars.

An Army List or Gazette purporting to be published by authority, and either to be printed by a Government printer or to be issued by H.M. Stationery Office (or if in India by some officer under the Governor-General of India, or the Governor of any Presidency) is evidence of the rank, appointments, and corps of the officers named [Army Act (1881), s. 163, sub-s. (*d*); as to certificates, &c., showing the service in, or discharge from, H.M.'s forces or ships, by military and naval officers respectively, see *post*, 371].

A Navy List or Gazette, purporting to be published by authority and either to be printed by a Government printer or to be issued by his Majesty's stationery office, shall be evidence of the status and rank of the officers therein mentioned and of any appointment held by such officers until the contrary be proved (Naval Discipline Act 1915, C. s. 9).

The Law List, purporting to be published by the authority of the Commissioners for Inland Revenue, is *prima facie* evidence of the solicitors and conveyancers named therein being duly certified (23 & 24 Vict. c. 127, s. 22); and the absence of a name is *prima facie* evidence of non-qualification (*R.* v. *Wenham*, 10 Cox, 222). The Roll of Solicitors kept at the office of the Law Society is also admissible, and may be proved by certified extract

Clergy lists, peerages, directories, court guides, and similar unofficial publications, are not admissible to prove the particulars contained (Tay s. 1785; Hubback, 700-703).

The Law List, published as opposite, has been held not evidence of the *date* of a solicitor's certificate (*Raven* v. *Stevens*, 3 T.L.R. 67).

Admissible.

under the hand of the secretary of the Society (Tay. s. 1693).

The Medical Register, published by the General Council of Medical Education, or, in the case of persons not registered therein, a certified copy of an entry in the general or local register, is similarly admissible (21 & 22 Vict. c. 90, s. 27);—so, also, registers of dentists (41 & 42 Vict. c. 33, ss. 11, 29); of chemists [Pharmacy Acts (Eng.) 1852, s. 7, and 1868, s. 13 (*Pharmaceutical Soc.* v. *Mercer*, 101 L.T. 635); Pharmacy Act (Ir.) 1875, s. 27, even though the entries are not certified and countersigned (*Barrett* v. *Henry*, 1904, 2 I.R. 693)]; and of veterinary surgeons (44 & 45 Vict. c. 62, ss. 3, 9). [Tay, s. 1638.]

Inadmissible.

University, College, and Manor Books.

University and College books are admissible to prove degrees conferred and other collegiate proceedings (***Tracy Peerage,*** Min. Ev. 68; *Moises* v. *Thornton*, 8 T.R., pp. 306-307; *Collins* v. *Carnegie*, 1 A. & E. 695; Hubback, Ev. of Succ. 534-5, and see *post*, 372-3). A Bursar's book has also been stated to be admissible (*Smart* v. *Williams*, 1694, Comb. 247, 249; *contra*, *Anon.* Ld. Ray, 745). And where the practice has been not to sign the entries, unsigned entries are receivable (***Lauderdale Peerage,*** 10 App. Cas. 692).

Manor Books, being "public documents in the sense that they concern all interested in the manor" (*Sturla* v. *Freccia*, 5 App. Cas. p. 643, *per* Ld. Blackburn), are evidence of manorial customs, and the public matters therein recorded (*Heath* v. *Deane*, 1905, 2 Ch. 86, 91). They may also be tendered as *reputation* (*ante*, 297-8, 305); and in the case of admittances and surrenders, as acts of ownership (*A.-G.* v. *Emerson*, 1891, A.C. 649; *ante*, 111).

University and College Books. To prove the marriage of a fellow of a college—the practice being for entries in college books to be made and signed by the registrar—*un*signed entries relating to the marriage, though in a deceased registrar's handwriting, held inadmissible (*Fox* v. *Bearblock*, 17 Ch.D. 429; see Corporation Books, *post*, 372).

University calendars are not admissible to prove the truth of the particulars contained therein (Tay. s. 1785; Hubb. 700-703).

CHAPTER XXXI.

PUBLIC INQUISITIONS, SURVEYS, ASSESSMENTS AND REPORTS.

INQUISITIONS, surveys, assessments, reports and returns are admissible, but not generally conclusive, in proof of their contents when made under public authority, and in relation to matters of public interest or concern.

[Tay. ss. 1674, 1767-1773, 1777; Ros. N.P. 194-200; Hubback, Ev. of Succ. 584-606; Stark. Ev., 4th ed., 284-291, 404-408. As to *proof* of Public Inquisitions, Surveys, &c., see *post,* 555; as to the effect of Inquisitions, Surveys and Reports made for *private* purposes, *post,* 356, 435; as to published maps, &c., *post,* 378-9].

Principle. The general ground of reception is that such documents contain the results of inquiries made under competent public authority, and concerning matters in which the public are interested (2 Phil. & Arn. Ev., 10th ed., 125; Tay. s. 1767; Hubback, 589; *Sturla* v. *Freccia,* 5 App. Cas. 623; *Mercer* v. *Denne,* 1905, Ch. 538; *cp.* "Public Registers," *ante,* chap. xxx.).

The public documents included in this article have, for convenience, been treated under the head of exceptions to the hearsay rule; although many of them partake rather of the nature of reputation or judgments, than of hearsay as hitherto defined. Thus, they resemble judgments *in rem* (*post,* 407-10) in being receivable against strangers, but are distinguishable not only in seldom affording conclusive evidence of the matters determined (*Hill* v. *Clifford,* 1907, 2 Ch. 236, 252, C.A.), but in being in many instances founded on unsworn testimony.

The importance of ancient inquisitions, extents, and surveys has greatly diminished since the abolition of writs of right, and the passing of modern Statutes of Limitation; but they are still often of value upon questions of public rights, customs, peerage claims, &c. (Tay. s. 1767).

Public Authority. There must be a judicial or quasi-judicial duty to inquire by a public officer (*Sturla* v. *Freccia, sup., per* Lord Blackburn; Lord Selborne uses the expression, "legal jurisdiction to inquire, under public authority"; Parke, B., in *Irish Society* v. *Derry,* 12 C. & F. 641, speaks of a "public duty to inquire").

Public Matter or Purpose. The matter inquired into must be of a public nature, or required to be ascertained for a public purpose; Parke, B., *sup.,* speaks of a "public matter" and "entries of a public nature"; Sugden, L.C., in *Welland* v. *Middleton,* 11 Ir. Eq., 603, uses the expression "public purpose," as does Lord Selborne in *Sturla* v. *Freccia, sup.;* Lord Blackburn in the latter case states that "the very object (of the inquiry) must be that it should be

made for the purpose of being kept public, so that the persons concerned in it may have access to it afterwards." In *Mercer* v. *Denne,* 1904, 2 Ch. pp. 541, 544, Farwell, J., in adopting Ld. Blackburn's statement adds: "The test of publicity as put by Ld. Blackburn is that the public are interested in it and entitled to see it, so that if there is anything wrong in it they would be entitled to protest. In that sense it becomes a statement that would be open to the public to challenge or dispute, and therefore it has a certain amount of authority (p. 541). . . The whole gist of the rule as to public documents is that the publicity must be contemporaneous, and publicity means such publicity as would afford the opportunity of correcting anything that was wrong" (p. 544). On appeal, 1905, 2 Ch. p. 558, Vaughan Williams, L.J., while concurring in the decisions by Farwell, J., though not perhaps exactly on the same grounds, thought that the latter "carried the ruling of Ld. Blackburn rather further than Ld. Blackburn himself intended." Cozens-Hardy, L.J., however, stated that he agreed with Farwell, J., "on all the points decided by him as to the admissibility of documents" (p. 568).

Inquisitions made with a view to ascertain and record the rights, property, and revenues of the Crown, are public documents within the present rule; while if such inquisitions were made merely for some private or temporary purpose they will be rejected (*Mercer* v. *Denne,* 1905, 2 Ch. 538; *Phillips* v. *Hudson,* 2 Ch. Ap. 243; 2 Phil. Ev., 10th ed., 125).

Inquisitions, surveys, &c., made under public legal authority, but for *private purposes,* may, however, be receivable between parties and privies as in the nature of judgments (*cp. post,* 412-15); though where taken under *private authority* merely, they have been rejected (*Phillips* v. *Hudson, sup.;* as to Maps generally, see *post,* 378).

Excess or Jurisdiction. Irregularity. Interest. If the inquiry be *ultra vires* (*Evans* v. *Taylor,* 7 A. & E. 617; *Latkow* v. *Eamer,* 2 H. Bl. 437; *Glossop* v. *Pole,* 3 M. & S. 175; *Powis Peerage,* cited Cruise on Dignities, c. 6, s. 60), or if the inquisition has been vacated, or there has been any irregularity in the proceedings (*Powis Peerage, sup.*), the evidence will be rejected.

An inquisition, however, which is only voidable and not void, is receivable (*Leighton* v. *L.,* 1 Str. 308); so irregularity may be cured by proof that the inquisition has been acted on, for the Court will then presume in favour of regularity (Hubback, 591).

The fact that the return operates in the interest of the officer making it, affects weight and not admissibility (*Irish Society* v. *Derry, sup.; Sturla* v. *Freccia, sup., per* Lord Blackburn).

EXAMPLES.

Admissible.

A Coroner's Inquest and Verdict *super visum corporis,* have been admitted, as evidence of the facts found [*R.* v. *Gregory,* 15 L.J.M.C. 38, where an inquisition was received, though held insufficient *per se,* to prove an allegation in a libel that A. had been murdered; *Prince of Wales' Assoc.* v. *Palmer,* 25 Beav. 605, where, in a civil case, it was held to shift the burden of proof to the contrary; *cp. Garnett* v.

Inadmissible.

A Coroner's Inquest and Verdict have been held inadmissible to prove the cause of death in a Workman's Compensation case [*Bird* v. *Keep,* 1918. 2 K.B. 692, C.A.; or that a deceased workman, who had committed suicide, was insane (*Grime* v. *Fletcher,* 1915, 1 K.B. 734). They were also rejected as *res inter alios acta* in an Admiralty suit (*The Mangerton,* Swab. 120)].

Admissible.

Ferrand, 6 B. & C. 111; *Jones* v. *White*, 1 Str. 68. In America the cases conflict, with perhaps a preponderance against admissibility; 15 Harv. L. Rev. 664; Wigmore, s. 1671.]

Inquisitions in Lunacy are admissible, but not conclusive, evidence of that fact even against strangers [*Faulder* v. *Silk*, 3 Camp. 126; *Hassard* v. *Smith*, Ir. R. 6 Eq. 429; *Prinsep* v. *Dyce Sombre*, 10 Moo. P.C. 232, 244; *Hill* v. *Clifford*, 1907, 2 Ch. 236, 244-5 C.A.; *Re Crippen*, 1911, P. 108, 115; *Bird* v. *Keep*, 1918. 2 K.B. 692, C.A.]. Under the Lunacy Act, 1890, s. 116, a Master's order is, also, now *prima facie* evidence thereof (*Harvey* v. *The King*, 1901, A.C. 601); and as to medical certificates, see s. 28, sub-s. 4.

An inquisition taken under an order of the House of Commons, held conclusive of the amount of fees payable in a public office (*Green* v. *Hewett*, 1 Peake N.P.C. 243, 245).

The Domesday Book (*temp.* William I.), compiled under Royal authority, upon the oaths of sheriffs and others,—is evidence of the tenure of land, and of the various other particulars stated. This is the earliest public inquisition or survey extant (Tay s. 1768).

The Down Survey (*temp.* Charles II.) is by statute made conclusive evidence of certain boundaries, and is *prima facie* evidence of other particulars between all persons (*Dublin (Archb.)* v. *Trimleston*, 12 Ir. Eq. R. 251; *Tisdall* v. *Parnell*, 14 Ir. C.L.R. 1).

The Book of Distributions, although only an abstract of the above, is also admissible as compiled under public authority, and preserved in a public office (*Poole* v. *Griffith*, 15 Ir.C.L.R. 239, 280; *Spaight* v. *Twiss*, 13 Ir.C.L.R. 516).

Maps taken under, and as part of the return to, inquisitions held by commissioners at various dates down to 1852, under the authority of the Statute of Sewers (23 Hen. VIII. c. 5), are evidence for rating purposes, of parochial and other public boundaries affected by the Statute (*New Romney Corp.* v. *Commrs. of New Romney*, 1892, 1 Q.B. 840, C.A.). So, as to old orders of Commissioners of Sewers, though not proved to have been executed, for this may be presumed (*R.* v. *Leigh*, 10 A. & E. 398).

Inquisitions *post mortem* finding the existence of a right of fishery in the lords of a certain manor, are admissible to prove these facts (*Rogers* v. *Allen*, 1 Camp. 309; Steph. art. 5, *n*).

Inquisitions *post mortem*, taken by escheators and others under Royal or statutory authority, and upon oath, as to the possessions, heirs, &c., of deceased Crown tenants *in capite*, are admissible,

Inadmissible.

A rider to the verdict of a jury is no part of the verdict and is inadmissible (*R.* v. *Harding*, 1 Cr. App. R. 219; 25 T.L. R. 139, C.C.A.)

A survey of a manor, made when belonging to the Crown, *temp.* Edward IV., though preserved in the Augmentation Office, considered inadmissible against the lord to prove the rights of the tenants, as

Admissible.

but not conclusive, evidence of the particulars stated (*Rowe* v. *Brenton*, 8 B. & C. 737, 739-41; and see fully Hubback, 584-606. These inquisitions, of which the earliest recorded was in the reign of Henry III., ceased to be taken in 1660).

So, as to Inquisitions and Surveys made on Attainers (*Neill* v. *Devonshire*, 2 L.R. I. 162-3, Affd. 2 App. Cas. 183-4).

An inquisition, taken under a warrant from the Exchequer, held evidence to show whether a Prior or the Crown was seised of lands [*Tooker* v. *Beaufort*, 1 Bury, 146; but a return to a commission which was neither signed nor sealed, has been rejected on the ground that *non constat* it might not have been a draft, *Slane Peerage*, 5 C. & F. 23; *post*, 555].

A survey of a manor, made in 1637 under a Royal Commission, is admissible to show the rights of those interested (*Blandy-Jenkins* v. *Dunraven*, 62 J.P. 661, *per* Byrne, J., reversed on other grounds, 1899, 2 Ch. 121).

A survey and report by a surveyor made in 1816, in discharge of a statutory duty, on the occasion of a sale of Crown lands, and produced from the Land Revenue Office, held admissible (*Evans* v. *Merthyr Tydfil Council*, 1899, 1 Ch. 241, C.A., following *Smith* v *Brownlow*, *inf.*).

Admiralty Charts made in pursuance of official duty, and showing the position of Walmer Castle, held admissible for that purpose (*Mercer* v. *Denne*, 1904, 2 Ch. 534, 544, *per* Farwell, J.; affd. on other points, 1905, 2 Ch. 538 C.A.).

An ancient extent of Crown Lands, purporting to have been taken by the King's steward under 4 Edw. I. stat. 1, and preserved in the proper public office,—Held, evidence of the matters recorded [*Rowe* v. *Brenton*, 8 B. & C. 737, 747, cited *sup.* In the same case, a "caption of seisin" to the use of the Duke of Cornwall, by certain parties assigned by his letters patent, was received as a public document in proof of the Duchy accounts and tenancies (see p. 577; and *Mercer* v. *Denne*, 1905. 2 Ch. p. 556-7, explaining this decision)].

Minister's (*e.g.* sheriffs', bailiffs', and receivers') accounts of Crown lands, deposited in the public record offices (*e.g.*, the Land Revenue Office, or the Exchequer), are evidence of the title of the Crown [*Doe* v. *Roberts*, 13 M. & W. 520, 523, 524; *Blandy-Jenkins* v. *Dunraven*, 62 J.P. 661; and irrespective, probably, of the death of the officer, Ros., N.P., 18th ed. 197].

Parliamentary surveys (*i.e.* surveys of Church and Crown lands made by commissioners during the Commonwealth) are evidence of the matters stated, though only taken under the *de facto* authority of a usurper (*Freeman* v. *Read*, 4 B. & S. 174, 179).

Inadmissible.

being merely a private document taken for the purposes of the Crown [*Phillips* v. *Hudson*, 2 Ch. Ap. 243, *per* Ld. Chelmsford, L.C. In *Evans* v. *Merthyr Tydfil*, 1899, 1 Ch. 241, Chitty, L.J., remarked that the survey here was not made under the requisitions of a public statute; but in *Mercer* v. *Denne*, 1905, 2 Ch. 538, 547, Williams, L.J., denies this, adding that the ground of decision was that the survey related to property which the King had reserved to himself as private owner, property with which the public had nothing to do. Its admissibility as an admission by a predecessor in title was not argued].

A *Survey* of Walmer Castle made in 1616 by the direction of the then Lord Warden of the Cinque Ports, stating that damage had been done by the sea to the walls of the castle; *Petitions* in support thereof by local persons; and an *Estimate* made by the King's engineer for their reparation,—held inadmissible as public documents, not being, or intended to be, records affecting the King's property or revenues, but made for a temporary purpose merely (*Mercer* v. *Denne*, *sup.*, cited *ante*, 290, 301). So, also, *War Office Plans and Reports to the Board of Trade* made with regard to the above (*Mercer* v. *Denne*, *opposite*).

A survey, made by the commissioner of the Earl of Leicester, of lands then his own, but afterwards becoming Crown lands, held inadmissible as made under private authority, though preserved in a public office (*Daniel* v. *Wilkin*, 7 Ex. 429).

A survey made by direction of Oliver Cromwell, when Lord General of the Parliamentary forces, of lands granted to him by Parliament, held inadmissible as made under private authority (*Beaufort* v. *Smith*, *inf.*).

Admissible.

Inquisitions and surveys of manors belonging to the Duchies of Cornwall and Lancaster (while the Dukes had sovereign rights) are evidence, though not conclusive, of the manorial customs and boundaries specified therein [*Beaufort* v. *Smith*, 4 Exch. 450; *Daniel* v. *Wilkin*, 7 Exch. 429; *Manchester Corp.* v. *Lyons*, 29 Ch.D. at 299; *Blandy-Jenkins* v. *Dunraven*, 62 J.P. 661. In *Smith* v. *Brownlow*, L.R. 9 Eq. 241, they were also received as evidence of reputation, see *ante*, 297, 304.

The *Valor Beneficium* of 1291 (known as Pope Nicholas's Taxation) is admissible as a public document, not as an accurate account of the precise value, but to show the then estimated value of the benefices mentioned (*Bullen* v. *Michel*, 2 Price, p. 477; 4 Dow, p. 324); but not whether tithes were taken in kind or by a *modus* (*Short* v. *Lee*, 2 J. & W. 486).—So, the *Valor Beneficium* of 26 Hen. VIII. (*ibid.*; and *Drake* v. *Smyth*, 5 Price, 369. See also 2 Eagle on Tithes, 402, 403).

Ecclesiastical terriers (*i.e.* returns of the temporal possessions of the church in every parish) are evidence of the matters stated, being made under the authority of the 87th Canon (see Stark. Ev., 4th ed. 289-232; 2 Phil. & Arn. Ev., 10th ed. 120; Tay. s. 1772).

A bishop's returns in obedience to writs from the Exchequer, stating the vacancies, &c., in his diocese, are admissible as statements by a public officer in discharge of a public duty. So, his returns as to *first-fruits;* and the entries in the first-fruits books are admissible as secondary evidence of the returns (*Irish Society* v. *Derry*, 12 Cl. & F. 641; *Sturla* v. *Freccia*, 5 App. Cas. 623).

An incumbent's returns in answer to inquiries by his bishop, for the information of the governors of Queen Anne's bounty, are admissible as in the nature of an inquisition in a public matter (*Carr* v. *Mostyn*, 5 Ex. 69).

Tithe Commutation maps are admissible as public documents on questions of tithe [6 & 7 Will. IV. c. 71, ss. 60-4; 7 *id.* & 1 Vict. c. 69, s. 2). They have also been received to prove other matters within the authority of the Commissioners, *e.g.* that fences existed, or tracks were visible on the land at their respective dates (*A.-G.* v. *Antrobus*, 1905, 2 Ch. pp. 193-4; followed in *A.-G.* v. *Moorsom Roberts*, 72 J.P.R. 123, and *Fuller* v. *Chippenham R.D.C.*, 79 *id.* 4; and *cp. Caton* v. *Hamilton*, *infra*); that certain strips of land bordering a highway were when the map was made not enclosed or used for purposes rendering them titheable (*Copestake* v. *West Sussex C. C.*, 1911. 2 Ch. 331); as well as to fix third parties with notice of the apportionment (*Giffard* v. *Williams*, 38 L.J. Ch. 597,

Inadmissible.

A survey and report defining, *inter alia*, the boundaries of a *Duchy* manor, and made under 4 Edw. I. stat. 1, by a deputy surveyor-general, *temp.* Eliz.,—held inadmissible, the statute giving no power to ascertain boundaries (*Evans* v. *Taylor*, 7 A. & E. 617; *cp. Mercer* v. *Denne*, 1905, 2 Ch. pp. 557, 563).

Tithe Commutation maps, made under 6 & 7 Will. IV. c. 71, although by s. 64 "satisfactory evidence of their accuracy," are inadmissible to prove private boundaries as between two adjoining owners (*Wilberforce* v. *Hearfield*, 5 Ch.D. 709, *per* Jessel, M.R.; *Coleman* v. *Kirkaldy*, 1882, W.N. 103, *per* Kay, J.; *Frost* v. *Richardson*, 129 L.T.Jo. 132-3); or the extent of a public right of way (*Copestake* v. *West Sussex*, C.C. *opposite*); or other matters not within the scope of the statutory authority (*A.-G.* v. *Antrobus*, *opposite*).

Admissible.

604). As to their admissibility as evidence of reputation, see *ante*, 297, 304.

Ordnance Survey maps have, like Tithe maps, been admitted as *prima facie* evidence to show what fences, tracks, &c., were visible to the surveyor at their respective dates (*A.-G.* v. *Antrobus, &c., sup.; A.-G.* v. *Merrick*, 79 J.P. 515); — also, in an action of trespass, to show not what the boundary was, but what had been the position of a fence, alleged to be a boundary fence, in 1875, when the survey was made (*Caton* v. *Hamilton, opposite, per* Grantham, J.); also, in an action on a covenant not to trade within half a mile of plaintiff's premises, to show how far the half mile extended [*Mouflet* v. *Cole*, 8 Ex. 32-35, *per* Blackburn, J.; see generally as to measurement of distance, *post* 379); also to show the general position of a particular place or district (*Bristow* v. *Cormican*, 3 App. Cas. 641, 664, *per* Ld. Blackburn); and also on a question of private boundaries, (*Spike* v. *Thompson, per* Blackburn, J., cited 1882, W.N. 103). An Award Map, under the Commons Act 1876, is admissible but not conclusive as to boundaries (*Collis* v. *Amphlet*, 1918, 1 Ch. 232, C.A.; see 1920, A.C. p. 272).

Plans deposited by a Railway Co. with a local authority in connection with a proposed light railway which was ultimately abandoned, are admissible as public documents, on a question as to the existence of a public road, to show that the alleged road was not marked thereon, the local authority being the statutory guardian of public roads and the plans being published for inspection and objection by those interested (*A.-G.* v. *Antrobus*, 1905, 2 Ch. 188, 192, 194-5).

Herald's Visitation Books (made under the authority of Royal commissioners and upon sworn testimony between the years 1528 and 1688), are evidence of the pedigrees, &c., of the nobility and others. So, the Book of Funeral Certificates containing copies of the certificates given by the Heralds after attending, in the course of their duty, the funerals of great men, are admissible as secondary evidence of the certificates [*Sturla* v. *Freccia, sup.;* Ros. N.P.; 18th ed. 214; Tay. s. 1769; and see fully Hubback, Ev. Suc. 538-566). In the above case Lord Blackburn pointed out that these books are admissible, not merely in peerage claims (as stated by James and Brett, L.JJ., 12 Ch.D. at pp. 428, 433), but at *nisi prius* as well].

An order of a Naval Court, held under the Merchant Shipping Act, 1894, s. 483, discharging a seaman from his ship, is conclusive evidence of such discharge even *inter alios* (*Hutton* v. *Ras Steam Shipping Co.*, 1907, 1 K.B. 834, C.A.).

Inadmissible.

Ordnance Survey maps are not admissible under the present head on questions of private boundaries or title [4 & 5 Vict. c. 30, s. 12; since the materials before the surveyor do not include private title-deeds, and he has no authority whatever to bind the parties, *Tisdall* v. *Parnell*, 14 Ir.C.L.R. 1, 27-8; *Caton* v. *Hamilton*, 53 J.P. 504; *Coleman* v. *Kirkaldy, sup.*, not following *Spike* v. *Thompson, opposite*]; nor to explain a deed (*Wyse* v. *Leahy*, I.R. 9 C.L. 384). As to their admissibility as Reputation, see *ante*, 297, 305; to show general geographical facts, *post*, 378-9; under the Land Transfer Act, 1897, see s. 14 and Rule 269; and to explain conveyances, *post*, 624.

Herald's Books of Benefactors' Pedigrees, kept in pursuance of a Royal commission empowering the Heralds to raise funds for the restoration of the college, and to enrol the pedigrees of the donors, held not admissible as public documents, the duty being not to investigate and report on the truth of such pedigrees, but merely to enrol such as were presented (*Shrewsbury Peerage*, 7 H.L.C., p. 14). So, a *Book of Pedigrees*, which was merely a collection of private entries in the handwriting of a deceased Herald, but not an office book kept in the discharge of duty (*id.* 33). So, a book of "Arms and Descents of the Nobility, E. 16," kept by the Heralds distinct from the records, and not under Royal authority, or in the discharge of any duty (*id.* 24).

A Board of Trade inquiry and order under the Merchant Shipping Act, 1854, resulting in the suspension of a master's certificate on the ground of negligence, is inadmissible to prove such negligence in an action against the owners, although by s.

Admissible.

In a County Court action, under the Workmen's Comp. Act, 1906, to prove the fact and cause of a seaman's death in the Red Sea,—depositions by the Captain of the ship taken at Aden on an enquiry before a Consular officer pursuant to the Merchant Shipping Act, 1894, s. 691, held admissible under s. 7 (1 *c*) of the former Act; and *semble* the Report of the Consular officer would also be admissible [*Pyper* v. *Manchester Liners*, 5 L.Jo. Cy., Ct. Rep. 26 (Ap. 15, 1916), *per* Judge Mellor, K.C. *Sed. qu* and see cases *opposite*.]

Land Tax Assessments are evidence of the assessment upon the person, and for the property named; as well as of occupation (*Doe* v. *Seaton*, 2 A. & E. 171; *Doe* v. *Arkwright*, *id.* 182 *n*; *Doe* v. *Cartwright*, 1 C. & P. 218; *Johnson* v. *Thompson*, 15 L.T. (O.S.) 437; *Ronkendorff* v. *Taylor*, 4 Peters, 349).

Valuation Lists of property in the metropolis are rendered conclusive evidence of the gross or rateable value of hereditaments for various purposes by 32 & 33 Vict. c. 67, s. 45.

The Poor Law valuation in Ireland is admissible, but not conclusive, evidence of the value of land,—being "a public document made for a public purpose" (*Welland* v. *Middleton*, 11 Ir. Eq. 603, *per* Sugden, L.C.; *Swift* v. *M'Tiernan*, *id.* 602).

Rate-Books of the Poor Law Unions in Ireland are *prima facie* evidence of the liability of the person rated (*Castlebar Guardians* v. *Lord Lucan*, 13 Ir.L.R. 44). And Poor-Rate Books in England are *prima facie* evidence of the making and publication of the rate (Poor Rate Act, 1869, s. 18; *Beeson* v. *Derby*, Ryde and Konstams Rating Appeals, 328, 331); and of the occupation or ownership of the persons rated at any given time (*Smith* v. *Andrews*, 1891, 2 Ch. 678; *Blount* v. *Layard*, *id.* p. 681 *n*, *per* Field, J.); although they are not conclusive (*R.* v. *Simmons*, 95 L.T.Jo. 61; and see also 28 L.Jo. 164). When, however, on objection, the committee have fixed the gross estimated rental of premises this is, on appeal to Q.S., conclusive against them, and they cannot show it was too low (*Horton* v. *Walsall Committee*, 1898, 2 Q.B. 237).

The printed Reports of the Charity Commissioners appointed under 58 Geo. III. c. 91, are *prima facie* evidence of the documents and facts stated thereon, on due notice being given to the opposite side [Charitable Trusts Recovery Act, 1891, 54 & 55 Vict. c. 17, s. 5 (1); *post*, 434; and unless otherwise directed, a two days' notice is sufficient, R.S.C. (C.T.R.) 1892, r. 4; C.C.R. 1903, O. 48, s. 22].

The report of a Committee of the General Medical Council finding A., a dentist, guilty of professional misconduct, and an

Inadmissible.

18 of the Act made *prima facie* evidence of the truth of the matters stated (*McAllum* v. *Reid*, L.R. 3 Ad. & E. 57 *n*; *The Mangerton*, Swab. 120; *The City of London*, *id.* 245, 246; *Hill* v. *Clifford*, 1907, 2 Ch. p. 251-2). So, as to *Wreck Enquiries* under the same Act and *Depositions* taken thereat (*Nothard* v. *Pepper*, 17 C.B.N.S 39; *The Little Lizzie*, L.R.3 A. & E. 56; *The Henry Coxon*, 3 P.D. 156, 159; *ante* 252, *post*, 440), or *Pilotage Enquiries* (*The Lord Seaton*, 9 Jur. 603).

Land Tax Assessment Books are no evidence of seisin; nor of the names of the occupiers, where proof is given that it was usual to make no alteration in the name so long as the land was in the *same family* (*Doe* v. *Arkwright*, 2 A. & E. 182 *n*; 5 C. & P. 575).

The report and finding of a Royal Commission though composed of Judges and Law Lords, does not bind, and is not receivable in evidence in, any Court to decide any question of law or fact therein (*Judge* v. *Horrell*, 140 L.T.Jo. 359. C.A. Ir.)

The confidential Report of a Committee appointed by a public department of a foreign State, to ascertain the fitness of a

Admissible.

order of the Council, founded thereon, and made under the Dentists Act, 1878, ss. 13-15, directing the registrar to strike off A.'s name from the Register of Dentists; —held, *prima facie* evidence of such misconduct, in an action brought by B., another dentist, against A., to dissolve their partnership by reason thereof [*Hill* v. *Clifford*, 1907, 2 Ch. 236, C.A., affd. on other grounds, *sub nom. Clifford* v. *Timms*, 1908, A.C. 12. *Cp. Re Feldmann*, 97 L.T. 548].

The Reports of the Searchers at the Custom House are evidence of the cargoes on board, being official documents made under statutory authority (*Johnson* v. *Ward*, 6 Esp. 48).

As to Engineers' Reports concerning scientific facts beyond living memory, see *East London Ry.* v. *Thames Conservators*, *post*, 380.

As to Certificates by Public Analysts under the Food and Drugs Act, 1875, see *infra*, 368-9.

[As to Reports and Awards by various classes of Judicial Officers, which are evidence only *inter partes*, but not against strangers, nor as public documents, see *post*, 433-5, *e.g.* Reports and Awards by official referees under the Arbitration Act, 1889; by the Official Receiver under the Bankruptcy Acts; by Inspectors under the Company (Cons.) Act 1908; by the Law Society under the Solicitors Act 1888; and by Licensing Justices under the Licensing Act 1904.]

Inadmissible.

candidate for a public office, in which his age and other details of his personal history are stated, is not receivable as evidence of those facts; such an authority not being a legal one for a public purpose, nor the matter inquired into one of a public nature [*Sturla* v. *Freccia*, 5 App. Cas. 623. It would also be inadmissible as a declaration by deceased persons in course of duty, or upon a matter of pedigree, or upon a question of public and general right, *ante*, 316].

The Report of the master of a foreign ship as to its burden, &c., required to be filed in order to get the cargo landed;—Held inadmissible, as not being made by a public officer in the discharge of a public duty, but by a private individual for his own benefit (*Huntley* v. *Donovan*, 15 Q.B. 96). Similarly, the captain's Protest is not evidence in chief of the facts stated, though admissible on cross-examination to contradict his testimony (*Christian* v. *Coombe*, 2 Esp. 489; *The Hedwig*, 1 Spink 19; *cp. The Lyndica*, 23 L.T. 474).

A Report as to the ingredients of food, made by a Public Analyst, but not in pursuance of any statutory duty, is not admissible as evidence thereof (*Shortt* v. *Robinson*, 63 J.P. 295).

[As to Reports by Chancery visitors under the Lunacy Act 1890; of the Postmaster-General as to a publication being a newspaper; and of Gas-Inspectors made *ex parte*, which are not evidence even *inter partes*, see *post*, 434-5].

CHAPTER XXXII.

OFFICIAL CERTIFICATES, LETTERS, AND RETURNS.

THE certificates, letters or returns of public officers, intrusted by law with authority for the purpose, are *primâ facie,* but not generally conclusive, evidence of the *facts* authorised to be stated, but not of extraneous matters. And where it is part of the duty of an official to supply *copies* of any record, register, or other document, such copies are admissible as secondary evidence of the originals (*Brown* v. *Thornton,* 6 A. & E. 185; *post,* 539-42); unless, however, expressly so made by statute, a certified *extract* from such documents, or a certificate of its *effect or result,* is inadmissible (*Finlay* v. *Finlay,* 31 L.J. Mat. 149; *post,* 542).

[Tay. ss. 1610-1659, 1784-1784A; Ros. N.P. 18th ed., 217; Wigmore, Ev., ss. 1674-83].

Principle. The ground upon which such documents are admitted is that where the law has appointed a person to act for a specific purpose, it will trust him so far as he acts under his authority (B.N.P. 229; *Brown* v. *Thornton, sup.;* and see *Sturla* v. *Freccia,* 5 App. Cas. 623). Where the certificate consists merely of a copy of another document, *e.g.* a register, its admissibility will depend on that of the original document (*ante,* chap. xxx.).

History. In ancient times, trials in certain cases were by certificate merely, the certificates being conclusive. Lord Coke enumerates six of such cases, viz.:— (1) That of the King's Marshal of the Host that a man was serving in the army; (2) That of the Mayor of a town in France that a person was in his custody as prisoner; (3) That of the Ld. Mayor and Aldermen, by the Recorder, as to the customs of London (*ante,* 21; *Plummer* v. *Bentham,* 1 Bur. 248; a custom once certified is looked upon as laid and cannot be certified again, *Blacquiere* v. *Hawkins,* 1 Doug. 380; *Burin* v. *Nott,* 12 Sim. 436); (4) That of the Sheriff whether a man be a citizen or foreigner; (5) That of a Judge to prove records (*ante,* 7); (6) That of the Ordinary, or Bishop, to prove marriage, bastardy, excommunication, or profession (*Norwood* v. *Stephenson* (1738), Andrews, 227; *Ilderton* v. *I.,* 2 H.Bl. 155-60). Later on, apparently in analogy to the above, the use in certain cases of certificates by public officers came to be allowed, not as conclusive, but as evidence merely, though now by way of exception to the hearsay rule [Gresley on Ev., 2nd ed., 253-4; Wigmore, s. 1674].

At Common Law, however, a certificate of a mere matter of fact not coupled with matter of law, remains generally speaking inadmissible, though given by a person in an official position, or even, it is said, by the Sovereign under

the sign-manual (*Omichund* v. *Barker,* Willes, 538, 549-50; but see *Mighell* v. *Johore* (*Sultan*), 1894, 1 Q.B. 149; and *cp.* Best, s. 183). If, therefore, the person is bound to record the fact, the proper evidence is a copy of the record duly authenticated; but as to matters which he is not bound to record, his certificate, being extra-judicial, is merely the unsworn statement of a private person and will be rejected (Tay. s. 1784). Certain exceptions, however, have been allowed to this rule, partly on the historical analogy mentioned above, and partly on grounds of convenience, although the cases themselves are neither uniform nor very satisfactory.

By Statute, also, a variety of matters have been rendered provable by the certificates of officials, either generally, or for the special purposes of certain Acts ; the certificates being sometimes made *conclusive* (as to the effect of this provision, see *post,* 369), sometimes *sufficient* (which appears to mean conclusive in the absence of evidence to the contrary: *Board of Trade* v *Glenpark,* 1904, 1 K.B. 682, 687; *cp. Garbutt* v. *Durham Committee,* 1904, 2 K.B. 514), and sometimes merely *primâ facie* evidence of the matters certified. The insertion of extraneous matters will not invalidate the certificate (*Bakewell* v. *Davis,* 10 T.L.R. 40); but it seems doubtful whether a statutory certificate, when defective, can be supplemented by the oral evidence of its author (*Hudson* v. *Bridge,* 88 L.T. 550; *post,* 588).

Identity of Persons, &c., named in Certificates (see *ante,* 343-4; *post,* 523).

EXAMPLES.

Common Law Certificates.

Admissible.

The King's certificate under the sign-manual, authorising the release of a prisoner, is evidence of the legality of the discharge (*R.* v. *Miller,* 1 Lea. 74; *R.* v. *Gully, id.* 98; *cp. Mighell* v. *Johore* (*Sultan*), *infra*).

The license of the Pope during his supremacy in this country is evidence of an impropriation (*Cope* v. *Bedford,* Palm. 426); so, the Pope's Bull is evidence that monastic lands were tithe free at the time of the dissolution of the monasteries (*Clanricarde's* Case, Palm. 37-8).

A certificate or letter from, or on behalf of, a Secretary of State in his official capacity is equivalent to a certificate or letter from his Majesty, and is conclusive evidence of the matters stated, *e.g.* the independence of a foreign Sovereign [*Mighell* v. *Johore* (*Sultan*), 1894, 1 Q.B. 149, C.A.; and under the Foreign Jurisdiction Act, 1890, s. 4, the certificate of one of his Majesty's principal Secretaries of State is conclusive as to the extent of British jurisdiction abroad].

The certificate of the Sec. of State for India is evidence that an Indian official is entitled to administer oaths, and judicial notice will be taken of a signature so authenticated (*Ferguson* v. *Benyon,* 16 W. R. 71; *ante,* 23).

Inadmissible.

The King's certificate, under the sign-manual, of a mere matter of fact, has been said to be inadmissible (*Omichund* v. *Barker,* Willes, 550; and see the discussion in Berkeley Peerage, 1891, Times, June 27, and L.Jo., July 4, in which a letter or certificate of the Prince Regent, written when the Regency Act was in force, was rejected in proof of certain facts known to him, and relating to the pedigree of the claimant. The document in that case, however, appears to have been written by the Prince in his private capacity and *post litem motam*).

Admissible.

The certificate of a Colonial Secretary is said to be evidence of Colonial law (Tristram & Coote's Probate Practise, 14th ed., p. 52.)

An Ambassador's certificate has in two cases been admitted to prove foreign law (see Foreign Law, *post*, 389; this is doubted in Tay. s. 1784).

The Heralds' Funeral Certificates are evidence of the matters of pedigree stated therein (*Sturla* v. *Freccia*, 5 App. Cas., 623, 645; Hubback, Ev. of Succ. 565).

A passport granted by an English Secretary of State is evidence that the person described therein was abroad at a given date (*Whaley* v. *Carlisle*, 17 Ir. C.L.R. 792).

The certificate of the Sec. of State for War as to a sergeant's station is similarly admissible (*Lloyd* v. *Woodall*, 1 Wm. Bl. 29, 30).

A bishop's certificate of ordination is evidence of holy orders (*R.* v. *Bathwick*, 2 B. & Ad. 639, where the certificate was 30 years old, produced from proper custody, and sealed with the bishop's private seal; *aliter* perhaps, had it been his corporate seal, for then some evidence would have been required that it was the proper one); and in cases of dower his certificate of marriage is conclusive (*Ilderton* v. *Ilderton*, 2 H. Bl. 155-60); as is his certificate that a chapel is licensed for marriage (7 & 8 Vict. c. 56, s. 2).

A certificate that a marriage had been solemnised at Utrecht, and that the parties had cohabited there as man and wife, such certificate being given under the seal of the Minister there and of the said town,—Held sufficient proof of such marriage from the necessity of the case and as the best evidence obtainable (*Alsop* v. *Bowtrel*, Cro. Jac. 541, disapproved in *Omichund* v. *Barker*, Willes, 538, 550).

A minister's certificate of a marriage performed by him was admitted by Parke, B., at *nisi prius*, on the ground that it was part of the transaction, though the register itself was rejected [*Stockbridge* v. *Quicke*, 3 C. & K. 305, *sed qu.* The ground stated is not satisfactory, and the case was doubted in *Miller* v. *Wheatley*, 28 L.R. Ir. 144, 158. See *ante*, Declarations in course of Duty, p. 291].

A certificate of a Japanese marriage, given by the secretary of the governor before whom it was performed, was admitted in *Brinkley* v. *Att.-Gen.*, 15 P.D. 76, but the leave of the Court had been obtained, and the Att.-Gen. consented. A certificate may of course be admissible if tendered as secondary evidence of the register; and

Inadmissible.

The certificate of a commissioner of Excise as to the accuracy of the Excise books, is inadmissible (*Dunbar* v. *Harvie*, 2 Bli. 351).

An officer's certificate is not (at common law) evidence of the military service, &c., of a subordinate [*Robinson* v. *Buccleuch*, 31 Sol.Jo. 329, C.A.; see, however, the Army Act (1881), s. 163, cited *infra;* and as to Army Lists, &c., *ante*, 350, 353.

The certificate of the rector or professors of a University is not evidence of the grant of a diploma. [*Moises* v. *Thornton*, 1799, 8 T.R. 303. In this case, to prove a medical degree, the plaintiff produced a diploma under the seal of a University, and to authenticate it called a witness who had no previous knowledge of the University, its constitution, or professors, but to whom the above officials had admitted the diploma and its signatures to be theirs, and also signed a certificate to the same effect. It was held that the diploma was not evidence either as the original corporate act, or as a copy thereof, but that either the original books containing the act should have been produced and the seal proved to be the proper seal by some one who knew it, or else an examined copy of the entry tendered.]

The certificate of the Veterinary College is not evidence that a student had attended lectures there (*Sewell* v. *Corp*, 1 C. & P. 392; the ground of rejection here was that the College was not a public body known to the law.)

A minister's certificate of a marriage performed by him, but not tendered merely as secondary evidence of the register, was rejected in *Nokes* v. *Milward*, 2 Add. 386; and see *Farrell* v. *Maguire*, 3 Ir.L.R. 187, cited *ante*, 291; and Hubback, Ev. of Succ. 258.

Admissible.

it would be receivable in a case of pedigree if proved to have been acknowledged by a deceased relation (Hubback, Ev. of Succ. 258).

Justices' certificates as to encroachments on, or repairs to, highways used, by long-established practice, to be admissible to prove the facts certified (*R.* v. *Mawbey*, 6 T.R. 634-8).

The certificate of a Judge or clerk of a Foreign Court, is evidence that a foreign official is duly qualified to adminsiter oaths (*Re Lambert*, L.R. 1 P. & D. 138; *Levitt* v. *L.*, 2 Hem. & M. 626).

As to certificates of Foreign Law, see *supra*, and *post*, 389.

A certificate of a Notary is evidence of the protest abroad of a foreign bill of exchange (Bayley on Bills, 490; *Geralopulo* v. *Wieler*, 10 C.B. 690); or that an affidavit has been duly sworn before him abroad (*Re Davis' Trusts*, L.R.8.Eq.98; *Re Lambert*, *sup.*; and see Annual Practice, Notes to O. 38, r. 6); or that a power of attorney has been duly executed in a British colony (*Armstrong* v. *Stockham*, 24 L.J.Ch. 176; *Hayward* v. *Stephens*, 36 L.J. Ch. 135); or that a foreign official is duly qualified (*Exp. Worsley*, 2 H. Bl. 275; *Omealy* v. *Newell*, 8 East, 364; *Cole* v. *Sherard*, 11 Ex. 382; *Abbott* v. *A.*, 29 L.J.P. & M. 57; *Re Magee*, 15 Q.B.D. 332; Brookes' Notary, 6th ed. 157-8; as to judicial notice of notarial seals and signatures, see *ante*, 24; and as to where verification is required, see *Sharpe* v. *Jackson*, 39 L. Jo. 400; and Stringer on Oaths, 3rd ed. 46-55).

A consular certificate has been received to prove that a certain person held the office of notary abroad (*Haggitt* v. *Ineff*, 24 L.J.Ch. 120; and see now the Commissioner for Oaths Acts, 1889, and 1891, *ante*, Judicial Notice, 24). It was also made evidence of certain facts connected with marriages solemnised before him under the Foreign Marriages Act, 1849, s. 17; but see now *ante*, 346.

As to a certificate of the personal service of a writ by a foreign process-server, see *Ford* v. *Miescke*, 1885, W.N. p. 198.

Inadmissible.

In a Workman's Compensation case, the certificate of a doctor that the applicant was "incapacitated from work," is not admissible to prove that fact [*Richards* v. *Sanders*, 5 B.W.C.C. 352, C.A.; *Flynn* v. *Burgess*, 48 Ir. L.T.R. 132. C.A. *Aliter* as to the statutory certificate by a Medical Referee, see *Chuter* v. *Ford*, cited *post*, 371].

In *Appleton* v. *Braybrook*, 6 M. & S. p. 37, Abbott, J., said: "The certificate of a notary is not received as evidence of the facts certified." And a Notarial *certificate* has been rejected as evidence of the presentment in England of a foreign bill (*Chesmer* v. *Noyes*, 4 Camp. 129); or of the due execution of a deed in a foreign country (*Exp. Church*, 1 D. & R. 324), or British colony (*Nye* v. *Macdonald*, L.R. 5 P.C. 357). And a notarial *copy* has been rejected as secondary evidence of a foreign will (*Re Brown*, 80 L.T. 360); and of a foreign marriage settlement (*Permanent Trustee Co.* v. *Fels*, 1918, A.C. 879; *op. post*, 538, 548, 560).

A consular certificate is not evidence of the amount realised by the sale of goods at a foreign port, although the consul is required by law to superintend the sale (*Waldron* v. *Coombe*, 3 Taunt. 162).

The certificate of Lloyd's agent abroad is not receivable to prove the amount of damage done to goods at a foreign port, even against a subscriber (*Drake* v. *Marryat*, 1 B. & C. 473).

Statutory Certificates.

The following are some of the principal matters provable by certificate under various statutes:

The certificate of the Speaker of the House of Commons as to any matter, given under the Parliament Act, 1911, s. 3, is conclusive.

Birth, Baptism, Marriage, Death and Burial. As to these certificates, which are merely certified copies of the registers, and

Admissible. *Inadmissible.*

whose admissibility is determined by that of the latter, see *ante*, chap. xxx.

A certificate of Naturalization (provable by production or certified copy) confers the same status as that of a natural-born British subject [British Nationality and Status of Aliens' Act, 1914, ss. 3, 21. The Act contains no provision as to the evidential effect of the certificate].

Previous trial and conviction or acquittal of Indictable Offences may (either in civil or criminal cases, *Richardson* v. *Willis*, L.R. 8 Ex. 69) be proved by the certificate of the clerk, or other person having the custody of the records, or his deputy; the certificate to contain "a copy of the indictment, trial, conviction and judgment, or acquittal, as the case may be, omitting the formal parts" (14 & 15 Vict. c. 99, s. 13; as to the Registers of Convictions under the Summary Juris. Act, 1879, see *post*, 558). A previous *conviction* of any indictable offence may, *for the purpose of discrediting a witness*, be proved by a certificate containing the substance and effect only of the indictment and conviction and signed as above (28 & 29 Vict. c. 18, s. 6; *post*, 482); and a previous conviction of any indictable offence may also be proved *for any purpose*, in a similar manner to that last mentioned; and any *summary conviction* may be proved by a copy of such conviction purporting to be signed by the justice, or the officer of the court, or the clerk or other officer of any court to which such conviction has been returned (34 & 35 Vict. c. 112, s. 18; Tay. s. 1613), or by a copy of the minute or memo. of the conviction entered in the register required to be kept under the Summary Jurisdiction Act 1879, s. 22 (Cr. Just. Admn. Act, 1914, s. 28; *post*, 558). Production of the certificate, with evidence of defendant's identity, is sufficient proof of his "previous conviction" (*R.* v. *Drabble*, 53 Sol. Jo. 449).

Proof of previous trial for felony or misdemeanour may in *subsequent trials for Perjury*, or subornation, committed therein, be given by a certificate containing the substance and effect only (omitting the formal part) of the previous indictment and trial, purporting to be signed by the clerk of the court or other officer having the custody of its records, or by the deputy of such clerk or officer, which shall be sufficient evidence thereof without proof of the signature or official character of the person appearing to have signed the same (Perjury Act, 1911, s. 14; *post*, chap. xliii., 556, 557).

Dismissal of Charges at Petty Sessions may, in addition to other modes, be proved as follows:—By a copy, certified by the justices, of the order dismissing any charge of an indictable offence (42 & 43

Admissible.

Inadmissible.

Vict. c. 49, s. 27, the dismissal to have the same effect as an acquittal on a trial on indictment); or dismissing any charge of an offence heard summarily out of sessions (11 & 12 Vict. c. 43, s. 14).

The dismissal of charges of *Assault* may be proved by the justices' certificate stating the fact of such dismissal (24 & 25 Vict. c. 100, ss. 42, 43); which operates to release the defendant (but not joint-tort-feasors with him, *Dyer* v. *Munday*, 1895, 1 Q.B. 742) from all proceedings *civil* or *criminal*, for the same cause (s. 45; as to similar relief in other cases of dismissal or summary conviction, see *post*, 410-1, 413). Such certificate must be made on the merits and in presence of both parties (*Reed* v. *Nutt*, 24 Q.B.D. 669); it should specify the grounds of dismissal; it should be given within a reasonable time after the hearing, if not before the justices separate, and to operate as a bar, must be specially pleaded [Tay. ss. 1615-1620; 1710; Ros. N.P. 903; *cp. Great Southern Ry.* v. *Darby*, 27 Ir.L.T.R. 45; *Donnelly* v. *Ingram*, 31 *id.* 139].

Certificates of Ministers of Pensions, Labour, Food, Shipping, National Service and of the President of the Air Board and President of the Air Council, that documents purporting to be issued by them were duly issued, are conclusive [Ministry of Pensions Act, 1916, s. 16; New Ministries and Secretaries Act, 1916, s. 11; Ministry of National Service Act, 1917. s. 2; Air Force (Constitution) Act 1917. s. 10].

Adulteration of Food. Under the Sale of Food and Drugs Act, 1875, s. 21, the analyst's certificate is sufficient evidence against the defendant of the result of the analysis, unless he requires the analyst to be called as a witness, or gives rebutting proof (*Hewitt* v. *Taylor*, 1896, 1 Q.B. 287). So, under the Act of 1899, s. 22, its production by the defendant is similarly sufficient; and *cp.* the Fertilizers and Feeding-Stuffs Acts, 1893, s. 5, and 1906, s. 3. See further the Food and Drugs Acts, 1875 to 1907 as amended by the Milk and Dairies Act, 1915, ss. 8-9. It has been doubted whether a defective certificate can be supplemented by the oral evidence of the analyst (*Hudson* v. *Bridge*, 88 L.T. 550).

Adulteration of Food. A certificate obtained in proceedings against a retail dealer is not admissible on a subsequent charge against the wholesale vendor (*Tyler* v. *Kingham*, 1900, 2 Q.B. 413; *R.* v. *Mahony*, 1909, 2 I.R. 490); nor even on a second charge against the same defendant (*Fulham Council* v. *Farmers' Co.*, 39 L.Jo. 195; *cp. Haynes* v. *Davis*, 1915. 1 K.B. 332).

A certificate stating that the sample of milk analysed contained "6 per cent. of added water, which opinion is based on the fact that the sample contains 7.97 per cent. solids not fat, whereas genuine milk contains 8.5 per cent. solids not fat," is admissible, for though not stating the constituent parts of the sample, yet it showed the grounds on which the opinion was based and on which the court could act (*Bridge* v. *Howard*, 1897, 1 Q.B. 80; *Quinlan* v. *Evison*, 1897, Times, January

A certificate stating that the sample of milk analysed contained "5 per cent. of added water to the prejudice of the purchaser," is inoperative since, as the amount of water inherent in milk varies apart from adulteration, it gave no grounds for the opinion on which the court could act (*Fortune* v. *Hanson*, 1896, 1 Q.B. 202. *Semble*, the certificate should have set out the constituent parts of the sample, including the total percentage of water therein).

Admissible.

30). Where in a case, not of adulteration, but of abstraction of fat from food, the analyst added in his certificate under head of "Observations," that the abstraction of fat was a fraud and might be injurious to health,"—held, though "observations" should only be made in cases of adulteration, yet that as they were mere expressions of opinion on which the magistrate had not acted, they did not invalidate the certificate [*Bakewell* v. *Davis*, 1894, 1 Q.B. 296; and see *Hindley* v. *Haas*, 88 L.T. 465; *Bayley* v. *Cook*, 92 L.T. 170; and *Hull* v. *Horsnell*, *id.* 81; *aliter*, if they had been statements of fact, since the latter being evidence of their truth under the statute, might tend to convict the defendant; and see *Robinson* v. *Newman*, 86 L.J.K.B. 814, holding that as the statute allows observations (*e.g.* whether a mixture is in excess of the normal) a conviction may be founded on these alone]. So, a certificate showing results only, but not details, is admissible (*Jenkins* v. *Norden*, 35 T.L.R. 368).

Incorporation of Joint Stock Companies. The Registrar's certificate is *conclusive* evidence that all requisitions in respect of (*a*) registration, or (*b*) matters precedent or incidental thereto, have been complied with, and that the association is a company authorised to be registered and duly registered under the Act (Companies (Consolidation) Act, 1908, s. 17).

[Under the Act of 1862, s. 18, which, however, only referred to requisitions in respect of (a), the registrar's certificate was generally held to be conclusive (*Oakes* v. *Turquand*, L.R. 2 H.L. 325, 354; *Peel's case*, 2 Ch. 674, 682; *Re Nassau Co.*, 2 Ch.D., 610; *Glover* v. *Gales*, 18 *id.* 173); but it was held not conclusive on the question whether its provisions applied to the Co. at all (*Salomon* v. *S.* 1897, A.C. 22, 55; *Re National Deb. Corp.* 1891, 2 Ch. 505; and *cp. Re Hercules Ins. Co.* 11 Eq. 321, and *Re Northumberland Co.*, 2 De G. and J. 357, 371; *contra Ladies' Dress Assoc.* v. *Pulbrook*, 1900. 2 Q.B. p. 381; *Re Laxon*, 1892, 3 Ch. 555). In Buckley on Companies, 9th ed. 31, it is said that the present sec. presumably omits the objections raised in *Salomon* v. *S.*, and *Re National Deb. Corp. sup.*; but in *British Assoc. &c.* v. *Nettleford*, 27 T.L.R. 527, Hamilton, J., decided that sec. 1 of the Companies Act 1900, which is in similar terms to the present sec., did not make the certificate conclusive that the Co. was validly registered and was not really a trade union, and that the sec. only dealt with ministerial acts]. Under former Acts, the certificate was said also to be *exclusive* evidence, *i.e.* the only proof of incorporation receivable (*Re Dudley*

Inadmissible.

So, a certificate that "I estimate the excess of water as 13 per cent. above what is allowed by statute," is inadmissible as stating matter both of law and fact (*Newby* v. *Sims*, 1894, 1 Q.B. 478; *Hudson* v. *Bridge*, 88 L.T. 550); or one stating merely that a sample of beer contained "arsenic," or a "serious quantity of arsenic" (*Lee* v. *Bent*, 45 Sol.Jo. 505); or one which omits to insert the weight of a sample when the validity of the analysis depends thereon (*Sneath* v. *Taylor*, 1901, 2 K.B. 376; *Hudson* v. *Bridge*, *sup.*). And a report made by a Public Analyst, but not pursuant to any statutory duty, is not admissible to prove the ingredients of food (*Shortt* v. *Robinson*, 63 J.P. 295, cited *ante* 362).

[As to the sufficiency of the certificate, see further *Goulder* v. *Rook*, 1901, 2 K.B. 290; *Bayley* v. *Cook*, 92 L.T. 170; and 67 J.P. 363, 374. And as to samples taken subsequently to the date of the offence, see *Wilkinson* v. *Clark*, 1918, 2 K.B. 636; *Smith* v. *Phillpott*, 1920, 1 K.B. 222.

Admissible.

Tramways, 42 W.R. 126; *sed qu.* and this fact may also be inferred from trading, &c., *ante*, 109). [As to corporation and company books, generally, see *post*, chap. xxxiii].

Proprietorship of Shares. A certificate under the common seal of the company is *prima facie* evidence of the title of a member to the share specified (Companies (Consolidation) Act, 1908, s. 23); and will prevail over the transfer, or an entry in the register (*Henderson* v. *Coulson*, 6 T.L.R. 28). As to estoppel by the certificate, see *post*, chap. xlvii; and as to Company Books generally, *post*, chap. xxxiii.

The Passing of Resolutions. The declaration of the chairman of a general meeting is, unless a poll is demanded, conclusive evidence of this fact [Companies Act 1908, s. 69 (3); though this has been held not to apply to invalidity appearing on the face of the resolution as where the required majority is shown not to have been obtained (*Re Caratel Mines*, 1902, 2 Ch. 498; *Allison* v. *Johnson*, 46 Sol.Jo. 686), or where fraud is shown (*Arnot* v. *United African Lands*, 1901, 1 Ch. 518, C.A.).

Composition or Scheme in Bankruptcy. A certificate of the Official Receiver that a composition or scheme has been duly accepted and approved, shall, in the absence of fraud, be conclusive as to its validity [Bankruptcy Act, 1914. s. 16 (14)].

Patents, Designs, and Trade Marks. A certificate purporting to be given by the Comptroller-General of Patents, &c., "as to any entry, matter, or thing which he is authorised by this Act, or by any general rules made thereunder, to make or do, shall be *prima facie* evidence of the entry having been made, and of the contents thereof, and of the matter or thing having been done or left undone" [Patents and Designs Act, 1907 (7 Ed. VII. c. 29), s. 78-9; so, also, the Registrar's Certificate under the Trade Marks Act, 1905 (5 Ed. VII. c. 15), s. 51; *cp. ante*, 348].

Registration and Enrolment of Deeds and Wills, in Yorkshire, Middlesex and Ireland. As to such certificates, see *ante*, 349, and *post*, 530-1: and certificates of *searches* are also admissible under the Acts there mentioned. As to the effect of registration, see further, *ante* 349; also Ros. N.P. 18th ed. 143, 211; and Tay. ss. 1645-1648.

Registration of Deeds of Arrangement, Bargains and Sale, Conveyances in Mortmain, &c. As to the effect of certificates of the registration of these, see *post*, chap. xliii., p. 565.

Registration of British Ships. The Registrar's certificate is *prima facie* evidence of the matters contained or endorsed (Merchant Shipping Act, 1894, ss. 64, 695).

Inadmissible

Registration of Bills of Sale. The certificate of registration is no evidence that a proper affidavit has been filed (*ante*, 122; *post*, 564.

Admissible.

Title to Land. Under the Land Transfer Act, 1875, s. 80, certificates of title or charge (or office copies thereof), are *prima facie* evidence of the matters contained. See Land Transfer Rules, 1903, rr. 258-68.

Rules of Building Society. The certificate of the Registrar is conclusive evidence of the validity of the rules of any Building Society, i.e. that all necessary steps were taken to render them binding on the society and its members [Bldg. Soc. Act, 1874, s. 20 (3); *Rosenberg* v. *Northumberland Soc.*, 22 Q.B.D. 373.]

Post Office Savings Bank. The certificate of the Postmaster-General, or of one of his Secretaries, is admissible to prove that a bank is such (*post*, 376).

Qualification of Apothecaries. A certificate, purporting to be given under the common seal of the Apothecaries' Co., is evidence of qualification, the seal being judicially noticed (14 & 15 Vict. c. 99, s. 18, *ante*, 24).

Service of Military and Naval Officers. By the Army Act (1881), s. 163, sub-s. (1) (*b*), any letter, return, or other document, purporting to be signed by, or on behalf of, a Secretary of State, or the Commissioners of Admiralty, [or of the Air Council, (Air Force Constitution Act 1917, s. 12)] or the commanding-officer of any portion of his Majesty's forces, or of any of his Majesty's ships;—is evidence of service in, or discharge from, such forces or ships respectively. In *Re Limond*, 84 L.J. Ch. 833, letters from the India Office, and from the colonel and a captain of a deceased's officer's regiment were read to show that his will was made while on active service. It is not clear whether this was by consent or otherwise. See, however, *Robinson* v. *Buccleuch*, *ante*, 342, 365; *cp. R.* v. *Gray*, 6 Cr. App. R. 242.

Age, Fitness and Wages of Children, etc. Under the Factory and Workshop Act, 1901, s. 147 (3), a declaration by the certifying surgeon of the district that he has personally examined the person in question and believes him to be under age stated is admissible as evidence of such age; and his certificates, under ss. 63-5, are probably also evidence of age and fitness for employment (Tay. s. 1645). And, under the Children Act, 1908, s. 123, a copy of an entry in the wages book of the employer, or if no book is kept, a statement by him, or any responsible person in his employment, is *prima facie* evidence of the amount and payment of wages to the person stated.

The certificate of a Medical Referee, under the Workmen's Compensation Act, 1906, s. 8, is conclusive of the existence of the disease from which a workman was suffering, and the date of his disablement. (*Chuter* v. *Ford*, 1915, 2 K.B. 113).

[For a fuller list of Statutory Certificates, see Tay. ss. 1611-1659].

Inadmissible.

CHAPTER XXXIII.

CORPORATION, COMPANY AND BANKERS' BOOKS.

ENTRIES in the public books of a corporation, made by the proper officer, are, at *common law, prima facie* evidence, even against strangers, of the public acts of the corporation; and are, by *statute,* often made evidence, *prima facie* or conclusive, of private matters as well.

[Tay. ss. 1781-1783; Ros. N.P. 125, 219; Grant on Corporations, 317-319; Hubback, Ev. of Succ. 536-537; Whart. ss. 661-663.]

At Common Law. The books must have been publicly kept as the corporation books (*Shrewsbury* v. *Hart,* 1 C. & P. 113), and the entries made by the usual officer or his substitute (*R.* v. *Mothersell,* Stra. 93; and see *Baker* v. *Cave,* 1 H. & N. 674). Unsigned entries will be rejected (*Fox* v. *Bearblock,* 17 Ch.D. 429), unless there has been a usage not to sign them (*Lauderdale Peerage,* 10 App. Cas. 692, 700.) So, where an entry required a stamp, an unstamped entry was rejected in favour of a loose paper, properly stamped, from which the entry had been transcribed, and which was held to be the only original and effectual act of the corporation (*R.* v. *Head,* Peake Ev., 5th ed. 84 *n,* cited *ante,* 341). Erasures will generally be presumed to have been made before the entries were signed (*Steevens' Hospital* v. *Dyas,* 15 Ir. Ch. R. 405; *post,* 520). As to informalities in books kept under *Statute,* see *post,* 374.

Entries in the public books of a corporation as to *private matters,* and entries in its *private books,* are only receivable as admissions *against* the corporation (*Brett* v. *Beales,* M. & M. p. 429; *Hill* v. *Manchester Waterworks,* 5 B. & Ad. 866), or members who have acquiesced in them (*Hill* v. *Manchester Waterworks, sup.; Waterford Corp.* v. *Price,* 7 Ir. L.R. 310; *Re Llanharry Co., Stock's Case,* 10 Jur. N.S. 790, 812; *Hallmark's Case,* 9 Ch.D. 329; *Lindley's Company Law,* 6th ed. 432-3; *ante,* 146, 258); but are not admissible in *its own favour* (*id.; R.* v. *Debenham,* 2 B. & Ad. 145; *Marriage* v. *Lawrence,* 3 B. & Ald. 142; *A.-G.* v. *Warwick,* 4 Russ. 222). Private entries have, however, been received on questions of ancient possession, not as evidence of the facts stated, but to show acts of ownership, or to explain local terms (*Malcolmson* v. *O'Dea,* 10 H.L.C. 593; *ante,* 112).

EXAMPLES.

Admissible.	*Inadmissible.*
Entries relating to the following matters have been received as being of a public nature:	Entries relating to the following matters have been rejected as being of a private nature:

Admissible.

The election, swearing in, disfranchisement, or restoration of a corporator (*Symmers* v. *Regem*, Cowp. 489; *Brown* v. *London Corp.*, 11 Mod. 225); the customs of a corporation (*Bruin* v. *Knott*, 12 Sim. 436); and its by-laws (*Holdsworth* v. *Dartmouth Corp.*, cited Ros. N.P., 18th ed. 217).—So, on a question of pedigree, entries in the books of a corporation have been received to prove that a member was received by a certain description (*Collins* v. *Maule*, 8 C. & P. 502); or was ordained and despatched as a missionary abroad (*Lauderdale Peerage*, 10 App. Cas. 692).

See further as to University and College books, *ante*, 354.

Inadmissible.

Proceedings against certain persons for refusing to pay toll (*Brett* v. *Beales*, M. & M. 419; *London* v. *Lynn*, 1 H.Bl. 214 *n*; *Marriage* v. *Lawrence*, 3 B. & Ald. 142); a right to the ownership of a house (*Waterford Corp.* v. *Price*, *sup.*); or to the appointment of a curate (*A.-G.* v. *Warwick*, 4 Russ. 222). So, to prove fraud or irregularity in the execution of a bond by a corporation, their books have been rejected as evidence for them, against a member of the corporation (*Hill* v. *Manchester Waterworks Co.*, *sup.*; *Holdsworth* v. *Dartmouth Corp.*, *opposite*).

By Statute. The books of corporations and public companies are in some instances rendered admissible by statute in proof of their contents, not only as to public, but also as to private matters. Thus, the registers of companies, subject to the *Companies Clauses Consolidation Act*, 1845, required by s. 9 to be sealed with the company's seal, and to contain the names and addresses of the shareholders, the shares (distinguishing each by its number) held by them, and the amounts paid thereon, are, in actions for calls by the company, made by s. 28 *primâ facie* evidence of the defendant being a shareholder and of the number and amount of his shares (see *Portal* v. *Emmens*, 1 C.P.D. 201, 212-213, per Lindley, J.); and by s. 98 the minute-books which are required to contain notes, minutes, or copies of the directors' appointments, contracts, orders, and proceedings of meetings, are, if signed by the chairman of such meetings, receivable in all courts as *primâ facie* evidence of the matters entered therein, of meetings having been duly convened and held, of the persons making or entering the orders, &c., being shareholders, directors or members of the committee, and of the signature of the chairman and the fact that he is such.

So, by the *Companies* (*Consolidation*) *Act*, 1908, the *Register* of members required by s. 25 to contain the names, addresses and occupations (if any) of the members; the shares (distinguishing each by its number) held by them; the amounts paid, or agreed to be considered as paid, thereon; and the dates of entry and cessation of membership, are *primâ facie* evidence of the matters directed or authorized by the Act to be inserted therein (s. 33, replacing s. 37 of the Companies Act, 1862). By s. 71 of the same Act (replacing s. 67 of the Companies Act 1862), the *Minute-books* required to contain minutes of all proceedings of general meetings and (where they are directors or managers), of its directors or managers, are, if purporting to be signed by the chairman of that or of the next succeeding meeting, evidence of the proceedings; and, until the contrary is proved, every general meeting of the company, or meeting of directors or managers, in respect of the proceedings whereof minutes have been so made, shall be deemed to have been duly held and convened, and all proceedings had thereat to have been duly had, and all appointments of directors, managers, or liquidators, shall be deemed to be valid. Minute-books under the repealed Act of 1856, s. 40, have been held evidence between shareholders, but not to prove a party a shareholder (*Fox's*

Case, 3 De G. J. & S. 465; and see *Maguire's Case,* 3 De G. & S. 31; and *Clarke* v. *Imperial Gas Co.,* 4 B. & Ad. 315); but under the Acts of 1862 and 1867, the register and minutes, &c., were received as *primâ facie* evidence of the ownership of shares against a director, though held to be rebutted, by his own conduct and that of the company (*Re Barangha Oil Co., Arnot's Case,* 36 Ch.D. 702, C.A.). And the chairman having *primâ facie* authority to decide all incidental questions which arise at such meeting and necessarily require decision at the time (*Henderson* v. *Bank of Australasia,* 45 Ch.D. 330), the entry by him in the minute-book of the result of a poll, or of his decision on all such questions, is *primâ facie* evidence of such result and of the correctness of such decisions (*Re Indian Zoedone Co.,* 26 Ch.D. 70.) As to the chairman's *Declaration* as to the due passing of resolutions at General Meetings, see *ante,* 370. By c. 220, "Where any company is being wound up, all books and papers of the company (*e.g.* an allotment book, *Re Great Northern Salt Works, Exp. Kennedy,* 44 Ch.D. 472, though no record appears of any board or committee having been held at that date, *id.*) and of the liquidators, shall, as between the contributories of the company (or an alleged contributory, *Re Barangah Co., sup.;* but as to strangers, see *Re Pyle Works,* 1891, 1 Ch. 173, 184), be *primâ facie* evidence of the truth of all matters purporting to be therein recorded." Minute-books of meetings of creditors under the Bankruptcy Act, 1914, s. 138, are similarly receivable (*ante,* 349, *post,* 561). As to the admissibility of certificates of incorporation, or of the proprietorship of shares, see *ante,* 369-70).

Informalities and Errors. Where the Act requires a register to be sealed, an unsealed register is inadmissible (*Birkenhead Co.* v. *Brownrigg,* 4 Ex. 426; *Cheltenham Co.* v. *Price,* 9 C. & P. 55; *Wolverhampton Co.* v. *Hawkesford,* 11 C.B. N.S. 456); but otherwise clauses as to the mode of signing minutes, keeping registers, and making official returns, are considered as directory only; it being sufficient if the provisions of the particular Act are substantially complied with (*Bain* v. *Whitehaven Ry.,* 3 H.L.C. 1; *East Gloucestershire Ry* v. *Bartholomew,* L.R. 3 Ex. 15; Lindley's Company Law, 6th ed. 143-8). Thus, company books have been received notwithstanding the omission of a shareholder's address, or of the amount paid, or of the distinctive numbers of his shares; and an official return will be admissible although its heading may be inaccurate, or although it does not purport to be signed by the proper officer, or is signed at a wrong time (Lindley, 74-85, and cases cited.)

A share ledger has been received as a register (*Weikersheim's Case,* L.R. 8 Ch. 831); as also a series of volumes, the last only of which, containing a recapitulation of the others, was sealed in accordance with the Act (*Inglis* v. *G.N.Ry.,* 1 Macq. 112). On the other hand, a rough memorandum-book or paper containing the names of, and shares held by, a portion of the shareholders, although sealed has been rejected as a register (*Wolverhampton Co.* v. *Hawkesford, sup.;* see Lindley, 76, 144-5); and so also a series of allotment sheets not intended as a register but only as materials from which one might be prepared (*Re Printing Co., Exp Cammell,* 1894, 2 Ch. 392, 398. *Aliter,* perhaps if the sheets had been treated by the Company as a register until a formal one existed, *per* Kay, L.J.).

Corrections. A company may correct errors in its own register, at least such as the Court would authorize or compel the correction of (*Hartley's*

Case, L.R. 10 Ch. 157; *Re Etna Co.,* Ir. R. 7 Eq. 264); or it may be allowed or compelled to do so, either under statutory provisions to that effect (as in the Companies (Consolidation) Act, 1908, ss. 32, 163), or by mandamus [Lindley, 79; 165-172; 1045].

Bankers' Books. Copies of entries in bankers' books—*i.e.* ledgers, day-books, cash-books, account-books, and all others kept in the ordinary business of the bank (whether by the bank making the entries, or its successors, and whether for daily use or only occasional reference, *Asylum for Idiots* v. *Handysides,* 22 T.L.R. 573)—are receivable in all legal proceedings (for or against any one, and though the originals might not be so, *Harding* v. *Williams,* 14 Ch. D. 197; *Lond. and Westr. Bank* v. *Button,* 51 Sol. Jo. 466; in *Arnott* v. *Hayes,* 36 Ch.D. 731, 735, however, Cotton, L.J., remarked that bank books were only evidence against a customer if he had recognized the account, and in the same case, reported 56 L. J. Ch. 844, 847, Fry, L.J., who decided *Harding* v. *Williams, sup.,* stated that the latter case had been disapproved by the C.A.) as *primâ facie* evidence of the entries, or of the matters, transactions, and accounts therein recorded, upon proof that (1) the book was, at the time of the entry, one of the ordinary books of the bank; (2) that it is in the custody or control of the bank (or of the successor of the bank which made the entry, *Asylum, &c.* v. *Handysides, sup.*); and (3) that the entry was made in the ordinary course of business [Bankers' Books Evidence Act, 1879 (42 & 43 Vict. c. 11); ss. 3 & 4; repealing Bankers' Books Evidence Act, 1876 (39 & 40 Vict. c. 48). Prior to these Acts, entries in bankers' books (other than those of the Bank of England, as to which see *ante,* 348) could only be proved by production of the originals on *subpœna duces tecum,* and calling the clerks who made the entries, (*Cooper* v. *Marsden,* 1 Esp. 1; though in *Furness* v. *Cope,* 5 Bing. 124, Best, C.J., allowed a clerk to prove that a certain party had no balance at the bank by production of a ledger kept by another clerk, remarking that this was sufficient to prove the negative, though it might not have been to prove the affirmative.)

The above proof may be given by a partner or officer of the bank, and either orally or by affidavit (s. 4). But the copy must be examined copy, proved orally or on affidavit by some person (who need not necessarily be an officer of the bank, *R.* v. *Allbut,* 75 J.P.R. 112; 6 Cr. App. R. 55) who has examined it with the original entry (s. 5), and a mere certified abstract has been rejected (*R.* v. *Seale,* 150 C.C.C. Sess. Pap. 329).

Production of Original Books. No banker or officer of a bank is in any legal proceedings to which the bank is not a party, compellable to produce the bank books, or to appear as a witness to prove their contents, unless by order of a judge for special cause (s. 6).

Inspection. Under s. 7, a Court or judge (or stipendiary magistrate, *R.* v. *Kinghorn,* 1908, 2 K.B. 949; though *quære* the Ld. Mayor, *R.* v. *Bradlaugh,* 15 Cox, p. 222 *n*), may, on the application of any party to a legal proceeding, empower him to inspect and take copies of entries in the accounts either of *parties* or *strangers* (provided such entries would have been admissible in evidence prior to the Act, *Howard* v. *Beall* 23 Q.B.D. 1; *South Staffordshire Co.* v. *Ebsmith,* 1895, 2 Q.B. 669; *M'Gorman* v. *Kierans,* 35 Ir. L.T.R. 84; *Re Marshfield,* 32 Ch.D. 499; *Lister* v. *Varley* 89, L.T.

Jo. 232; but see *Pollock* v. *Garle,* 1898, 1 Ch. 1, in which the C.A. refused to make such an order in the case of third persons who were neither actual nor constructive parties to the case, *e.g.* as to the bank balance of a company, in an action against one of its directors for inducing a purchase of its shares by alleged misrepresentation as to such balance; and *cp. L'Amie* v. *Wilson,* 1907, 2 Ir. 130); and even in the case of Banks in Scotland and Ireland (*Kissam* v. *Link,* 1896, 1 Q.B. 574), for the purpose of the proceedings (s. 7; see *Parnell* v. *Wood,* 1892, P. 137; *Fitzpatrick* v. *M'Donald,* 30 L.R.I. 249; *Perry* v. *Phosphor Co.,* 71 L.T. 854); but not for ulterior purposes, *e.g.* to support a libel stating that the plaintiff was a man of no means (*Emmott* v. *Star Newspaper Co.,* 62 L.J.Q.B. 77; *R.* v. *Bono,* 29 T.L.R. 635). Such order must, unless otherwise directed, be served upon the bank three clear days (exclusive of Sundays and bank holidays) before it is to be obeyed (s. 7). The Court may (*Arnott* v. *Hayes,* 36 Ch.D. 731, C.A.), though it should not generally (*L'Amie* v. *Wilson, sup; Davies* v. *White,* 53 L.J.K.B. 275) make the order *ex parte,* and also without any affidavit in support of the application—*e.g.* where the materiality of the entries appears by the pleadings, but the inspection should be limited to the period covered by the matters in dispute (*Arnott* v. *Hayes, sup.*).

Meaning of "Bank." The word "Bank" is (by s. 9) restricted to (1) banks which have made a return to the Commissioners of Inland Revenue (such return may be proved by a copy verified by the affidavit of a partner or officer, or by producing a newspaper purporting to contain such copy published by the Commissioners); (2) Savings Banks certified under the Acts relating thereto (such certificates may be proved by an office or examined copy of the certificate); and (3) Post Office Savings Banks (proved to be such by the certificate of the Postmaster-General or one of his secretaries). But by 45 & 46 Vict. c. 72, s. 11, sub-s. 2, the word is extended to include any banking company to which the Companies Acts of 1862 to 1880 apply, and which the Registrar of Joint Stock Companies shall have certified to have furnished to him the list and summary with the addition specified by the Act; and where the bank is a company so registered, such certificate *must* be produced before the evidence can be used.

As to the practice under this Act see, generally, Ann. Pr. Notes to O .37, r. 7.

Banker and Customer. Pass-Books. In actions between the Bank and a customer, production of the original books may be compelled without a special order under the above Act (s. 6); and the pass-book operates as an admission against either (*Gaden* v. *Newfoundland Bank,* 1899, A.C. 281, 286). Thus, the pass-book is *prima facie* evidence against the banker of the state of the customer's account, though he is not estopped from correcting mistakes therein (*Gaden* v. *Newfoundland Bank, sup.; Gordon* v. *Bank of Syria,* 1896, Times, Dec. 7; *Holland* v. *Manchester Banking Co.,* 25 T.L.R. 386; and see *Brighton Syndicate* v. *Lond. and Cy. Bank,* 39 L.Jo. 168, where the bank had negligently allowed the customer's manager to make fraudulent entries), unless the customer has been induced thereby to alter his position (*Brighton Empire* v. *Lond. & Cy. Bank,* 1904, Times, Mar. 24; *Skyring* v. *Greenwood,* 4 B. & C. 281); and the pass-book is also evidence,

though not conclusive, against the customer (*Williamson* v. *W.*, L.R. 7 Eq. 542; *Chatterton* v. *Lond. & Cy. Bank,* 39 L.Jo. 168 C.A.), thus the mere fact of his returning it to the bank without objection does not constitute it a settled account (*Kepitigalla Co.* v. *National Bank of India,* 1909, 2 K.B. 1010; *Vagliano* v. *Bank of England,* 23 Q.B.D. p. 263, *per* Bowen, L.J.), nor preclude him recovering (*Walker* v. *Manchester &c., Banking Co.,* 108 L. T. 728); nor can the directors of a building society be held to have ratified an illegal borrowing by simply returning a pass-book (*Blackburn Building Soc.* v. *Cuncliffe,* 22 Ch.D. 61, 72).

CHAPTER XXXIV.

PUBLISHED HISTORIES, MAPS, DICTIONARIES, GRAMMARS AND ALMANACS. SCIENTIFIC, PROFESSIONAL, AND MERCANTILE RECORDS.

HISTORIES, (*a*) Approved public and general histories are admissible as in the nature of public documents or reputation, to prove ancient facts of a *public* or *general, though* not of a *private, particular* or *local, nature* [*Read* v. *Lincoln* (*Bp.*) 1892, A.C. 644, 653; *contra, Darby* v. *Ouseley,* 1 H. & N. 1, must now be considered as over-ruled].

The Court may also, as we have seen, irrespective of this rule, take judicial notice of public facts, past or present, affecting the government and constitution of the country, and may refer to accredited histories to satisfy itself of their existence (*ante,* 21, 26). The only practical difference between these two modes of proof is that the evidence in the former case goes to the jury, and in the latter to the Court. As to declarations by deceased persons and reputation respecting public and general rights, see *ante,* chap. xxv.; as to public Registers and Records, chap. xxx; and as to Public Inquisitions, Surveys, Assessments, and reports, chap. xxxi.

[Tay. s. 1785; Ros. N.P., 18th ed. 216; Steph. art. 35.]

MAPS. Published maps generally offered for public sale are, on similar grounds, admissible to show the relative positions of towns, countries, and other matters of geographical notoriety [*R.* v. *Orton,* cited Steph. art. 35, where maps of Australia were received to show the situation of various places at which the defendant was alleged to have lived; *R.* v. *Jameson,* 1896. Trial at Bar, Q.B., July 21, Official Rep. 91-5 where standard maps of Rhodesia and the Transvaal were admitted to show the general positions of the places referred to; *Edmundsen* v. *Amery,* Times, Jan. 28, 31, 1911, where War Office Maps were admitted to show the position of various places in S. Africa].

Judicial notice will, as we have seen, also be taken of the geographical position and general names applied to the districts in the Admiralty charts (*Birrell* v. *Dryer,* 9 App. Cas. 345; *ante,* 22).

Maps and surveys may be admissible (1) as *public documents* under chap. xxxi.; (2) as *quasi-public* documents under the present heading to prove general geographical facts; (3) as *reputation,* under chap. xxv.; and (4), private maps and plans may be received as *admissions* against the party under whose authority they were prepared, or his successors in title (*ante,* chaps. xviii.-ix.; *Craven* v. *Pridmore* 18 T.L.R. 282; *M'Kenna* v. *Howth,* 27 Ir. L.T.R. 48; see, however, *Phillips* v. *Hudson,* explained *ante,* 358); though not in their favour as against strangers (*Pollard* v. *Scott, Peake,* 19; *Wakeman* v. *West,* 7 C. & P. 479). Maps on the back of a lease or conveyance, however, are

part of the contract, and, as such, evidence for or against both parties and their successors, of what was demised or conveyed (*Wakeman* v. *West, sup.;* as to how far they restrict the deed, see *post,* 624).

Measurement of Distance by Maps, &c. Where, to show that an offence had been committed within 500 yards of a County boundary, it was claimed that the distance could be measured by the nearest road, Parke, B., remarked "I think I must take the distance measured geometrically from the boundary to the spot" [*R.* v. *Wood,* (1841), 5 Jur. 225]. So, where in an action for breach of a covenant not to trade within half a mile of the plaintiff's premises, the question was whether the distance should be measured by the road, by the fields, by the nearest available means of access, or as the crow flies, the court held that it should be measured on the Ordnance Map, by the compass, taken from the nearest point of one house to the nearest point of the other [*Mouflet* v. *Cole,* (1872), L.R. 8 Ex, 32; this, as Blackburn J., explained, though it is what would commonly be meant by drawing a circle of half a mile radius round the spot in question, is not precisely the same as an actual straight line between two points, since in the map the surface is treated as a plane and in drawing a straight line it will vary in level.] Under certain acts, *e.g.* the Parliamentary Voters Registration Act, 1843, s. 76, the Municipal Corporation Act, 1882, s. 231, measurement by map is expressly sanctioned by the words "in a straight line on a horizontal plane," as Blackburn, J., pointed out in *Mouflet* v. *Cole, sup.* And, now, under the Interpretation Act, 1889, s. 34, measurement of distance under Acts passed since 1889 is, unless a contrary intent is expressed, to be in this manner, *i.e.* "in a straight line on a horizontal plane." In the Licensing Act, 1910, s. 61, however, a contrary intent is expressed and distances thereunder are to be measured by "the nearest public thoroughfare." This, in ordinary cases, can be done by surveyors going over such thoroughfares with a chain; but to measure *de novo* an imaginary straight line over intervening obstacles obviously requires scientific calculation (see 80 J.P. Jo. 3).

DICTIONARIES AND GRAMMARS. Standard dictionaries are admissible to show the meaning of words [*Mathew* v. *Purchings,* Cro. Jac. 203; Answer of the Judges to the H.L. (1789), 22 How St. Tr. 302, "Judges can resort to grammars and glossaries if they want such assistance"; *R.* v. *Tomlinson,* 1895, 1 Q.B. p. 709; *Homer* v. *H.,* 8 Ch.D. p. 775; *Re Rayner,* 1904, 1 Ch. p. 188; *Yangtsze Ins. Assn.* v. *Indemnity Ass. Co.* 1908, 2 K.B. 504, 507], though whether as evidence *per se,* or merely to refesh the memory of the judge on a matter judicially noticed (*ante,* 26), is not very clear. Probably the former view may be supported on the analogy of histories, maps, and scientific tables; thus in *R.* v. *Peters,* 16 Q.B.D. 636, 641, Ld. Coleridge, C.J., observed : "It is a well-known rule of courts of law that words should be taken to be used in their ordinary sense, and we are therefore sent for instruction to these books." So, also, Sir J. Wigram: "For the purpose of ascertaining what the characters or words in a document are, the court may call a witness, as it would look into a dictionary for the same purpose" (Extr. Ex. s. 56). See, however, *Canada* v. *Commrs., &c., infra.*

Although, however, dictionaries (unlike expert or other oral evidence, *Camden* v. *Commrs. of Inl. Rev.,* 1914, 1 K.B. 647-50 C.A.; *post,* 390),

are admissible to show the meaning of *statutory* words, they are not always reliable guides thereto (*R.* v. *Peters, sup.; Midland Ry* v. *Robinson,* 15 App. Cas. 19, 34); nor are they necessarily safe authorities as to *technical* or *foreign* terms, which must usually be explained by experts (*post,* 387-8; moreover, the meaning of English *legal* terms can, it is said, only be shown by the decisions of Courts, or the *dicta* of recognised text-books, or, perhaps, by the practice of conveyancers (Underhill on Wills, 7; *Re Athill,* 16 Ch.D. 211, 223); though law dictionaries have also been referred to (*Blandford* v. *Marlborough,* 2 Atk. p. 545; *Re Bright-Smith,* 31 Ch.D. p. 317).

ALMANACS. Judicial notice will be taken of the Almanac annexed to the Common Prayer Book, as being part of the law of the land, but not of matters not contained therein—*e.g.* the time of the rising or setting of the sun; nor is an almanac evidence of such matters (*Tutton* v. *Darke,* 5 H. & N. 647; *Collier* v. *Nokes,* 2 C. & K. 1012; *ante,* 25).

SCIENTIFIC AND PROFESSIONAL, &c., RECORDS. The *Carlisle Tables* have been admitted to prove the average duration of life at a particular age, on proof that they were accepted as authoritative by insurance companies (*Rowley* v. *L. &N. W. Ry.,* L.R. 8 Ex. 221; approved in *Garman* v. *Brighton Electric Co.,* 1890, Q.B.D. June 28, *ex rel.*). Dr. Wharton distinguishes between works of exact and those of inductive science, the former being, he states, admissible in America, the latter not (ss. 665-667). The report of a deceased engineer as to the construction of the Thames Tunnel has been received as evidence of scientific facts beyond living memory, on proof that it was accepted as accurate amongst engineers (*East London Ry,* v. *Thames Conservators,* 90 L.T. 347; 68 J.P. Rep. 302). Scientific and professional treatises may also, as will be seen, be used to refresh the memory of experts (*post,* 392-3). As to Scientific Instruments, see *ante,* 162-3, 170-1.

The British Pharmacopœia, published by the Medical Council under the authority of the Medical Acts, 21 & 22 Vict. c: 90, s. 54; 25 & 26 Vict. c. 91, ss. 2, 3, is admissible, though not conclusive, as the recognised professional standard for the proper ingredients of drugs, &c. (*White* v. *Bywater,* 19 Q.B.D. 582; *Dickens* v. *Randerson,* 1901, 1 K.B. 437; *Boots* v. *Cowling,* 88 L.T. 539; *Hudson* v. *Bridge, id.* 550; *ante,* 109); and by 31 & 32 Vict. c. 121, s. 15, a penalty of £5 is imposed for compounding them otherwise than in accordance therewith.

Stock Exchange Journals have been admitted to show the price at which stock was made up at the fortnightly settlement, on proof that they were generally accepted as accurate, though any criticism thereof would also have been considered (*R.* v. *Perryman,* 147 C.C.C. Sess. Pap. 1099, *per* A. T. Lawrence, J.). And the *Racing Calendar* was accepted by the magistrate's court in Dublin to prove that a particular horse won a race on a certain day (Sunday Times, Sep. 22, 1918).

EXAMPLES.

Admissible.

(*a*) Published histories have been admitted to prove the following public matters:

Speed's Chronicle, to prove the date of the decease of Isabel, Queen Dowager of Ed. II. (*Ld. Brownker* v. *Atkyns*, Skin. 14; citing also *Ld. Bridgewater's Case*, *id.* 15); and Prince Cantemir's History of the Ottoman Empire, to prove a universal custom of the Mahomedan religion (*R.* v. *Warren Hastings*, cited 2 Phil. & Arn. Ev., 10th ed. 156, and by Lord Ellenborough in *R.* v. *Picton*, 30 How. St. Tr. 492).—And, on a question of early ecclesiastical doctrine and usage, Collier's Ecc. History, Hooker's Polity, and other authoritative historical and theological works have been admitted, as well as old contemporary pictures and engravings [*Read* v. *Lincoln* (Bp.), 1892, A.C. 644, 652; *Ridsdale* v. *Clifton*, 2 P.D. 276. Old engravings, however, have been rejected as evidence of reputation (*Giant's Causeway Co.* v. *A.-G.*, cited *ante*, 305].

In *Neale* v. *Fry* (1684), cited under slightly different names in the three reports of *Stayner* v. *Droitwich*, 1 Salk. 281, Skin. 623, and 12 Mod. 85, it is stated that chronicles were admitted to prove the date of King Philip's assumption of the title of King of Spain. But this is incorrect, as appears from a full report of the same case, *sub nom.* Lady Ivy's Trial (*Mossam* v. *Ivy*). Here the defendant set up two deeds of Philip & Mary, in which Philip was described as King of Spain, and the plaintiff showed by several Acts of Parliament and other records that Philip had not, at the date of the deeds, assumed that title, so that the deeds were probably forged; but it does not appear that he tendered any Chronicles for that purpose. The defendant, however, did tender such evidence to show when 'Charles V.' had resigned the Crown of Spain in favour of Philip, but it was rejected by Jeffreys, C.J., who remarked, "is a printed history, written by I know not who, an evidence in a Court of law?" [See Peake, Ev. 5th ed. 81-3; Tay. s. 1785 *n*].

Inadmissible.

(*a*) Published histories have been rejected to prove the following private or local matters:

The Chronicles of Stowe and Dugdale, to prove the creation of a peerage (*Vaux Peerage*, 5 C. & F. 526); Camden's Britannia, to prove a local custom to sink salt-pits (*Steyner* v. *Droitwich*, 1 Salk. 281); Dugdale's Monasticon, to prove that a certain abbey was an inferior abbey (*id.*, the original records being producible); Coke's Institutes to prove the historical facts mentioned therein [*R.* v. *Reffit* (1734). Cunningham, 36]. Nichols's History of Brecknockshire, to prove parish or county boundaries (*Evans* v. *Getting*, 6 C. & P. 586; Alderson, B., remarked, however, that "it was not like a general history of Wales"); Habington's Survey of Worcestershire, written in the 17th century, and regarded as a historical authority, but only recently published, to prove the physical condition of a parish church when the author saw it (*Fowke* v. *Berington*, 1914, 2 Ch. 308; *ante*, 302). And a public history has been rejected to prove that King Alfred founded a certain college (*Cockman* v. *Mather*, 1 Bernad. 14).

CHAPTER XXXV.

REPUTATION, OPINION, INFERENCE, BELIEF.

The general reputation prevailing in the community, and the opinions, inferences, or beliefs of individuals (whether witnesses or not), are inadmissible in proof of material facts.

Principle. Evidence of this nature is sometimes said to be excluded by the hearsay rule (*Wright* v. *Tatham,* 7 A. & E. pp. 385-9, *per* Parke, B.; Gulson on Proof, s. 353); but it is, in general, inadmissible whether delivered on oath or not. The grounds more commonly assigned for its rejection are that opinions, in so far as they may be founded on no evidence, or illegal evidence, are worthless, and in so far as they may be founded on legal evidence, tend to usurp the functions of the tribunal whose province alone it is to draw conclusions of law or fact [Best, s. 511; *cp.* Gulson on Proof, ss. 347-8; *Carter* v. *Boehm,* 3 Burr, p. 1918; *North Cheshire Co.* v. *Manchester Co.,* 1899, A.C. 83, 85; *ante,* 56, 65; and see further, *infra.* For a criticism of these grounds see Wigmore Ev. ss. 1920-1].

History of the Rule. The rules against Hearsay and Opinion evidence are thought to have had a common source in the old demarcation between the province of the witnesses and that of the jury. As to hearsay, see *ante,* 218, 222-4. As to Opinions, while the witnesses swore to say what they had "seen and heard," the oath of the jury included, also, what they knew by way of reasoning and inference. Thus, in an early case it was held that the witnesses were not challengeable "because the verdict will not be received from them, but from the jury; and the witnesses are to be sworn 'to say the truth,' without adding 'to the best of their knowledge'; for they should testify nothing but what they . . know for certain, that is to say what they see and hear" [Anon. Lib. Ass. 110, 11 (1349)]. "It is not satisfactory for the witness to say that he thinks or persuadeth himself; and that for two reasons by Coke: 1st because the judge is to give an absolute sentence, and therefore ought to have more sure ground than thinking; 2nd, the witness cannot be prosecuted for perjury; 3rd, that judges are always to give judgment *secundum allegata et probata,* notwithstanding private individuals think otherwise" [*Adams* v. *Canon,* 1 Dyer, 53 *b.* note (1621)]. "A witness swears but to what he hath heard or seen, generally or more largely to what hath fallen under his senses. But a juryman swears to what he can infer and conclude from the testimony of such witnesses by the act and force of his understanding" [Bushell's Case, (1670) Vaughan, 135, 142,]. The rule against opinion evidence is not mentioned in Gilbert's Ev., written before 1726, nor in Buller's N.P., written before 1767. But it appears in Peake's Ev. (1801), 142: "Though witnesses can in general speak only to facts, yet in questions

of science, persons versed on the subject may deliver their opinion on oath on the case proved by others"; in Evans' Pothier (1806), II. 216: "There are also many cases in which witnesses speak from judgment and opinion without reference to technical knowledge, *e.g.* evidence of character and other testimony amounting to a general conclusion from particular facts"; in Espinasse N.P. (1811), 411: "So, also, as to value, it must always rest in opinion only; and the like as to the sobriety of a party, and other matters of proof which from their nature can only be given from the opinion which the witnesses may form"; as well as in Starkie Ev. (1824), and other text-books. In general, therefore, the rule has been that witnesses could not speak to their opinions any more than to hearsay; though in certain cases reputation was always received (*ante,* 294). By later authorities, the admission of expert testimony is treated as an exception to this rule; but it must be remembered that from very ancient times it was the practice for the *Court* to be assisted by skilled witnesses, *e.g.,* 1354 by surgeons, as to whether a wound was mayhem or not (Lib. Ass. 145, 5); and it is probable that for a long time after ordinary witnesses were allowed to testify to the jury, experts were still thought of the old way, as helpers of the Court, the latter instructing the jury on the point on which such evidence was furnished, until finally the modern conception came in of regarding experts as testifying like other witnesses, directly to the jury [Thayer, Pr. Tr. Ev. 100-1, 196, 498-9, 519, 523; *id.* Cas. Ev. 2nd ed. 672-3; Wigmore Ev. s. 1917; Salmond, Essays, 81; as to experts, see 15 Harv. L. Rev. 40.]

Admissibility for other Purposes. Reputation is sometimes receivable for other purposes than to prove the existence of the facts reputed. Thus, as we have seen, it may be received when convertible with character (*ante,* 188); or when affording reasonable grounds for a party's belief (*Sheen* v. *Bumpstead,* cited, *ante,* 155); or when showing the state of the public mind (*R.* v. *Vincent, ante,* 84; Tay. s. 579). So books are admissible to show the opinions of their writers on a given subject, or the sense in which words are used; though such opinions cannot be made evidence of specific facts (*Darby* v. *Ouseley,* 1 H. & N. 1).

On the other hand, the prevalence of a public rumour or reputation is not admissible to bring home knowledge of its subject-matter to a specific individual (*ante,* 146); nor can a libel be justified by proof of the existence of rumours to the same effect as the libel (*Lockhart* v. *Jelly,* 19 L.T. 659; and see *Scott* v. *Sampson,* 8 Q.B.D. 491, cited *ante,* 191).

EXCEPTIONS.

To the excluding rule above stated there are important exceptions, General Reputation, and the Opinions of Experts or Non-experts being admissible in the cases, and to prove the facts, enumerated below.

Sir James Stephen states that "oral evidence must in all cases whatever be direct; that is, if it refers to an opinion, or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds" (Digest Ev. art. 62). But, though this is generally true, it is not invariably so, witnesses being in some cases allowed to testify to the

opinions of third persons who were not upon oath, *e.g.* when the opinion is that of the community (Reputation); or when it is part of the *res gesta* (*ante*, 64-5; *Manchester Brewery* v. *Coombs*, *ante*, 75; *Wright* v. *Tatham*, *ante*, 85; *Du Bost* v. *Beresford*, *infra*), or part of an admission (*ante*, 232), or of a declaration against interest (*ante*, 279), or of a dying declaration (*ante*, 320); or in rare cases when it relates to age (*ante*, 371)), or to foreign law (*infra*), When the opinion is that of a witness, it must generally be given *vivâ voce;* though in interlocutory cases (see Non-Experts, *infra*), and sometimes, on grounds of convenience or expense, in others, affidavits are allowed (*Wilson* v. *W.*, 1903, P. 157).

(*A*) **GENERAL REPUTATION.** General reputation is admissible to prove the existence of the facts mentioned below, partly by reason of the difficulty of obtaining better evidence in such cases, and partly because "the concurrence of many voices," among those most favourably situated for knowing, raises a reasonable presumption that the facts concurred in are true. [Tay. ss. 577-578; Stark Ev., 4th ed. 43-50, 186-190; Whart. ss. 252- 256.]

(1) **Public Rights.** General reputation is admissible to prove public rights under the same limitations as hearsay on this subject (*ante*, chap. xxv.). (2) **Pedigree.** And family repute is similarly receivable to prove matters of pedigree (*ante*, 312). (3) **Marriage.** Evidence of general reputation (not confined to family repute, or to questions of pedigree), is admissible in proof or disproof of marriage (*Doe* v. *Fleming*, 4 Bing. 266; *Evans* v. *Morgan*, 2 Cr. & J. 453, where it was held sufficient in the absence of cross-examination; Steph. art. 53; Tay. s. 578); and has sometimes been accepted in preference to the oath of the party (*Elliott* v. *Totnes Union*, 57 J.P. 151). And it is not inadmissible because divided, discontinuous, or restricted to a particular class or locality, though these circumstances may impair its weight (*Andrews* v. *Ulthwaite*, 2 T.L.R. 895; *Re Haynes*, 94 L.T. 431; *Lyle* v. *Elwood*, 19 Eq. 98). But the testimony must be general; if it is based merely on the statements of some particular person, it ceases to be admissible as general reputation, and can only be tendered on a question of pedigree, and as the statement of a deceased relation (*Shedden* v. *A.-G.*, 30 L.J.P.M. 217; *ante*, 312). In cases of bigamy, divorce, and petitions for damages by reason of adultery, however, stricter proof is required. Thus, on a charge of bigamy, the prisoner's admission of a former valid marriage (*ante*, 233), or his marriage certificate coupled with evidence of cohabitation, though without testimony of any witness present at the marriage (*R.* v. *Simpson*, 15 Cox, 323), or, in case of a Jewish marriage, even such testimony without the production and proof of the marriage contract itself (*R.* v. *Althausen*, 17 *id.* 630; *ante*, 47), is insufficient; though *aliter*, it has been said, to prove a former marriage by the *prosecutor* (*R.* v. *Wilson*, 3 F. & F. 119). As to foreign marriages, see *ante*, 343. (4) **Identification.** To prove that a libel referred to the plaintiff, evidence that he was publicly jeered at in consequence of the libel (*Cook* v. *Ward*, M. & P. 99), or, in the case of a caricature, exclamations of recognition by spectators in a public gallery (*Du Bost* v. *Beresford*, 2 Camp. 511), are admissible. So, also, the reputation prevailing in a testator's family or neighbourhood, respectively, to identify a legatee (*Re Gregory*, 34 Beav. 600), or the subject-matter of a devise (*Anstee* v. *Nelms*, 1 H. & N. 225; *Re Steel*,

1903, 1 Ch. 135; *post,* 612). And the same species of evidence has been admitted to identify a picture (*Burton* v. *Agnew,* Times, Feb. 4th, 1913).

(*B*) **OPINIONS OF EXPERTS.** The opinions of skilled witnesses are admissible whenever the subject is one upon which competency to form an opinion can only be required by a course of special study or experience. [Tay. ss. 1419-1425; Best, ss. 513-516; Ros. N.P. 177-8; Steph. arts. 49-50.]

When the subject is one upon which the jury is as capable of forming an opinion as the witness, the reason for the admission of such evidence fails, and it will be rejected (*Ramadge* v. *Ryan,* 9 Bing. 333). So, also, when the Court is assisted by Assessors, as in Admiralty cases involving questions of nautical skill (*The Kestrel,* 6 P.D. 182; *The Sir R. Peel,* 4 Asp. 321; *The Assyrian,* 63 L. T. 91); in which cases, however, if the judge differ from the Assessors, his view must prevail (*The Beryl,* 9 P.D. 137; *The Gannet,* 1900, A.C. 234, 237).

Reports, &c., ordered by the Court. In addition to the scientific evidence adduced by the parties, the Court, for its own guidance and information, may (in cases other than criminal proceedings by the Crown, as to which see *infra*) and even without the consent of the parties (*A.-G.* v. *Birmingham, &c., Board,* 1912, A.C. 788), order independent *inquiries and reports* to be made, or *experiments* to be tried either in or out of Court (*Marconi* v. *British Co.,* Times, Dec. 15th, 1910), by experts of its own selection, and may act on such reports [Arbitration Act, 1889, ss. 13, 14, repealing, but virtually re-enacting, Jud. Act, ss. 56, 57; see *Colls* v. *Home Stores,* 1904, A.C. 179, 192; *Badische* v. *Levinstein,* 24 Ch. D. 156; *Enderwick* v. *Allden,* 88 L.T. Jo. 12; *Weed* v. *Ward,* 40 Ch. D. 555; *Kennard* v. *Ashman,* 10 T. L. R. 213; *A.-G.* v. *Birmingham, &c., Board, sup.;* but see *Slingsby* v. *A.-G.,* 32 T.L.R. 364, C.A.; affd. s. n. *A.-G.* v. *Slingsby,* 33 *id.* 120 H.L., where, in a legitimacy case, the calling by the judge himself of a sculptor to give his opinion as to the resemblance of the child (produced) to its alleged parents, though with the assent of the parties, was held irregular; *ante,* 118]. So, in the Chancery Division, a judge in chambers may, in such way as he thinks fit, obtain the assistance of accountants, merchants, engineers, actuaries, and other scientific persons, the better to enable any matter at once to be determined, and may act upon their certificates (O. 55, r. 19); or he may order photographs to be taken in the presence of both sides (*Hudson* v. *Ashby,* 1896, 2 Ch. 21-2). Where an expert has been so appointed he occupies a quasi-judicial position and should not be sworn or examined as a witness (*Broder* v. *Saillard,* 24 W.R. 456; *Hugo* v. *Larkins,* 3 B.W.C.C. 228); nor should he himself examine or cross-examine the witnesses (*Earwicker* v. *Lond. Graving Dock Co.,* 32 T.L.R. 377 C.A.), nor act as Assessor when he has already acted as Referee (*Wallis* v. *Soutter,* 59 Sol. Jo. 285, C.A.; as to the certificate of a Medical Referee, see *ante,* 371). The reports of Court Valuers under the Land Law (Ir.) Act, 1881, have, however, been held, in analogy to testimony by expert witnesses, impeachable by evidence that the valuers were biased, mistaken, or acting on erroneous principles —proved, in the last case, by their declarations that such principles were adopted by them (*Gosford* v. *Alexander,* 1902, 1 I.R. 139). As to medical

inspection and reports in Nullity suits, see Rayden on Divorce, 155-6; and as to the admissibility of Reports by judicial officers, *post*, 434-5.

Under the Criminal Appeal Act, 1907, s. 9 (*d*) (*e*), questions involving prolonged examination of documents or accounts, or scientific or local examination, may be referred to a special commissioner, whose report may be acted on so far as the Court think fit (*R.* v. *Holt*, 14 Cr. App. R. 152); and the Court may, also, appoint special experts to assist it as assessors. The report of a prison doctor, made to the authorities, as to a prisoner's insanity, has been allowed to be read as evidence for the prisoner, the doctor being too ill to attend and the Crown not objecting (*R.* v. *Rutherford*, Times, Ap. 9, 1919).

Competency and Credit. The competency of the expert is a preliminary question for the judge, and is one upon which, in practice, considerable laxity prevails. Though the expert must be "skilled," by special study or experience, the fact that he has not acquired his knowledge professionally goes merely to weight and not to admissibility (*R.* v. *Silverlock*, 1894, 2 Q.B. 766). As to who are experts in Science, Art, Foreign law, etc., see *infra*, 386-9.

Credit. The fact that the expert was not in a fit state of mind or health to form a proper opinion; or is interested, or corrupt; or has expressed a different opinion at other times, may be elicited in cross-examination, or, if denied, independently proved (*Alcock* v. *Royal Exchange Assur.*, 13 Q.B. 292; *Gosford* v. *Alexander*, 1902, 1 I.R. 139; Tay. s. 1445; *post*, 477-9). And when a theory advanced by an expert was very extraordinary, he was allowed to be cross-examined by his own side (*R.* v. *Cook*, 147 C.C.C. Sess. Pap. 466, *per* Darling, J.).

Value of Expert Evidence. The testimony of experts is usually considered to be of slight value, since they cannot be indicted for perjury, are proverbially, though perhaps unwittingly, biased in favour of the side which calls them, as well as over-ready to regard harmless facts as confirmation of preconceived theories; moreover, support or opposition to given hypotheses can generally be multiplied at will (*Re Dyce Sombre*, 1 Mac. & G. 116, 128, *per* Ld. Cottenham; *Tracy Peerage*, 10 C. & F. p. 191, *per* Ld. Campbell; *Abinger* v. *Ashton*, 17 Eq. pp. 373-4, *per* Jessel, M.R.; Tay. ss. 58, 68; Steph. 2 Jur. Soc. Pap, 236; *id.*, General View of Cr. Law, 2nd ed., 199; 11 Harv. L. Rev. 169; 15 *id.* 40). Indeed, where the jury accept the mere untested opinion of experts in preference to direct and positive testimony as to facts, a new trial may be granted (*Poynton* v. *P*, 37 Ir. L.T.R. 54; *Aitken* v. *McMeckan*, 1895, A.C. 310; *cp. Newton* v. *Ricketts*, 9 H.L.C. 262, 266). In *Bowden* v. *B.*, 42 L. Jo. 402, the Court accepted the evidence of a wife as to the paternity of a 10 months child in spite of the unanimous opinion of several doctors. And in *R.* v. *Follett*, 47 L. Jo. 34 (1912), the Recorder of London went the length of stating that, in forgery cases, the practice of calling experts in handwriting had been discontinued in consequence of the grave mistakes they had made.

Subjects of Expert Testimony: Science, Art, Trade, Technical Terms, Handwriting, Foreign Law. (*a*) *Science and Art.* The opinions of medical men (under which term unqualified practitioners, hospital students, and dressers have occasionally been permitted to testify, Best, s. 516), are admissible upon questions within their own province—*e.g.* insanity, the causes of disease or death, the effects of poisons, the consequence of wounds, the conditions of gestation (*Gardner Peerage*, Le March, R.), the effect of hospitals

upon the health of a neighbourhood (*Metrop. Asylums District* v. *Hill,* 47 L.T. 29); those of actuaries, or accountants familiar with the business of life insurance, as to the average duration of life with respect to the value of annuities (*Rowley* v. *London & N. W. Ry.,* L.R. 8 Ex. 221); those of naturalists as to the ability of fish to overcome obstacles in a river (*Cottrill* v. *Myrick,* 3 Fairf. 222); those of an expert in forestry as to the probable object with which certain plantations had been laid out (*Weld-Blundell* v. *Wolseley,* 1903, 2 Ch. 664); and so with other branches of science. As to patent cases, see *infra,* 393. The opinions of artists, art critics, museum officials, dealers, and restorers are admissible as to the genuineness (*Huntington* v. *Lewis,* 1917, Times, May 16-24; *Belt* v. *Lawes,* 1882, id. Dec. 12-16), merit (*Whistler* v. *Ruskin,* 1878, *id.* Nov. 26), likeness to a sitter, or decency (*R.* v. *Blind,* 1892, Times, April 29, tried at Bow Street) of a work of art; those of engineers as to the cause of obstruction to a harbour (*Folkes* v. *Chadd,* 3 Doug. 157); those of engravers as to the impressions from a seal (*id.*), or the probability that a will was written over erased pencil marks (*R.* v. *Williams,* 8 C. & P. 434); those of officers of a fire-brigade as to the cause of a fire (*R.* v. *Heseltine,* 12 Cox, 404); those of military men as to a question of military practice (*Bradley* v. *Arthur,* 4 B. & C. 295); those of post-office clerks as to post-marks (*Abbey* v. *Lill,* 5 Bing. 299); those of shipbuilders, marine surveyors, and engineers as to the strength and construction of a ship (*The Robin,* 1892, P. 95); and, when the Court is not sitting with Assessors those of nautical men as to the proper navigation of a vessel (*Sills* v. *Brown,* 9 C. & P. 601; *Fenwick* v. *Bell,* 1 C. & K. 312; *ante,* 385).

Trade. Market Value. 'Materiality' in Policies, &c. The opinions of shopkeepers are admissible to prove the average waste resulting from the retail sale of goods (*McFadden* v. *Murdock,* I.R. 1 C.L. 211); those of persons conversant with a market, to prove market value (Wigmore, ss. 711-21); those of accountants to prove what losses are chargeable to capital (*Bond* v. *Barrow Co.,* 1902, 1 Ch. 353); and those of business men to prove the meaning of trade terms (*Robertson* v. *Jackson,* 2 C.B. 412; provided the witness is first asked whether there is any generally understood meaning attached thereto, *Curtis* v. *Peek,* 13 W.R. 230; *post,* 399). So, though formerly doubtful, it is now well settled that the opinions of underwriters are receivable as to what facts are "material" in a policy of marine assurance (*Scottish Shire Line* v. *London, &c., Co.,* 1912, 3 K.B. 51, 70; *Thames, &c., Co.,* v. *Gunford,* 1911, A.C. 529, 538-9; for the earlier cases, see 1 Smith, L.C., 12th ed., 556, notes to *Carter* v. *Boehm;* and generally as to what facts and representations are material, see Marine Ins. Act, 1906, ss. 18, 20). And the opinions of medical men are similarly admissible as to what maladies are material in an insurance proposal (*Yorke* v. *Yorkshire Co.,* 1918, 1 K.B. 662). As to the opinion of tradesmen upon whether a trade name was calculated to deceive, see *ante,* 65, upon the operation of a covenant in restraint of trade, *post,* 394, and to prove trade customs, *ante,* 106. On income tax enquiries the Commissioners may, but are not bound to, receive expert evidence (*R.* v. *General Income Tax Commrs.,* 27 T.L.R. 353).

Technical Terms. Local, foreign, or technical terms (other than those of English law, *ante,* 380), may always be explained by experts (*Kell* v. *Charmer,* 23 Beav. 195; *Goblet* v. *Beechey,* 3 Sim. 24; *Shore* v. *Wilson,* 9 C.

& F. 355, 555; *Re Cliff*, 1897, 2 Ch. 229, *post*, 390, 630, 665), unless they are equally intelligible to ordinary readers; thus, the opinions of engineers are not admissible to show what matters are "delineated" upon statutory plans (*Dowling* v. *Pontypool Co.*, 18 Eq. 714), nor those of surveyors and auctioneers as to the meaning of "nominal rent" in a statute (*Camden* v. *Commrs. of Inl. Rev.*, 1914, 1 K.B. 641, 645-50, C.A.). See *post*, 390, 630, 665.

Handwriting. Experts may, as we have seen, give their opinions upon the genuineness of a disputed handwriting, whether ancient or modern, after having compared it with specimens proved to the satisfaction of the judge to be genuine (*ante*, 108); and they may also, without such comparison, but from their general knowledge of the subject, give their opinion as to whether the writing is in a feigned or natural hand (*R.* v. *Coleman*, 6 Cox, 163; Tay. ss. 1417, 1877; Best, s. 246). So, their opinions are admissible as to the probable date of an ancient writing (*Tracy Peerage*, 10 C. & F. 154, 191); or as to whether interlineations were written contemporaneously with the rest of a document (*Re Hindmarch*, L.R. 1 P. & D. 307).

On questions of *handwriting*, not only specialists, but post-office officials, lithographers and bank clerks have been permitted to testify as experts (*R.* v. *Coleman*, 6 Cox, 163; Best, s. 246), as well as a solicitor who had for some years given considerable attention and study to the subject, and had several times compared handwriting for purposes of evidence, though never before testified as an expert (*R.* v. *Silverlock*, 1894, 2 Q.B. 766); but not police inspectors or constables merely as such (*R.* v. *Crouch*, 4 Cox, 163; *R.* v. *William*, 9 Cox, 448; *R.* v. *Harvey*, 11 Cox, 546; *R.* v. *Rickard*, 13 Cr. App. R. 140; see *post*, 399-400).

Foreign Law. Foreign Law, which includes Scotch and Colonial law, except on appeals to the House of Lords and Privy Council respectively (*ante*, 14), must, unless ascertained under the statutory procedure *inf.*, be proved as a fact by skilled witnesses, and not, as was at one time held, by the production of the books in which it is contained, for the Court is not competent to interpret such authorities (*Sussex Peerage*, 11 C. & F. 85, 114). So, where Irish law differs from English, *e.g.* as to the validity of a marriage, Irish barristers have been called to prove it (*D'Arcy-Evans* v. *D.-E.*, *ante*, 343). Whether foreign law, though regarded as a question of fact, is for the judge or jury, seems doubtful (*ante*, 16).

In *foreign law* the expert may be either a professional lawyer, or a person *peritus virtute officii*, *i.e.* the holder of an official situation which requires and therefore implies legal knowledge (*Sussex Peerage*, 11 C. & F. 85, 124); or perhaps some other person who from his profession or business has had peculiar means of becoming acquainted with the law in question (*Van der Donckt* v. *Thellusson*, 8 C.B. 812).—The following have been held *competent*:—A foreign judge, barrister, or solicitor practising in the courts of his own country (Tay. s. 1425; *Bristow* v. *Sequeville*, 5 Ex. 275; *Hansen* v. *Dixon*, 96 L. T. 32). An English barrister, who, though not practising in Malta, was familiar with, and had been employed by the Colonial Office in reference to, such questions, as to Maltese law (*Wilson* v. *W.*, 1903, P. 157; but see *inf.*); one who, though he had not practised in Rhodesia, was the reader in Roman Dutch law for the Law Society, as to Rhodesian law (*Brailey* v. *Rhodesian Consolidated*, 1910, 2 Ch. 95, 102-3); one who had studied Italian

law in Italy and was counsel to the Italian consulate here, as to Italian law (*Rose-Troup* v. *Sleeping Car Co.*, Times, Jan. 31, 1911); one who, though not technically entitled to practice in Uruguay, was qualified to do so and familiar with the law there, as to such law (*Burford* v. *B.*, 1918, P. 140). A Governor-General of Hong Kong, though a non-lawyer, as to the marriage law there (*Cooper-King* v. *C.-K.*, 1900, P. 65). A colonial attorney-general, although a non-lawyer, as to the law of his colony (*Sussex Peerage, sup., per* Lord Brougham, p. 124). A Russian, who, though not a lawyer, was secretary to his father, who was one, as to Russian law (*Carlin* v. *C.*, 1906, Times, March 14). A Roman Catholic Bishop holding the office of coadjutor to a vicar apostolic in England, as to Roman marriage law (*Sussex Peerage, sup.*). A French vice-consul in England as to the commercial law of France (*Lacon* v. *Higgins*, 3 Stark. 178). A Persian ambassador, or secretary of embassy, as to Persian law (*Re Dost Aly Khan*, 6 P.D. 6; ecclesiastics are the only professional lawyers in Persia, but diplomats are also required to know the law). A Belgian merchant and commissioner of stocks and bills of exchange, as to the Belgian law affecting such bills (*Van der Donckt* v. *Thellusson, sup.*; although this decision applies in terms to foreign law, the point involved was merely one of mercantile usage). A Chilian notary public, as to Chilian testamentary law (*Re Whitelegg*, 1899, P. 267); and an English merchant, trading in Chili, as to the fact that a marriage register is required to be kept by Chilian law (*Abbott* v. *A.*, 29 L.J.P.M. & A. 57; *sed qu.*, and see *Sussex Peerage, sup.*).—The following have been held *incompetent:* Prussian law cannot be proved by a jurisconsult at the Prussian embassy, who has no practical acquaintance with such law, but has merely studied it at a Saxon university (*Bristow* v. *Sequeville, sup.*; *Re Turner*, 1906, W.N. 27); nor by an English barrister, who has studied it only in England (*Re Bonelli*, 1 P.D. 69).—Nor can Canadian law be proved by an English barrister, though he practises before the Privy Council in appeals from Canada (*Cartwright* v. *C.*, 26 W.R. 684). Scotch marriage law cannot be proved by a Scotch Roman Catholic priest (*R.* v. *Savage*, 13 Cox, 178); nor by a Scotch tradesman (*R.* v. *Brampton*, 10 East, p. 287): nor by a mere resident gentleman (*Sussex Peerage, sup.*, overruling *R.* v. *Dent*, 1 C. & K. 97). The Mahomedan marriage law of Egypt cannot be proved by an Egyptian, who, though he resided there, was not specially conversant with such law (*R.* v. *Naguib*, 1917, 1 K.B. 359, C.C.A.).

Experts on the subject may refer to Codes and precedents in support of their views: and the passages cited will then be treated as part of their testimony. Moreover, where the evidence of the witnesses is conflicting or obscure, the Court may go a step further and examine and construe the passages cited for itself in order to arrive at a satisfactory conclusion (*Nelson* v. *Bridport*, 8 Beav. 527; *Bremer* v. *Freeman*, 10 Moo. P.C. 306; *Di Sora* v. *Phillipps*, 10 H.L.C. 624; *Concha* v. *Murietta*, 40 Ch. D. 543). As to proof of foreign and Colonial statutes see *post*, 549.

Foreign law must, in general, be proved *on oath*, either orally or, in some cases, by affidavit (*Wilson* v. *W.*, 1903, 157; *Westlake* v. *W.*, 102 L.T. 396; *Re Arton*, 1896, 1 Q. B. 509, 511 *n*); and not by the mere certificates of experts, though this strictness has occasionally been relaxed [*Re Oldenburgh*, 9 P.D. 234; *Re Klingeman*, 32 L.J.P. 16 (doubted in Tay. s. 1784); and see

certificates by a Colonial Sec. as to colonial law, *ante,* 365). Moreover, *previous decisions* upon the same point, and even between the same parties, are not admissible, for being a question of fact it must be decided on evidence and not on authority (*M'Cormick* v. *Garnet,* 5 D.M. & G. 278; *Bater* v. *B.,* 1907, P. 333); in addition to which the law is continually liable to change. As to *foreign documents,* see *inf.*

Statutory Procedure to ascertain Colonial and Foreign Law. By 22 & 23 Vict. c. 63, a case may be stated for the opinion of the Superior Court in any of *His Majesty's Dominions* to ascertain the law of that part [see *Lord* v. *Colvin,* 1 D. & S. 24 (Scotch Law); *Login* v. *Princess of Coorg,* 30 Beav. 632 (Bengalese law)]. And, by 24 & 25 Vict. c. 11, a similar case may be stated for the opinion of a Court in any *Foreign State* with which his Majesty may have entered into a convention for the ascertainment of such law. The latter Act is practically a dead letter, as no convention has ever been made in pursuance of it. In the only case in which it is known to have been used, the report of the foreign authority was received through the diplomatic channel and was filed, like a deposition, in the central office, an office copy being used (Ann Pr., *note* to O. 37, R. 5).

Foreign Custom or Usage may be proved by any witness, whether expert or not, who is acquainted with the fact (*Ganer* v. *Lanesborough,* 1 Peake, R. 18, explained by Lord Lyndhurst in *Sussex Peerage,* 11 C. & F. p. 124; *Mostyn* v. *Fabrigas,* 1 Cowp. 174; *Van der Donckt* v. *Thellusson,* 8 C.B. 812); thus, any Jew is competent to prove a Jewish marriage custom (*Lindo* v. *Belisario,* 1 Hagg, C.R. 216; as to proof of Jewish Marriages, however, see *ante,* 384).

Facts. The testimony of experts is not confined to opinion evidence; they may, and frequently do, testify to matters of fact specially cognisable by them, *e.g.,* the meaning of technical terms, the existence of a trade custom, or the conditions revealed on an autopsy. And they may, of course, prove ordinary facts, not as experts, but as ordinary witnesses.

Subjects on which Experts may not testify. The opinions of experts are not receivable on the following subjects:

Construction of Documents; Statutory Terms. Questions of construction, whether of domestic or foreign documents, being matters of law and not of fact, belong exclusively to the Court (*ante,* 14-15), and the opinions of experts thereon are inadmissible, *e.g.* the construction of, or meaning of particular terms in, a modern statute (*Camden* v. *Commrs. of Inl. Rev.,* 1914, 1 K.B. 641, 645-50, *post,* 394); the construction of a Company prospectus (*Grove* v. *Buluwayo Co.* cited *ante,* 66), patent specification (*Gadd* v. *Manchester Corp.,* 67 L.T. 569; *Brooks* v. *Steele,* 14 R.P.C. p. 73; *Badische* v. *Levinstein,* 14 App. Cas. 717-8), covenant in restraint of trade (*Haynes* v. *Doman, post,* 394), or statutory plan (*Dowling* v. *Pontypool Co.,* 18 Eq. 714). In construing *foreign* documents, the Court will generally require from experts a translation of the language, an explanation of the peculiar terms employed, and information as to any foreign law or rule of construction applicable to the case (*Di Sora* v. *Phillipps,* 10 H.L.C. 624; *Stearine Co.* v. *Heintzman,* 17 C.B.N.S. 56; *Chatenay* v. *Brazilian Co.,* 1891, 1 Q.B. 79; *Re Cliff,* 1892, 2 Ch. 229).

Professional Conduct. The opinions of experts are not receivable upon disputed points of professional duty, morality, or etiquette; except so far as

they may be necessary to elucidate the rules of a particular profession (*post,* 393).

English Law. Morals. Probability. Human Nature. Nor are the opinions of lawyers admissible to explain technical legal terms (*ante,* 380), or matters of English law, though they may prove the proper cost of a particular legal proceeding (*ante,* 20; *Gilligan* v. *National Bank,* 1901, 2 I.R. 513, 515; as to English Statutes, see *Camden* v. *Commrs. of Inl. Rev., sup.*). And neither experts nor ordinary witnesses may give their opinions upon *matters of legal or moral obligation,* or *general human nature,* or *the manner in which other persons would probably act or be influenced* (*Campbell* v. *Rickards,* 5 B. & Ad. 840, *per* Ld. Denman, C.J.; *Bourne* v. *Swan,* 1903, 1 Ch. 211, 224; *Royal Warrant Holders' Assn.* v. *Deane,* 1912, 1 Ch. 10, 14-15). So, the opinions of cattle-drovers and the like are not admissible upon the question of how an accident to cattle in a railway truck must have happened (*Smith* v. *Midland Ry.,* 57 L.T. 813), nor as to the prudence of an agistor putting horses to graze amongst horned cattle (*Smith* v. *Cook,* 1 Q.B.D. 79); nor are those of firemen as to whether there was anything to point to the fire having occurred accidentally, for this is not a matter of scientific knowledge (*R.* v. *Cattermoul,* 121 C.C.C. Sess. Pap. 151, *per* Hawkins, J.; see, however, *R.* v. *Heseltine, post,* 398); nor those of jurymen as to what verdict they would have given had the evidence been different (*Hatch* v. *Lewis,* 2 F. & F. p. 475).

Scope. Grounds and Form of the Opinion. Hypothetical Questions. (*b*) An expert may give his opinion upon *facts* which are either admitted, or proved by himself, or other witnesses in his hearing, at the trial, or are matters of common knowledge; as well as upon *hypotheses* based thereon.

His opinion is not, in general, admissible upon materials which are not before the jury, or which have been merely reported to him by hearsay [*R.* v. *Staunton,* 1877, Times, Sept. 26; *cp.* Wills, Circ. Ev., 6th ed., 156-60; Tidy's Legal Medicine, 8, 17, 25; Gardner Peerage, Le Marchant, 85-90; *Wright* v. *Tatham,* 5 C. & F. 670, 690; *Re Dyce Sombre,* 1 Mac. & G. 116, 128, *per* Ld. Cottenham; so, in America, opinions as to facts stated out of court, or hypothetical questions having no foundation in the evidence, are excluded, Whart. ss. 441, 451, 452; Chamberlayne's Best, note (*f*) to s. 511; Greenleaf, 14th ed., s. 440, note (*b*) to p. 531]. And although on questions of professional skill he may state in a general form what would be the proper course to pursue under the circumstances proved (*Sills* v. *Brown,* 9 C. & P. 601, 604; *Chapman* v. *Walton,* 10 Bing. 57; *Rich* v. *Pierpont,* 3 F. & F. 35; *Collier* v. *Simpson,* 5 C. & P. 73), he may not be asked what his own conduct would have been under such circumstances (*Berthon* v. *Loughman,* 2 Stark. 258; *Hatch* v. *Lewis,* 2 F. & F. 467, 475; *Ramadge* v. *Ryan,* 9 Bing. 333; though the fact that he has acted in accordance with his opinion may always be proved to enhance its weight, *post,* 397).

The cases are conflicting as to how far an expert may be asked the *very question which the jury have to decide;* but the weight of authority appears to be as follows:—(*a*) Where the issue involves other elements beside the purely scientific, the expert must confine himself to the latter, and must not give his opinion upon the legal or general merits of the case (*Seed* v. *Higgins,* 8 H.L.C. 565-6, and cases cited *ante,* 65; *Crosfield* v. *Techno-Chemical Laboratories,* 29 T.L.R. 378; *Jameson* v. *Drinkald,* 12 Moore, C.P. 148; *Campbell* v.

Rickards, 5 B. & Ad. 840); (*b*) Where the issue is substantially one of science or skill merely, the expert may, if he has *himself* observed the facts, be asked the very question which the jury have to decide (*Folkes* v. *Chadd,* 3 Doug. 157; *R.* v. *Layton,* 4 Cox, 149; *R.* v. *Richards,* 1 F. & F. 87; *Martin* v. *Johnston, id.* 122; *Lovatt* v. *Tribe,* 3 F. & F. 9; *R.* v. *Mason,* 7 Cr. App. R. 67; Tay. s. 1421; Wills, Circ. Ev., 6th ed., 156-60. If, however, his opinion is based merely upon facts proved by *others,* such a question is improper, for it practically asks him to determine the truth of their testimony, as well as to give an opinion upon it (*R.* v. *M'Naghten,* 10 C. & F. 200; *R.* v. *Frances,* 4 Cox, 57; *Doe* v. *Bainbrigge, id.* 454; *Sills* v. *Brown,* 9 C. & P. 601; *R.* v. *Mason, sup.;* and see, *per* Bucknill, J., 50 Sol. Jo. 53); the correct course is to put such facts to him *hypothetically,* but not *en bloc* (*R.* v. *Ferrers,* 19 How St. Tr. 942-944), asking him to assume one or more of them to be true, and to state his opinion thereon (*Fenwick* v. *Bell,* 1 C. & K. 312; *Malton* v. *Nesbitt,* 1 C. & P. 72; *R.* v. *Frances,* 4 Cox, 57; *R.* v. *Mason, sup.;* Tay. s. 1421; Wills, Circ. Ev., 159; Wigmore, Ev. ss. 672-84; Whart. s. 452); where, however, the facts are not in dispute, it has been said that the former question may be put as a matter of convenience, though not as of right (*R.* v. *M'Naghten, sup.;* though even this latitude was disapproved in *R.* v. *Frances, sup.*).

Impeachment. Corroboration. Illustration. Experiments. (c) In all cases in which opinion evidence is receivable, whether from experts or not, the grounds or reasoning upon which such opinion is based may be inquired into. This inquiry is usually reserved for cross-examination, and is, in some cases, inadmissible in chief—*e.g.* the proper question to a valuer is, "What is the fair or market value?" in cross-examination, but not in chief, he may give his reasons, as that neighbouring land had sold for so much (*Sheen* v. *Bumpstead,* 1 H. & C. 358, *per* Bramwell, B.). So, witnesses called to impeach the general reputation for veracity of an adversary's witness may in cross-examination, but not in chief, state the grounds of their opinion (Steph. art. 133). And in cases where the police have a statutory power to arrest or search on reasonable suspicion of felony, &c., though it seems they may be asked in chief whether they had reasonable grounds to suspect the defendant, yet the particulars can only be elicited in cross-examination (*R.* v. *Tuberfield,* 10 Cox, 1). On the other hand, it is usual for medical witnesses to detail the results of an examination before being asked as to their opinions founded thereon; so, where a witness called to prove the handwriting of A. had stated in chief, "I think the handwriting is A.'s from its contents and other circumstances," he was allowed to be asked in chief what those circumstances were (*R.* v. *Murphy,* 8 C. & P. 297).

In addition to the above, facts, although otherwise irrelevant (Tay. s. 337; Steph. art. 50), as well as the result of *experiments* made either out of court with special reference to the trial (*R.* v. *Heseltine,* 12 Cox, 404), or even before the Court itself (*Bigsby* v. *Dickenson,* 4 Ch. D. 24), may be given in evidence in corroboration, illustration, or rebuttal of the opinion. So, on cross-examination the witness may be asked whether he has not expressed opinions inconsistent with his present testimony; and if he deny the fact it may be independently proved (see *ante,* 386).

Reference to Text-Books, Price Lists, &c. An expert may refer to text-books to refresh his memory, or to correct or confirm his opinion—*e.g.* a

doctor to medical treatises; a valuer to price lists; a foreign lawyer to codes, text-writers, and reports (*Sussex Peerage,* 11 C. & F. 114-5; *Collier* v. *Simpson,* 5 C. & P. 73; *Cocks* v. *Purday,* 2 C. & K. 269; Tay. s. 1422). Such books are not evidence *per se;* though if he describe particular passages as accurately representing his views, they may be read as part of his own testimony (*id.; Nelson* v. *Bridport,* 8 Beav. 527; *Concha* v. *Murietta,* 40 Ch. D. 543). Still less may counsel read them to the jury as part of his address (*R.* v. *Crouch,* 1 Cox, 94; *R.* v. *Taylor,* 9 *id.* 77). As to when the Court will construe such authorities for itself, see *supra,* Foreign Law; and as to when scientific works are evidence *per se, ante,* 380.

EXAMPLES.

Admissible.

(*a*) *Subjects of Expert Testimony.* In an action for libel, the question being whether A. had acted dishonourably in withdrawing his horse from a race after having bet against it, the rules of the Jockey Club not technically forbidding such a course;—the opinion of members of the Club as to the morality of such a proceeding held admissible to explain the meaning of the rules [*Greville* v. *Chapman,* 5 Q.B. 731. Mr. Taylor remarks that it is not probable the Court would sanction any extension of the doctrine here propounded, s. 1420 *n*].

A. sues B., a doctor, for libel in divulging facts confidentially imparted at a medical consultation. Other doctors may state what, in their opinion, is the professional rule as to such disclosures, and whether it has any and what exceptions (*Kitson* v. *Playfair,* 1896, Times, March 24 and 26).

In patent actions, experts may give evidence: (1) To explain the technical terms employed; (2) To instruct the Court in the scientific principles applicable to the case; (3) To show the state of scientific knowledge existing at the time of the grant; (4) To explain the nature, working, characteristic features, and probable mechanical results of an invention; together with what is old or new in the specification, and how far any scientific advance has been made thereby; as well as (5) in the case of rival inventions, to point out the similarities or differences therein and how far these are material or unimportant [*Clark* v. *Adie,* 2 App. Cas. 423; *Gadd* v. *Manchester Corp.,* 67 L.T. 569; *Parkinson* v. *Simon,* 11 R.P.C. 493, 506; *Brooks* v. *Steele,* 14 *id.* p. 73; *Ticket Co.* v. *Colley,* 12 *id.* 171, 186; *Crossfield*

Inadmissible.

(*a*) *Subjects of Expert Testimony.* In an action for libel, the question being whether Dr. A., in refusing on certain grounds to meet Dr. B. in consultation, had not honourably discharged his duty to his profession;—medical witnesses may not be asked (1) whether they would have met Dr. B. in consultation; or (2) whether Dr. A. had not honourably discharged his duty [*Ramadge* v. *Ryan,* 9 Bing. 333. Tindal, C.J., remarked that the answer to the latter question might depend altogether on the temper and peculiar opinion of the witnesses, and was a point on which the jury was as capable of forming an opinion as they; adding, that if any specific rules had been proved the defendant might perhaps have shown that the plaintiff, in violating them, had rendered himself unworthy of the countenance of his brethren].

A. sues B., a doctor, for libel, in divulging certain medical confidences. Other doctors cannot be asked whether a medical man would be justified in divulging such information for his own private ends, that being a question for the Court (*Kitson* v. *Playfair,* *opposite*).

In patent actions, experts may not give their opinions upon (1) the construction of a specification (*Gadd* v. *Manchester Corp., inf.; Crosfield* v. *Techno-Chemical Laboratories,* 29 T.L.R. 378); nor (2) as to whether there is, or is not, a want of novelty (*Parkinson* v. *Simon, inf.*); nor (3) whether the defendant's invention infringes the plaintiff's patent, or not (*id.; Seed* v. *Higgins, &c.,* cited, *ante* 65); nor (4) as to any of the issues of law or fact which the Court or jury have to determine; nor (5) as to the construction of any of the documents relied on by the parties (*Crossfield* v. *Techno-Chemical Laboratories, sup.*)

Admissible.	*Inadmissible.*
v. *Techno-Chemical Laboratories*, 29 T.L. R. 378].	
The question being whether A.'s trademark was so like R.'s as to be calculated to deceive;—Individual tradesmen may state that they themselves would or would not be deceived thereby (*Bourne* v. *Swan*, 1903, 1 Ch. 211, 224).	The question being whether A.'s trademark was so like B.'s as to be calculated to deceive;—Individual tradesmen may not testify (1) That it was or was not calculated to deceive, for this is the issue for the Court (*North Cheshire &c., Co.* v. *Manchester Co.* 1899, A.C. 85, and cases cited *ante* 65); nor (2) That other tradesmen would, or would not, probably be deceived thereby, for the witnesses are not experts in human nature (*Bourne* v. *Swan*, *opposite*, *per* Farwell, J., approved in *Royal Warrant Holders' Assn.* v. *Deane*, 1912. 1 Ch. 10, 14-15, *per* Neville, J.)
The question being whether a covenant in restraint of trade was reasonable;—evidence by persons engaged in the trade is admissible as to its nature, what is customary in it, of anything requiring attention in the mode of conducting it, of any particular dangers requiring precautions and the precautions so required (*Haynes* v. *Doman*, 1899, 2 Ch. 13, 24, C.A.)	The question being as to the reasonableness of a covenant in restraint of trade;—the opinions of persons engaged in the trade that the covenant was, or was not, reasonable, are inadmissible, this being a question of construction and legal effect which is for the Court (*Haynes* v. *Doman*, *opposite*).
The question being whether A., by the manufacture and sale of margarine, had broken a covenant and "not to carry on business as a provision merchant";—the opinions of persons in the trade as to (1) what class of goods was included in the word "provision" taken in conjunction with "merchant"; and (2) whether a margarine dealer came within such class are admissible [*Lovell* v. *Wall*, 104 L.T. 85, C.A.; 27 T.L.R. 236; cited *post* chap. xlvi., p. 665].	In *Lovell* v. *Wall*, *opposite*, the opinions of traders as to whether A., in making and selling maragine, would be properly described in the trade as a "provision merchant," were held inadmissible.
The question being whether a legacy of a sculptor's "mod tools for carving" meant modelling tools for carving, or moulds, or models; the *opinions* of statuaries were admitted to prove that there were no such tools known as modelling tools for carving, and that the word "mod" would be understood by a sculptor as an abbreviation for models (*Goblet* v. *Beechey*, 3 Sim. 24; 2 Rus. & Myl. 624).	
The question being whether the obliteration of a legacy, made by a testator after the execution of his will, by pasting it over with paper, was valid, *i.e.* so made that the prior words were "not apparent," as required by the Wills Act, 1837, s. 21;—the testimony of experts is admissible to decipher the words (*Ffinch* v. *Combe*, 1894, P. 191; *Re Horsford*, L.R. 3 P. & D. 211). Where the testator's intent is *absolutely* to revoke the legacy by the obliteration, the experts may use glasses, but not remove the paper or employ chemicals, nor is extrinsic evidence admissible to prove the original words; *aliter*, however, where the intent is only *conditionally* to revoke it, *i.e.* by dependent relative revocation [*id.*; Theobald on Wills, 6th ed. 40, 45; but *cp. Re Gilbert*, 1893, P. 183].	On an Income Tax appeal, the question being as to the meaning of the term *nominal rent* in a modern Act of Parliament;—the opinions of land agents and surveyors thereon, is inadmissible [*Camden* v. *Commissioners of Inland Revenue*, 1914 1 K.B. 641 C.A. The Court remarked that it would take judicial notice of the meaning, and if necessary instruct itself by reference to dictionaries or standard literary authorities; but that oral evidence of the meaning of words in a modern statute was wholly inadmissible. The evidence excluded was a question to a valuer whether there was in his profession a particular meaning attached to the words "nominal rent" and whether that meaning was "a rent not intended to represent the true rental value"].

Admissible.

(*b*) *Scope, Grounds and Form of Opinion. Hypothetical Questions.* The question being whether a medical man had negligently treated a patient;—medical witnesses who have only heard the evidence given in Court may be asked whether, assuming the facts proved to be true, they consider there was anything improper in the treatment described [*Rich* v. *Pierpont*, 3 F. & F. 35 (the first part of the question was not in this case put hypothetically, as is the strictly proper course); *Southern* v. *Thomas*, Times, Dec. 3, 1906]; or whether such treatment is sanctioned by books of authority (*Collier* v. *Simpson*, 5 C. & P. 73); or whether the result produced could, in their opinion, have been avoided by proper care (*Fenwick* v. *Bell*, 1 C. & K. 312, the case of a nautical witness).

A. is charged with murder: defence, insanity. A medical witness *who has personally examined A.* may give his opinion that he is, or is not, insane [*R.* v. *Layton*, 4 Cox, 149; *R.* v. *Richards*, 1 F. & F. 87; *Martin* v. *Johnston*, *id.* 122 (*will case*): *Lovatt* v. *Tribe*, 3 F. & F. 9 (ditto)]; or, that the insanity from which A. suffered was of a kind that usually prevents people from judging between right and wrong [Steph. art. 49 illust. (*b*), citing *R.* v. *Dove*, where, however, the question seems to have been put in a more direct and objectionable form; in *R.* v. *Higginson*, 1 C. & K. 129, the surgeon, who had examined A., was allowed to depose that he "was of weak intellect, but capable of knowing right from wrong," *per* Maule, J.]. In cases where the witness has merely heard the evidence of *others* as to A.'s condition, he may be asked to take particular facts, and, assuming them to be true, to give his opinion as to A.'s sanity [*R.* v. *Frances*, 4 Cox, 57; *R.* v. *Wright*, Rus. & Ry. 456; *R.* v. *Searle*, 1 Moo. & Rob. 75; Wills, Circ. Ev. 6th ed. 159]; so, it has been said, he may be shown a letter of A.'s and be asked if such a letter is a rational one (*Sharpe* v. *Macaulay*, cited Powell, Ev., 4th ed. 81; this case is not referred to in later editions); or whether a long fast followed by a draught of strong liquor (which condition had been proved) would be likely to produce a paroxysm of the disease in one suffering from it (*R.* v. *Wright*, *supra*).

A. is charged with the murder of B. by stabbing. Defence, that B.'s injuries were self-inflicted. A medical witness who had examined the body of B. and detailed the result of the examination having given his opinion without objection that B.'s wounds were not self-inflicted:—A medical witness who had not examined the body, but only heard the evidence of the former witness, was asked:—"Is it your opinion that the wound was inflicted by a person other than the deceased?" Answer, 'Yes.' On

Inadmissible.

(*b*) *Scope, Grounds and Form of Opinion. Hypothetical Questions.* The question being whether a medical man had negligently treated a patient; a medical witness cannot be asked whether, having heard the evidence, he considers there has been a want of due care and skill (*Rich* v. *Pierpont*, *opposite*); nor whether, assuming the facts proved to be true, they show negligence (*Malton* v. *Nesbit*, 1 C. & P. 72; *Jameson* v. *Drinkald*, 12 Moore, C.P. 148, cases of nautical witnesses); nor can he put in evidence medical works to show what treatment would be proper (*Collier* v. *Simpson*, *opposite*), though he may refer to such works to refresh his memory.

A. is charged with murder, defence, Insanity. A medical witness *who has examined A.* cannot be asked whether A. was capable of judging between right and wrong (*R.* v. *Layton*, 4 Cox, 149; *R.* v. *Higginson*, *opposite*, is contrary, *sed qu.*); or was responsible for his acts (*R.* v. *Richards*, 1 F. & F. 87); or was guilty of murder (*Jameson* v. *Drinkald*, 12 Moore, C.P. 148, 157). A medical witness who has merely heard the evidence of other witnesses as to A.'s condition cannot be asked whether, "having heard the evidence, he considers A. is, or is not insane?" [*R.* v. *M'Naghten*, 10 C. & F. 200; *R.* v. *Frances*, *opposite*; *Doe* v. *Bainbrigge*, 4 Cox, 454; in Wills, Circ. Ev. 6th ed. 159, Mr. Justice Wills remarks: "in several cases medical witnesses have been allowed to give their opinions as to the sanity of parties charged with crime, grounded upon the evidence adduced both for the prosecution and defence. Such evidence is, however, technically irregular, and an objection to it must, if made, prevail. It may in some cases be much more than technically irregular and even thoroughly objectionable]; nor can he be shown a letter of A.'s and asked whether the writer could have been of sound mind (*Sharpe* v. *Macaulay*, *opposite*).

Admissible.

appeal it was objected (1) that the question was a leading one and so improper; (2) that though the witness might be asked whether, assuming certain facts, they were indicative of the wound being inflicted by an assailant, or general questions as to the possibility of the wound being so inflicted, yet the question whether the wound *was* so inflicted was improper since, as the prisoner stated no third person was present, this was the very issue to be tried. Held, affirming Pickford, J., that the evidence was admissible (1) that though the question was leading, this objection had not been taken at the trial, and as it came at the end of the witness' evidence, the form was unimportant; (2) That the question was not the very one the jury had to decide, since the possibility of a third person being the assailant was only excluded from the case by other evidence; (3) It was virtually an opinion based on an assumed state of facts [*R.* v. *Mason* (1911) 7 Cr. App. R. 67; 76 J.P. Rep. 184; 28 T.L.R. 120, C.C.A. A similar question had been excluded by Bucknill, J., on the second ground, 50 Sol.Jo. 53. (1905); and see *R.* v. *Newton*, 1850, *per* Patteson, J., Wills Circ. Ev. 6th ed. 157, 176, and other cases there cited].

A. is charged with the murder of B. with whom he lived, by suffocating her in a bath. Evidence having been given that, afterwards two other women with whom A. lived had also been found dead in their baths, medical witnesses, who had only heard the evidence given at the trial, were allowed to be asked by the prosecution: "From the size of the bodies and the size of the baths, would the death of any one of the three women be consistent with accident?" On appeal, it being objected that this was the very question the jury had to decide, the Court held that it was obvious the questions were put hypothetically, that is, assuming the facts stated in evidence to be true, could any one of the deaths have been caused in a particular way? [*R.* v. *Smith*, 1915, 11 Cr. App. R. pp. 234, 238; (and less fully) 84 L.J.K.B. 2153].

The question being whether A.'s death was caused by poison; medical witnesses who attended A. at the time of his death, or who assisted at the *post-mortem*, or who analysed the remains, may give their opinions upon the point; so, also, a medical witness who has merely attended the trial and heard the facts proved by the former witnesses, provided such facts are put to him hypothetically (for detailed illustrations, see Brown and Stewart's Poison Trials).

In an action for damages for physical injuries caused by a collision;—the opinion of medical men is admissible, not only as to the present nature of such injuries,

Inadmissible.

The question being as to the cause of A.'s death;—the opinion of a medical witness formed merely from reading a statement of the facts prepared by the solicitor of the party calling him, which statement included a transcript of the depositions taken before the magistrate and of the notes of the *post-mortem* examination, is not admissible (*R.* v. *Staunton*, 1877, Times, September 26, *per* Hawkins, J. In *Beatty* v. *Cullingworth*, 1896, Times, November 17, in an action against a doctor for operating without consent, the same judge allowed the plaintiff's medical witnesses to give their opinion based upon notes of the case supplied by the defendant,

Admissible.

but as to their future and conjectural effects upon the sufferer (*Practice; Cunningham* v. *New York Ry.*, 49 Fed. R. 439).

The question being whether a ship was seaworthy when a policy of insurance was effected upon her;—the opinion of a shipbuilder that she could not have been so, held admissible, though founded solely upon what appeared in a survey of the ship made when the witness was not present and in which the surveyor was not bound to state all the facts on which he based his opinion (*Thornton* v. *Royal Exchange Co.*, Peake, 37).

The question being whether a certain document was written by A.;—an expert who has compared the document with a genuine specimen of A.'s writing *produced* at the trial may give his opinion that both are written by the same person (*ante*, 108).

Corroboration, Illustration, &c. The question being whether an obstruction to a harbour was caused by a neighbouring seawall;—an engineer who has given his opinion in the negative may support it by proof that in some cases harbours along the same coast, but where there were no seawalls, were similarly obstructed. (*Folkes* v. *Chadd*, 3 Doug. 157; *Metropolitan Asylums District* v. *Hill*, cited *ante*, 169-70).

In an action against the owner of a vessel for running down a tug;—the opinion of a marine insurance agent, who had examined the vessel and was called on behalf of the defendants, having been given to show how the collision occurred, the fact that though the tug was insured in the witness's office, he had advised its owners not to sue the vessel, is admissible as strongly corroborating the truth of the opinion (*Stephenson* v. *Tyne Commrs.*, 17 W.R. 590).—So, the opinion of underwriters and shipowners having been given as to the meaning of certain words in a charter-party, the fact that they regulated the voyages of their own vessels in accordance with such opinions is receivable (*Birrell* v. *Dryer*, 9 App. Cas. 345).

The question being whether a deficiency in goods entrusted by a grocer to his shopman was due to the latter's dishonesty, or to the necessary waste from retail sales;—other grocers may give their opinions (1) as to the percentage of waste which may generally be expected from that class of shop, and mode of dealing; and (2) as to whether the deficiency in question would

Inadmissible.

though he doubted the propriety of this course. The notes here, however, were receivable against the defendant as admissions).

So, a medical witness cannot be asked his opinion as to a case of protracted gestation which he had not personally attended, but of which the patient had informed him some months afterwards (*Gardner Peerage*, Le March. 75-80); nor, where he *has* attended the patient, can he put in evidence a statement by the latter as to the causes of her own delayed gestation (*id.* 169-176; and see *R.* v. *Gloster*, *ante*, 62, 84).

The question being whether a certain document was written by A.;—an expert who has compared the document with a genuine specimen of A.'s writing *not produced* at the trial, cannot give his opinion that both are written by the same person (*Fitzwalter Peerage*, 10 C. & F. 193; *Arbon* v. *Fussel*, 3 F. & F. 152; *McCullough* v. *Munn*, 1908, 2 I.R. 194; Tay. s. 1876); nor, even if produced, that both are written *by A.* (see Steph. art. 49, illust. (*d*).

(*c*) *Corroboration, Illustration &c.* The question being whether an obstruction to a harbour was caused by a neighbouring seawall;—proof that some other harbours along the same coast where there were such walls had been similarly obstructed were rejected, as an attempt *litem lite resolvere* (*Folkes* v. *Chadd*, *opposite; Hawks* v. *Charlemont*, 110 Mass. 110; and see *ante*, 170, and *Comm.* v. *Piper*, *infra*).

Admissible.	*Inadmissible.*
or would not be an excessive amount of waste under the particular circumstances proved. (3) The witnesses may also illustrate their opinions by proof of similar deficiencies from retail sales in their own business (*M'Fadden* v. *Murdoch*, Ir.R. 1 C.L. 211).	
The question being whether A. died of strychnine poisoning;—experts who have given their opinions as to the symptoms of such poisoning, and that A.'s death was caused thereby, may support such opinions by proof that other persons who were admittedly poisoned by strychnine had exhibited similar symptoms to A.'s; and experts whose opinion was that A. had, on the contrary, died from ordinary tetanus, may prove that other persons who admittedly died from the latter cause had exhibited symptoms like A.'s [*R.* v. *Palmer*, Steph. Hist. Cr. Law, vol. iii. 389). In this case, "the witnesses were confined in the closest way to speaking of the symptoms in general terms, and were not permitted to give any sort of opinion as to how they were produced" (Steph. General View, p. 225). Proof of this nature should only be admitted when the case is one of rarity, as were instances of strychnine poisoning at the date of Palmer's trial in 1856 (Steph. Ev., art. 50 *n*; *ante*, 170). The nature of new explosives may also be shown by their effect on other persons or buildings, injured at the same time (*R.* v. *Bernard*, and *R.* v. *McGrath*, cited *ante*, 70)].	See *R.* v. *Hall*, 5 N.Z.L.R. 93, *cited ante*, 180, in which evidence of other deaths was rejected to show *symptoms*, which the Court remarked should be confined to pathological facts.
The question being whether A. died from a certain poison;—experts may testify as to the results of experiments made by them upon various animals to illustrate the effects of such poison (*R.* v. *Lamson*, Browne and Stewart's Poison Trials; Steph. art. 54).—So, on a trial for arson, evidence of experiments, under similar conditions to those in question, made by an officer of the Fire Brigade since the commencement of the trial, is admissible to show the manner in which the building was probably ignited (*R.* v. *Heseltine*, 12 Cox, 404; but see *R.* v. *Cattermoul*, cited *ante*, 391).	The question being whether A. murdered B. by striking him with a certain instrument;—evidence of experiments made by a mechanician with a similar instrument upon a dynamometer, is not admissible to negative the sufficiency of the instrument in question to cause death [*Comm.* v. *Piper*, 120 Mass. 185; the Court remarked that such evidence tended not to assist, but to confuse and mislead the jury, unless the experiments were made under the same conditions as those in question; see *Folkes* v. *Chadd*, and *Hawks* v. *Charlemont*, *sup.*; and *ante*, 170).

(*C*) **OPINIONS OF NON-EXPERTS.** The opinions or beliefs of witnesses who are not experts are admissible in proof of the matters mentioned below, on grounds of necessity, more direct and positive evidence being often unobtainable.

Identity. Resemblance. Photographs. Witnesses may state their belief as to the identity of persons, whether present in court or not; and they may also identify absent persons by photographs produced and proved by any competent testimony, not necessarily, of course, that of the photographer, to be accurate likenesses (*R.* v. *Tolson*, 4 F. & F. 103; *Frith* v. *F.*, 1896, P. 74; *Hindson* v. *Ashby*, 1896, 2 Ch. 21-2, 27; *Hill* v. *H.*, 31 T. L. R. 541). In

matrimonial cases, however, the Court will not, unless under very special circumstances, act upon identification by photograph alone (*Frith* v. *F., sup.*; *Dawson* v. *D.*, 23 T.L.R. 716; *Hill* v. *H., sup.*). As to photographic copies of documents, handwriting, buildings, places, &c., see *post*, 540-1.

So, they may give their opinion as to the resemblance of an engraving to a picture not produced (*Lucas* v. *Williams*, 1892, 2 Q.B. 113, 116), or of a portrait that is produced, to one of the parties in court (*Milles* v. *Lamson*, 1892, Times, October 29th; *McQueen* v. *Phipps*, 1897, Times, July 1).

In criminal cases it is improper to identify the accused only when in the dock; the police should place him, beforehand, with others, and ask the witness to pick him out. Nor should the witness be guided in any way, nor asked "is that the man?" (*R.* v. *Cartwright*, 10 Cr. App. R. 219; *R.* v. *Williams*, 8 *id.* 84; *R.* v. *Chapman*, 7 *id.* 53; *R.* v. *Bundy*, 5 *id.* 270-2; *R.* v. *Dickman*, 5 *id.* 142-3; *R.* v. *Smith*, 1 *id.* 203; and see 46 L. Jo. 733, 751). So, with photographs; that of the prisoner should be placed with others and the witness asked to pick it out. It has been said that the jury should not even be allowed to know that the photographs were taken by the police, since they will naturally infer he was known to them (*R.* v. *Palmer*, 10 Cr. App. R. 77; *R.* v. *Varley*, *id.* 125); but in a later case where, however, these dicta were not cited, it was said that there was nothing improper in the jury knowing that the police had photographs of the accused, as it did not follow that they were photographs of convicted persons; and that the police have a duty in investigating these matters and in executing it have to deal with such evidence (*R.* v. *Kingsland*, 14 *id.* 8).

Libels. Threats. Meaning of Words. (*a*) *Reference to Plaintiff.* The opinion of witnesses is admissible to prove that a libel (*R.* v. *Barnard*, 43 J.P. 127; Odgers, Libel, 4th ed., 634), or threat (*R.* v. *Hendy*, 4 Cox, 243), refers to the complainant. *Meaning of Words.* So, though opinions are not receivable to explain ordinary words used in an *ordinary* sense, it is otherwise with ordinary words used in a *peculiar* sense, as where a slanderous meaning is imputed to apparently innocent language; but in such cases a foundation must always be laid by first asking the witness whether there was anything in the circumstances of the case, or in the conduct or tone of the speaker, to prevent the words from conveying their ordinary meaning, the question may then be put, "What did you understand by the words?" (*Daines* v. *Hartley*, 3 Ex. 200; *Brunswick* v. *Harmer*, 3 C. & K. 10; *Barnett* v. *Allen*, 3 H. & N. 376; *Gallaher* v. *Murton*, 4 T.L.R. 304; *Simmons* v. *Mitchell*, 6 App. Cas. 156, 163; see *Curtis* v. *Peek*, 13 W.R. 230; Odgers, 4th ed., 14, 120, 633).

Handwriting. (*b*) The genuineness of a party's handwriting, or mark, may be proved by the opinions not only of experts (see *ante*, 388), but of non-experts; and this is so even where the writer himself or the attesting witness is actually in Court and might be called (*Re Clarence*, 54 Sol. Jo. 117; *R.* v. *Derrick*, 5 Cr. App. R. 162), the standard of comparison being either some specimen document produced at the trial and proved to the satisfaction of the judge to be genuine (*ante*, 108), or, an exemplar formed in the mind of the witness from his *previous knowledge* of the party's handwriting. A statement that the witness is acquainted with the party's writing is generally sufficient in chief, it being for the opponent to cross-examine as to means and extent. Such knowledge may be acquired: (1) *By having at any time seen the*

party write, though the value of the opinion will, of course, vary with the frequency and recentness of the occasions and the attention paid to the matter by the witness; or (2) by *the receipt of written communications* purporting to be in his handwriting, in reply to documents addressed to him by or on behalf of the witness (*Re Clarence, sup.*); though the evidence will be strengthened by the communications having been acted on as genuine between the parties; or (3) *by having observed, in the ordinary course of business,* documents purporting to be in the party's handwriting; a method which applies also to the proof of ancient handwriting [*Doe* v. *Suckermore,* 5 A. & E. 703, 730-1; *Fitzwalter Peerage,* 10 C. & F. 193; *Crawford Peerage,* 2 H.L.C. p. 557; *ante,* 109].

The witness's knowledge must not, however, have been acquired for the express purpose of qualifying him to testify at the trial (Best, s. 236; *R.* v. *Crouch,* 4 Cox, 163; *R.* v. *Rickard,* 13 Cr. App. R. 140; *Stanger* v. *Searle,* 1 Esp. 14; *Doe* v. *Suckermore,* 5 A. & E. 703; *Fitzwalter Peerage, sup.*). And if his opinion rests upon extrinsic circumstances, *e.g.* the probabilities of the case, or the character or conduct of the supposed writer, and not on his actual knowledge of the handwriting, it will be rejected (*Da Costa* v. *Pym,* Peake, Add. Cas. 144). The witness need not swear to his belief, his bare opinion being admissible, though a mere statement that the writing is *like* that of the supposed writer is insufficient (Tay. s. 1868). The evidence being primary, and not secondary, in its nature, will not become inadmissible because the writer himself, or some one who saw the document written, might have been called (*Lucas* v. *Williams, inf.; Wright* v. *Cobb,* 1 T.L.R. 555; Best, s. 232; Tay. s. 1862); or because the document cannot be produced, as where it is lost, or incapable of removal, or not liable thereto, as in the case of public registers or books of the Bank of England (*Sayer* v. *Glossop,* 2 Ex. 409; *Mortimer* v. *McCallan,* 6 M. & W. 58, 63; *Lucas* v. *Williams,* 1892, 2 Q.B. 113). And further proof may have to be given of *identity* of the writer and party, where the witness is not personally acquainted with this (*post,* 523).

Mental and Physical Conditions. Age. Speed. Value. (*c*) A witness may, as we have seen, testify as to his *own* mental or physical condition at a given time (*ante,* 61, 82-7); or state what he thinks induced him to do a particular act (*Mansell* v. *Clements,* L.R. 9 C.P. 139); or what opinion he formed on receiving a certain letter (*R.* v. *King,* 1897, 1 Q.B. 214). Whether he is competent on the question of his own *sanity* is, perhaps, doubtful, though the weight of authority seems now in the affirmative. The evidence was admitted in *Hunter* v. *Edney,* 10 P.D. 93, and *Jackson* v. *J.,* 1908, Times, May 23, and see *R.* v. *Hill,* 2 Den. 254, and *R.* v. *Smith,* 8 Cr. App. R. 72, 74; but excluded in *Knight* v. *Young,* 2 V. & B. 184, and *Bootle* v. *Blundell,* 19 Ves. 494, 506; see also Pope on Lunacy, 2nd ed., 424, and *cp. post,* p. 452. The value of such evidence, however, would appear to lie not in its quality of testimonial assertion or opinion, but rather in its manifestation of the witness's mental capacity or the reverse, *i.e.,* as circumstantial or presumptive evidence.

With respect to the mental condition of *others,* neither the opinion of witnesses who are not experts (*R.* v. *Neville,* Craw. & Dix. Abr. Cas. 96; *R.* v. *Loake,* 7 Cr. App. R. 71-271), nor general reputation (*Greenslade* v. *Dare,* 20 Beav. 284), is admissible in this country to prove *insanity,* as distinguished from the conduct from which it may be inferred; though witnesses

are sometimes allowed to give such evidence, not as opinion *per se,* but as a compendious mode of eliciting facts (*Wright* v. *Tatham,* 5 C. & F. pp. 690, 720-1, 735; *cp. Durham* v. *D.,* 10 P. D. 80). Nor are the opinions of witnesses admissible to prove another person's *intention* (*Townsend* v. *Moore,* 1905, P. 66, 80; *ante,* 61). Witnesses may, however, describe the apparent condition of people and things, for here the phenomena are often too numerous and vague to be otherwise conveyed (Best, s. 517; Tay. s. 1416; *ante,* 45). So, statements of opinion as to the *age* of children have been received (*R.* v. *Cox,* 1898, 1 Q.B. 179). And the rate of speed of motor-cars may be similarly proved (Motor-Car Act, 1903, s. 9). As to proof of value by non-experts, see *R.* v. *Beckett, post,* 403.

Character. Although not, perhaps, in strictness, yet in practice, the opinions of witnesses are receivable on this subject (*ante,* 188).

Interlocutory Matters. So, on motions, &c., affidavits as to the deponent's information or belief are admissible, provided the grounds thereof are set out, otherwise not (O. 38, s. 3; *Re Anthony,* 1899, 2 Ch. 50; *post,* 500). And as to summons for directions, see *post,* 499.

Other Cases. Questions for the Jury and Not the Witness. As most language embodies inferences of some sort, it is not perhaps possible wholly to dissociate statement of opinion from statement of fact. The evidentiary test has been said to be, that if the fact stated *necessarily* involves the component facts, or can only be expressed by a direct statement or opinion, it will be admissible as amounting to a mere abbreviation, even though it be the very fact the jury have to decide; if it does not necessarily involve them, but may be supported upon several distinct bases of fact, the particulars only should be given and not the inference. Thus, though a witness might, without objection, state that "A. shot B." or "A. stabbed B." yet the statement that "A. killed B." would be improper, as involving a conclusion that might be remote and doubtful, and apply equally to a variety of different incidents [*ante,* 56, 65; Whart., ss. 15, 509-513. And see a reply to Dr. Wharton on this point by Mr. Justice Stephen, 3 Southern Law Rep. (Amer.) 567; and Chamberlayne's Best, s. 511].

EXAMPLES.

Admissible.	*Inadmissible.*
(*a*) To prove that a libel referred to the plaintiff, though it did not mention him by name, both the plaintiff and his friends may swear that, upon reading the libel, they understood it to refer to him (*R.* v. *Barnard,* 43 J.P. 127; *Broome* v. *Gosden,* 1 C.B. 728; *Bourke* v. *Warren,* 2 C. & P. 307).	
So, where A. sued B. for damages for destroying a picture called "Beauty and the Beast," to which B.'s defence was that the picture was a libel on his sister and her husband;—evidence was admitted of exclamations of recognition to that effect, uttered by spectators while looking at the picture in a public gallery in which it	

Admissible.

was examined (*Du Bost* v. *Beresford*, 2 Camp. 511, 512).

A. is indicted for writing to B. threatening that if B. sold his farm to certain persons he would "suffer as before";—B. may, after explaining the circumstances, state that he understood by the expression that A. intended to burn his house down (*R.* v. *Hendy*, 4 Cox, 243).

(*b*) To prove A.'s handwriting, the opinion of B., who had seen him write but once, and then only his surname (*Lewis* v. *Sapio*, M. & M. 39); of C., who only saw him write twenty years ago (*R.* v. *Horne Tooke*, 25 How, St. Tr. 71); and of D., A.'s servant, who had never seen him write, but had habitually posted his letters (*Doe* v. *Suckermore*, 5 A. & E. 703, *per* Lord Denman), are admissible.—So, to prove the writing of A., a merchant living abroad;—the opinion of B., a merchant in London who had writen to, and received answers purporting to come from, A. (*Carey* v. *Pitt*, Peake, Add. Cas. 130); of C., B.'s clerk, who had constantly read such letters; and of D., B.'s broker, who had habitually seen, and been consulted about, them (*Doe* v. *Suckermore*, *sup.*, *per* Lord Denman), are admissible, although neither B., C., nor D. ever saw A. write. —See also *R.* v. *Tranter*, *ante*, 125.

To prove the handwriting of A. (a deceased curate) to a marriage certificate eighty-five years old, the opinion of B., the parish clerk, who only knew A.'s writing

Inadmissible.

A. sues B. for libel in having written that A. should "return to his natural and sinister obscurity." The opinions of witnesses are not admissible to explain these words, there being nothing to show that they were not used in their ordinary sense (*Brunswick* v. *Harmer*, 3 C. & K. 10; in *Barnett* v. *Allen*, 3 H. & N. 376, the Court was divided as to whether the word "blackleg" could be so explained).

(*b*) To prove the handwriting of A. (a prisoner), the opinion of a constable, who in order to obtain a knowledge of his writing had paid him some money, and got him to write a receipt, is inadmissible (*R.* v. *Crouch*, 4 Cox, 163).

To prove a defendant's handwriting, the opinion of the plaintiff's attorney, who had frequently seen and acted on papers in the master's office, which the defendant's attorney admitted had been written by the defendant, is inadmissible [*Greaves* v. *Hunter*, 2 C. & P. 477. *In Smith* v. *Sainsbury*, 5 C. & P. 196, where one party had filed an affidavit made by A., the attorney to the opposite party was allowed to prove A.'s signature to another document from merely having seen the signature to the affidavit. This case is doubted by Mr. Taylor, 8th ed., s. 1865, in spite of the consideration, which would seem also to apply to the previous case, that the party who filed A.'s affidavit might be deemed to be estopped from denying the genuineness of A.'s signature; *cp. Brickell* v. *Hulse*, *ante*, 261].

A. sues B., C., and D., on their joint and several promissory note. To prove the signature of D., A. calls E., the solicitor for the defendants, whose only knowledge of D.'s handwriting was derived from a retainer, purporting to be signed by all of them, on which E. had acted in defending the action. Held, E.'s opinion was not admissible without proof that D. had acknowledged his signature, since B. and C. might have signed the document for him with his assent (*Drew* v. *Prior*, 5 M. & Gr. 264). So, to prove the signature of A., a Member of Parliament, the opinion of an inspector of franks who had frequently seen franks pass through the post office bearing A.'s name, but had never communicated with him thereon, has in two cases been rejected, as the signatures might have been forged (*Carey* v. *Pitt*, Pea. Add. Cas. 130, *per* Lord Kenyon; *Batchelor* v. *Honeywood*, 2 Esp. 714, *per id.* Mr. Taylor considers that these two cases carry the law to the verge of impropriety, as they conflict with the presumption of innocence, s. 1886, 8th ed.).

To prove the handwriting of an ancient document, the opinion of a witness, although an expert, who had acquired his knowledge not from a course of business,

Admissible.

from various old signatures of A., in the parish register, is admissible (*Doe* v. *Davies*, 10 Q.B. 314).—So, the opinion of C., the solicitor to A.'s family, who only knew A.'s writing by having examined, in the course of business, documents purporting to be in A.'s writing (*Fitzwalter Peerage*, 10 C. & F. 193).

(*c*) In an action by a house-agent to recover commission on the sale of a house, the evidence of the purchaser that "he thought he should not have bought the house had it not been for the agent's card to view," is receivable (*Mansell* v. *Clements*, L.R. 9 C.P. 139).

A. is charged with obtaining certain churns from B. by a false pretence, contained in a letter, that "the churns are required for home use." A question put to B., "what opinion did you form as to A.'s position and occupation from the receipt of that letter?" and B.'s answer, "I thought A. was either a farmer or a dairyman," held admissible as showing B.'s belief in the truth of A.'s representation, and that he was thereby induced to trust A. with the goods (*R.* v. *King*, 1897, 1 Q.B. 214, C.C.R.).

A is charged, under the Prevention of Cruelty to Children Act, 1894, with ill-treating certain children under the age of sixteen entrusted to her care. The fact that the children attended an elementary school, and testimony given by the mistress of the school that she believed they were under sixteen, as well as similar evidence by policemen and others who had seen the children, held admissible [*R.* v. *Cox*, 1898, 1 Q.B. 179. By s. 17 of that Act and by s. 123 of the Children Act, 1908, which replaces it, if a child *appears to the Court to be under* the age in question it shall be deemed to be so till the contrary is proved. In *R.* v. *Cox*, *sup.*, however, only one of the children was produced in court, so that opinion evidence as to age, and inspection out of court by the witnesses, appear to have been considered of general admissibility. *Cp. ante*, 371, as to medical certificates of the age and fitness of children under the Factory and Workshop Act, 1901.]

A. is charged with causing malicious damage of over £5 to a plate glass window at a post office. The Acting Assistant Superintendent to the General Post Office, was allowed to testify that, though not a glass expert, he had been informed by their clerk of the works that the damage was £8, and in his own opinion that was a correct assessment (*R.* v. *Beckett*, 8 Cr. App. R. 204; 29 T.L.R. 332).

For cases in which the opinions of ordinary witnesses have been received, although on the very questions which the jury have to decide, see *ante*, 56, 65.

Inadmissible.

but from having *studied* one or two genuine signatures (*not produced*) for the express purpose of testifying, is inadmissible (*Fitzwalter Peerage*, *opposite;* and see *ante*, 108-9).

(*c*) The question being as to the sanity of a testator;—the opinions of non-medical friends called as witnesses (*R.* v. *Neville*, Craw & Dix, Abr. Cas. 96, 97 *n*), or of deceased friends expressed by their letters and conduct, are inadmissible unless accompanying and explaining acts done by the testator (*Wright* v. *Tatham*, cited *ante*, 84).

[For other cases in which the opinions or inferences of ordinary witnesses have been rejected to prove facts which are for Court or jury, *e.g.* Negligence, Promise to Marry, &c., see *ante*, 65].

For cases in which the opinions of ordinary witnesses have been rejected as being on the very question which the jury have to decide, see *ante*, 56, 65.

CHAPTER XXXVI.

JUDGMENTS.

General Rules.

THE following general rules apply to judgments of every description:

(1) **All Judgments are conclusive of their Existence as distinguished from their Truth.** Judgments being public transactions of a solemn nature are presumed to be faithfully recorded. Every judgment is, therefore, conclusive evidence for or against all persons (whether parties, privies, or strangers) of its own *existence, date and legal effect,* as distinguished from the *accuracy of the decision* rendered. In other words, the law attributes unerring verity to the *substantive,* as opposed to the *judicial,* portions of the record (Best, s. 590; Tay. s. 1667; Steph. art. 40).

Thus, where A. has been tried and acquitted of a crime against B., and afterwards sues B. for malicious prosecution, the record in the criminal trial is conclusive evidence of A.'s acquittal; but it is, as we shall presently see, no proof whatever that A. was innocent, or that B. was the prosecutor, or was actuated by malice (*Legatt* v. *Tollervey,* 14 East, 302; *Purcell* v. *Macnamara,* 9 East, 361; *Leyman* v. *Latimer,* 3 Ex.D. 352, 354). So, a verdict against a master in an action for the negligence of his servant is conclusive proof, in an action by the master against the servant, of the amount of the damages recovered against the master; but it is not even admissible to prove the servant's negligence (*Green* v. *New River Co.* 4 T.R. 590; *Pritchard* v. *Hitchcock,* 6 M. & G. 151, 165). And, similarly, a judgment by a creditor against a surety is evidence in an action by the surety against the principal debtor, of the amount the surety has been compelled to pay, but not of his liability to pay it (*King* v. *Norman,* 4 C.B. 884; *Exp.* Young, *Re Kitchin,* 17 Ch.D. 668; *post,* 415, 427-8). And to rebut a surety's defence that the creditor had received money from the principal in satisfaction of his claim, the creditor was allowed to prove a judgment against himself by the assignees of the principal, by which such moneys were recovered back, not as conclusive against the surety, but as explanatory of the transaction (*Pritchard* v. *Hitchcock, sup.*)

So, judgments are admissible in this connection when they are tendered to *contradict a witness* [*Watson* v. *Little,* 5 H. &. N. 472, where A. having sworn that her son B. was born on March 18, *i.e.* five days after her marriage, an affiliation order of deceased justices reciting that A. swore B. was born on March 8, was received to contradict her testimony, though not to prove the bastardy or date of birth; *R.* v. *M'Cue,* cited *post,* 428, where, on the trial

of a receiver, the thief's testimony that he had committed the theft was allowed to be contradicted by the record of his acquittal]; or as constituting a *link of title,* or an *act of ownership* (*Brew* v. *Haren,* I.R. 11 C.L. 198); or as explaining the character in which the parties *sue, defend or hold property* (*Davies* v. *Lowndes,* 6 M. & Gr. 520; *Lyell* v. *Kennedy,* 14 App. Cas. 437); or *as influencing conduct* (*Thomas* v. *Russell,* 9 Ex. 764, cited *ante,* 155).

(2) **All Judgments are conclusive of their Truth in Favour of the Judge.** The judgment of a court of competent jurisdiction is conclusive for the purpose of protecting the judge who pronounced, and the officers who enforced, it when acting within the scope of their authority. This rule is founded on public policy for the protection of judges and their subordinates, since without it no one would be so rash as to undertake such offices (Tay. s. 1669).

In the *Superior Courts,* therefore, the original proceedings and judgment thereon constitute conclusive proof of the facts stated if, assuming such facts to be true, they show that the judge had jurisdiction (Tay. ss. 1669-1672; and see ss. 84-86; Steph. art. 45; Ros. N.P. 208-209, 1124-1129). In the *Inferior Courts,* however, the maxim *omnia rite esse acta* does not apply to give jurisdiction (*Falkingham* v. *Victoria Ry.,* 1900, A.C. 463-4; see 33 Am. L. Rev. 665-84). Thus, in the case of Awards (*id.*), or Orders made either under special statutory authority, or by Justices, the facts necessary to give the jurisdiction must appear on the face of the proceedings, either expressly or by necessary implication (*Taylor* v. *Clemson,* 11 C. & F. 610; *Christie* v. *Unwin,* 11 A. & E. 373; *R.* v. *Kent,* 16 Cox, 583; *Jones* v. *German,* 1897, 1 Q.B. 374); though such recitals are no evidence of their existence for other purposes (*R.* v. *Gilkes,* 2 Man. & Ry. 454; *R.* v. *Dublin,* 43 Ir. L.T.R. 271).

The rule only protects where the judge has acted without jurisdiction under a *bonâ fide* mistake of fact; and not where he has so acted wilfully, or under a mistake of law (*Calder* v. *Halket,* 3 Moo. P.C. 28; *Houlden* v. *Smith,* 14 Q.B. 841; *Anderson* v. *Gorrie,* 71 L.T. 382). Thus, where a justice had ordered the seizure of a boat under the provisions of the Bumboat Act (2 Geo. III. c. 28), the owner was precluded in an action against the justice from proving that it was a vessel and not a boat (*Brittain* v. *Kinnaird,* 1 B. & B. 432; and see *Kemp* v. *Neville,* 10 C.B. N.S. 523; and Ros. N.P. 1124-1129, *et seq.*). So, with an order under a Highway Act for the removal of timber encumbering the highway, the owner was estopped in an action against the justice from proving that the place was no part of the highway (*Mould* v. *Williams,* 5 Q.B. 469). And under the Justices Protection Act, 1848, s. 41, magistrates are expressly exempted from liability for issuing warrants of distress in respect of a *poor rate* which proves to be invalid; although, at common law, they would have been liable therefor, since the validity of the rate, which was necessary to give them jurisdiction, could not be determined by them (Tay. s. 1672; see *Fourth Building Soc.* v. *East Ham,* 1892, 1 Q.B. 661). On the other hand, a county court judge was not protected where he committed a party residing out of his jurisdiction for contempt in disobeying an order of the Court (*Houlden* v. *Smith, sup.*)

(3) **All Judgments are impeachable on Certain Grounds.** *Domestic Judgments,* when tendered to prove the truth of the finding, may, in general, be impeached on the grounds that they were (1) **Not Final** (which does not

mean not subject to appeal, but final as distinguished from interlocutory, *Huntley* v. *Gaskell,* 1905, 2 Ch. 656, C.A.; see Ann. Pr. Notes to O. 58, r. 15), reversed (the pendency of an appeal is not sufficient, *Scott* v. *Pilkington,* 2 B. & S. 11), a mere nonsuit (now abolished, *Fox* v. *Star Co.,* 1900, A.C. 19), discontinuance (under O. 26, r. 1; or by agreement, *The Kronprintz,* 12 App. Cas. 256), stay, on payment of money (*Kelly* v. *Hammond,* 2 T.L.R. 804), or withdrawal (of the record, under O. 26, rr. 1 & 2; or of a juror, *Thomas* v. *Exeter Post,* 18 Q.B.D. 822; *Ripley* v. *Arthur,* 86 L.T. 735); though judgment by default may estop if the grounds appear on the face of the judgment (*Irish Land Com.* v. *Ryan,* 1900, 2 I.R. 565; *Dowling* v. *Dillon,* 39 Ir.L.T.R. 121); or (2) **Not on the Merits,** *e.g.,* obtained on some technical objection, or default of pleading (*Re Orrell,* 12 Ch.D. 681); or misconception of the form of action, or because the debt was not then due, or the plaintiff was under a temporary disability to sue (Tay. s. 1719); or (3) **Without Jurisdiction** (or in the case of orders by justices, or under special statutory powers, omission to recite facts showing jurisdiction, *supra;* or (4) **Fraudulent, Collusive or Forged.** As to *fraud,* see *Priestman* v. *Thomas,* 9 P.D. 210, and *Wyatt* v. *Palmer,* 1899, 2 Q.B. 106. A plea of fraud, however, can in general only be taken advantage of by a stranger to the judgment who is in no way privy to the fraud, and not by a party, since, if the latter were innocent he might have applied to vacate the judgment, and if guilty he cannot escape the consequence of his own wrong (Tay. s. 1713; Steph. art. 46); so, as to collusion—*e.g.* where the parties, even without fraud, were not really in contest (*Bandon* v. *Becher,* 3 C. & F. 479, 510; *Girdlestone* v. *Brighton Co.,* 4 ExD. 107). The rule that fraud can only be proved by an innocent party does not apply, however, to probate (*Birch* v. *B.,* 1902, P. 130), or divorce (*Bonaparte* v. *B.,* 1892, P. 402) cases. As to impeaching Probates, &c., see *post,* 431-33. On the other hand, judgments *by consent* are binding (*Serrao* v. *Noel,* 15 Q.B.D. 549; *The Bellcairn,* 10 P.D. 165; *Re South American Co.,* 1895, 1 Ch. 37; *Huddersfield Co.* v. *Lister,* 1895, 2 Ch. 273; *Shaw* v. *Herefordshire,* 1899, Q.B. 282), provided they proceed upon a compromise of the cause of action and not upon some merely technical default (*Magnus* v. *National Bank of Scotland,* 57 L.J. Ch. 902), or contract which is *ultra vires* (*Great N.W.C. Ry.* v. *Charlebois,* 1899, A.C. 114; and see generally as to Judgments by consent, 30 Sol. Jo. pp. 260, 279, 294, 311), as also is a compromise sanctioned by the Court (*Worman* v. *W.,* 43 Ch.D. 296). As to parol evidence to affect judgments, see *post,* 569, 576.

Foreign Judgments (which term includes judgments, whether strictly of record or not, emanating from Irish, Scotch, Colonial, or foreign tribunals) may, in like manner, be impeached because (1) *Not final* (*Nouvion* v. *Freeman,* 15 App. Cas., 1); or (2) *Without jurisdiction* (*Pemberton* v. *Hughes,* 1899, 1 Ch. 781); or (3) *Fraudulent* (*Abouloff* v. *Oppenheimer,* 10 Q.B.D. 295; *Vadala* v. *Lawes,* 25 Q.B.D. 319; *Codd* v. *Delap,* 92 L.T. 510; *Hip Foong Hong* v. *Nestia,* 1918, A.C. 888; but see *Robinson* v. *Fenner,* 1913, 3 K.B. 853; and as to foreign judgments *in rem, Bater* v. *B.,* 1906, P. 209, C.A.); or (4) *Against natural justice* (*Pemberton* v. *Hughes, sup.; Robinson* v. *Fenner, sup.*); though not for mistake of fact, or of foreign or English Law (*id.;* Piggott, Foreign Judgments, 106-107; 2 Smith, L.C., 12th ed. 815-22; Tay. s. 1729; Ros. N.P. 209-211).

(4) **Judgments never Evidence of Collateral Matters.** No judgment is evidence of the truth of any matter not *directly decided, or a necessary ground of the decision;* thus, it is never evidence of facts which merely came collaterally in question, or were incidentally cognisable, or can only be inferred by argument from the decision (*R.* v. *Kingston* (*Duchess*), 20 How St. Tr. 538; 2 Smith L.C., 12th ed. 780; *R.* v. *Hutchings,* 6 Q.B.D. 300; *Concha* v. *C.,* 11 App. Cas. 541); nor, *à fortiori,* does any estoppel arise as to the mere reasons assigned for a judgment (*Allsop* v. *Joy,* 61 L.T. 213). So, the opinion of a Registrar, when refusing a receiving order, that the creditor was actuated by malice, is no evidence of that fact (*King* v. *Henderson,* 1898, A.C. 720; *Re Vitoria,* 1894, 2 Q.B. 387).

(5) **Effect of Judgments for and against a Party. Convictions. Dismissals. Acquittals.** It should be noticed, that judgments may have a different effect according as they are *for or against* a party; thus, a decree of divorce, altering status, concludes even strangers; but a judgment dismissing the petition affects only parties and privies (*Needham* v. *Bremner,* L.R. 1 C.P. 583). So, a conviction for non-repair of a road is conclusive against a parish of its liability to repair, but an acquittal (which does not like a conviction, ascertain any precise fact, though see *Kinnis* v. *Graves,* 19 Cox, 42) is not evidence for it of non-liability (*R.* v. *St. Pancras,* 1 Peake, 220; *R.* v. *Wick St. Lawrence,* 5 B. & Ad. 526; *Cooke* v. *Sholl,* 5 T.R. 255); moreover, convictions may be quashed, but acquittals cannot (*R.* v. *Galway,* 1906, 2 I.R. 499; *R.* v. *Simpson,* 1914, 1 K.B. 66). As to dismissals by magistrates, see *ante,* 367-8, and *post,* 424-5; and as to the distinction between judgments for or against joint-debtors, *post,* 414-5.

JUDGMENTS IN REM. Subject to impeachment on the grounds mentioned *supra,* a domestic judgment *in rem* is in civil proceedings (but not in criminal, Tay. ss. 1680-81) conclusive evidence for or against all persons, whether parties, privies or strangers, of the *matters actually decided;* and this, probably, although it has not been pleaded (Tay. s. 1673). It is also, as between parties and privies, conclusive of the *grounds of the decision* where these have been put in issue and actually decided by the Court; but as between strangers, or a party and a stranger, it is no evidence of the truth of such grounds except upon questions of *prize;* where it is conclusive if the ground of condemnation is plainly stated, and admissible if not (Tay. s. 1733-1734; *cp. Ballantyne* v. *Mackinnon,* cited *post,* 410); orders of removal of paupers have been considered to form a second exception (*R.* v. *Wye,* 7 A. & E. 770; *R.* v. *Hartington,* 4 E. & B. 780; though the latter case was doubted in *R.* v. *Hutchings,* 6 Q.B.D. 300); and Exchequer condemnations a third (*Hart* v. *Macnamara,* 4 Price, 154 *n*; *Geyer* v. *Aguilar,* 7 T.R. 681). As to these alleged exceptions see, however, *De Mora* v. *Concha,* 29 Ch.D. 268. In *Hill* v. *Clifford,* 1907, 2 Ch. 236, 244. Cozens-Hardy, M.R., stated that there were two classes of judgments in *rem,* one of which is conclusive against all the world and the other not conclusive, but admissible. In the latter category, however, he included matters which are not usually treated under this head, but under that of public documents, *i.e.,* public inquisitions &c., as to which see *ante.* chap. xxxi. [Tay. ss. 1674-1681, 1733-1738; Best, s. 593 Ros. N.P. 196-197, 207; 2 Smith, L.C., 12th ed., 775-81; Everest and Strode on Estoppel, 75-116; Whart. ss. 814-818.]

A foreign judgment *in rem* is generally conclusive against strangers only upon questions of *prize*, where the ground of condemnation is plainly stated; or of *marriage and divorce*, where the marriage was solemnized and the parties domiciled in the foreign country (*Bater* v. *B.*, 1906, P. 209); or of *bankruptcy*, as to contracts made in such country; or of *probate, administration, and guardianship* to a limited extent. [Tay. ss. 1732-1738; Piggott on Foreign Judgments; Foote on International Law, 572-583; Everest and Strode on Estoppel, 157-192; Whart. s. 813-818; 2 Smith L.C., 12th ed., 756-7].

Judgments in Rem and in Personam Distinguished. As applied to judgments, the terms *in rem* and *in personam*, which are adopted from, though not belonging to, the Roman law, have never been clearly defined in reference to our own or any other system (Steph. Dig., *note* xxiii.). A judgment *in rem* has been described as "an adjudication upon the status of some particular subject-matter by a tribunal having competent authority for that purpose" (2 Smith, L.C., 12th ed. 776; Piggott on Foreign Judgments, 244), a definition which, though seemingly the best that can be framed upon a difficult subject, is imperfect in that it fails to distinguish between territorial and ex-territorial status (Whart. ss. 815-818), besides including in its terms matters which are not properly classed as judgments *in rem*—*e.g.* inquisitions and criminal convictions (*sup.*; Tay. s. 1674). It has also been defined as "a judgment by a court having special jurisdiction over the subject-matter" (*M'Donnell* v. *Alcorn*, 1894, 1 I.R. 274, 278); such judgments, however, only operate *in rem* if they alter status (*Needham* v. *Bremner*, L.R. 1 C.P. 582).

The following is a list of the principal adjudications of this nature:—(1) *Judgments in condemnation of property* as forfeited, whether pronounced by the old Court of Exchequer (now the K.B.D.), or by the Commissioners, or sub-Commissioners of Excise, Inland Revenue, or Customs (*Geyer* v. *Aquilar*, 7 T.R. 681; *Maingay* v. *Gahan*, Ridge, L. & S. 1, 79). (2), *Adjudications as to Prize* in the Admiralty Court (*Le Caux* v. *Eden*, 2 Doug. p. 612), or for the enforcement of maritime lien (*The City of Mecca*, 5 P.D. 28). (3) *Decrees of the Divorce Court*, provided they alter status, *e.g.* decrees of judicial separation, or for dissolution or nullity of marriage, but not a judgment of adultery not followed by a decree (*Needham* v. *Bremner*, L.R. 1 C.P. 583); nor a decree in a suit for jactitation of marriage (*R. v. Kingston (Duchess)*, 20 How. St. Tr. 537-45); nor decrees under the Legitimacy Declaration Act, 1858 (see s. 8; and *cp. Shedden* v. *A.-G.*, 30 L.J.P. & M. 217); nor an affiliation order (*Anderson* v. *Collinson*, 1901, 2 K.B. 107, 109). (4) *Grants of Probate* (*Allen* v. *Dundas*, 3 T.R. 125; *post*, 409, 431-3), and administration (*Bourchier* v. *Taylor*, 4 Br. P.C. 708; *Prosser* v. *Wagner*, 1 C.B. N.S. 289). (5) *Adjudications in Bankruptcy* (Bpy. Act, 1914, s. 138, sub-s. 2); but not orders winding up companies (*Re Bowling*, 1895, 1 Ch. 663). (6) Old Judgments of Outlawry. (7) *Sentences of Deprivation* and expulsion, whether delivered by a spiritual court, visitor, or college (*Phillips* v. *Bury*, 2 T.R. 346), *Orders of Naval Courts* dismissing seamen (*Hutton* v. *Ras Steam Co.*, 1907, 1 K.B. 834), or of the *Medical Council* striking off a medical man (*Hill* v. *Clifford*, 1907, 2 Ch. 236). (8) *Settlement Adjudications*, if either unappealed against or confirmed (*R.* v.

Kenilworth, 2 T.R. 598; *R.* v. *Wick St. Lawrence,* 5 B. & Ad. 525; *Uxbridge* v. *Winchester,* 91 L.T. 533), (9) *Judges' certificates of election* of a member of parliament under 31 & 32 Vict. c. 125 (*Waygood* v. *James,* L.R. 4 C.P. 361), but not their reports under the same Act (*Stevens* v. *Tillet,* L.R. 6 C.P. 147). (10) Formerly, judgments for the Crown on *scire facias* for the repeal of patents (Ros. N.P. 196); and now orders for their revocation under the Patents Act, 1907, s. 25 (*id.; Re Deeley's Patent,* 1895, 1 Ch. 687; *Poulton* v. *Adjustable Co.* 1908, 2 Ch. 430, 439, C.A.). (11) Adjudications by Commissioners of Inland Revenue upon stamp duties (Tay. s. 1763; if delivered *before* the document is objected to in evidence, *Prudential Assoc.* v. *Curzon,* 8 Ex. 97); and various other judgments or orders made under special statutory powers, *e.g.* a Justice's order that a street is a highway, is a judgment *in rem,* and conclusive of the status of the street under the Private Street Act, 1892 (*Wakefield* v. *Cooke,* 1904, A.C. 31; *post,* 421); as well perhaps as (12) sentences of Courts-martial (Tay. s. 1675).

Judgments *in personam* are the ordinary judgments between parties in cases of contract, tort, or crime. It has been suggested that the term *inter partes* would be a more correct designation, to distinguish them from those adjudications *in rem* which affect personal status (2 Smith, L.C., 11th ed. 751); but as many judgments *in rem* also operate *inter partes* (see *e.g. The Dupleix,* 1912, P. 8, 12-15), the phrase *in personam* seems preferable. The former classification, moreover, has been recognised by the legislature (24 & 25 Vict. c. 10, s. 35).

Principle. The principle of the conclusiveness of judgment *in rem* as regards *persons* is, that public policy for the peace of society requires that matters of social status should not be left in continual doubt; and as regards *things,* that geneally speaking every one who can be affected by the decision may protect his interests by becoming a party to the proceedings, (Tay. s. 1676). In addition to which it is to be remembered that a decision *in rem* not merely declares the status of the person or thing, but *ipso facto* renders it such as it is declared; thus, a decree of divorce not only annuls the marriage but renders the wife *feme sole;* an adjudication in Bankruptcy not only declares, but constitutes, the debtor a bankrupt; a sentence in a prize Court not merely declares the vessel prize, but vests it in the captor.

Conflicting Judgments in Rem. Where there have been conflicting judgments *in rem,* the effect is to set the whole matter at large again (*R.* v. *Wye,* 7 A. & E. 770; *R.* v. *Hutchings,* 6 Q.B.D. 300 *Poulton* v. *Adjustable Co.,* 1908, 2 Ch. 430; *cp.* conflicting presumptions *ante,* 34).

EXAMPLES.

Admissible.	*Inadmissible.*
A. obtains probate of B.'s will (which he has forged) and sues C. for a debt due to B.;—the probate is conclusive evidence, until revoked, that A. is B.'s executor and has the right to deal with his assets (*Allen* v. *Dundas,* 3 T.R. 125; see *post,* 431-433).	A. obtains probate of B.'s will;— in proceedings between strangers the probate is neither conclusive nor, perhaps, admissible to show the genuineness of the will (see *R.* v. *Buttery,* Rus. & Ry. 342; *R.* v. *Gilson, id.* 343 *n*); the sanity of B. (*Marriot* v. *M.,* 1 Str. 671); his domicile *Concha* v. *C.,* 11 App. Cas. 541); or death (Tay. s. 1677), or that any particular property is the assets of B. (*Re McKenna,* 42 Ir. L.T.R. 50 [*post,* 431-3].
A., in the Probate Division, obtains, *ex parte,* a grant of letters of administration to B.'s estate. Afterwards C. brings an action in the Chancery Division for the	

Admissible.

administration of B.'s estate, alleging that he was next-of-kin to B., and that A. was illegitimate, and applied for a receiver and an injunction.—Held, that the letters were conclusive that A. was next-of-kin, and that they could only be impeached in the Probate Division (*Re Ivory, Hankin* v. *Turner*, 10 Ch. D. 372; *post*, 419, 420, 431).

In an action between a shipowner and an underwriter, the question being whether the cargo was neutral or enemy's property, the sentence of a foreign prize Court condemning the ship and cargo on the ground that the cargo was enemy's property, is conclusive, though neither plaintiff nor defendant were parties to the foreign proceedings (*Geyer* v. *Aguilar*, 7 T.R. 681).

Inadmissible.

In an administration suit, a finding that A. is entitled to an annuity, charged on the property of the deceased, on the ground that A. is the legitimate son of B., is not a judgment *in rem* as to A.'s legitimacy, so as to bind persons not parties to the inquiry (*M'Donnell* v. *Alcorn*, 1894, 1 I.R. 274).

A. is prosecuted for bigamy in marrying B. during the lifetime of C., A.'s husband;—a decree in a previous suit, brought in an ecclesiastical Court by A. against C., for jactitation of marriage, which decree was obtained on the ground that C. was not A.'s husband,—held not admissible to disprove A.'s marriage with C., since (1) not being *in rem*, it could not be given in evidence *inter alios*, and (2) it was, on the facts, fraudulent [*R.* v. *Kingston* (*Duchess*) 20 How. St. Tr. 355, *Barrs* v. *Jackson*, 1 Phill. Rep. p. 586; and *cp.* Judgments as affecting Strangers, *post*, 425-30].

JUDGMENTS IN PERSONAM AS AFFECTING PARTIES AND PRIVIES. Subject to impeachment on the grounds mentioned *ante*, 405-6, a *domestic* judgment of a court of competent jurisdiction is conclusive proof, in subsequent proceedings between the same parties or their privies, of the *matters actually decided* (*R.* v. *Kingston* (*Duchess*), 20 How. St. Tr. 355, 538), as well as of the *grounds of the decision*, where these can be clearly discovered from the judgment itself (*Alison's Case*, L.R. 9 Ch. 1, 25; *Priestman* v. *Thomas*, 9 P.D. 210; *Poulton* v. *Adjustable &c., Co.* 1908, 2 Ch. 430, 432-3; *Irish Land Com.* v. *Ryan*, 1900, 2 I.R. 565, C.A.; *Dowling* v. *Dillon*, 39 Ir. L.T.R. 121, C.A.; Steph. art. 41; *contra, Ballantyne* v. *Mackinnon*, 1896, 2 Q.B. 456, 462, where it was considered that a judgment *in personam*, like one *in rem*, is conclusive only of the point actually decided, and not of the grounds of judgment; *sed qu.* as to this case). [Tay. ss. 1684-1710; Best, ss. 588-95; Ros. N.P. 192-194; Steph. art. 41; 2 Sm. L.C. 12th ed. 781-813; Everest and Strode on Estoppel, 51-74; Whart. ss. 758-794; 33 Am. L. Rev. 665.]

Scope of Rule. This rule applies, in general, equally to civil and criminal proceedings, to County Courts, and to courts of summary jurisdiction (*Wright* v. *L. G. Omnibus Co.*, 2 Q.B.D. 271; *R.* v. *Miles*, 24 Q.B.D. 423; *Joint Committee* v. *Croston*, 1897, 1 Q.B. 251; *ante*, 367-8, *post*, 420-3). Thus the dismissal on the merits of a summons, under the Summary Jurisdiction (Married Women) Act 1895, operates as a bar to a fresh one for the same complaint (*Blackledge* v. *B.*, 1913, P. 9; *Stokes* v. *S.*, 1911, P. 195), and a withdrawal, if not for a mere technical defect, may have the same effect (*Pickavance* v. *P.*, 1901, P. 60.; *Davis* v. *Morton*, 1913, 2 K.B. 479; though see *R.* v. *Tyrone*, 1912, 2 I.R. 44; and *Brooks* v. *Bagshaw*, 1904, 2 K.B. 798). But an order of a court of summary jurisdiction will not operate as an estoppel (1) as to any matter which that Court had no authority to adjudicate directly and immediately between the parties; nor (2) as to any matter incidentally coming in question as to which a finding if held conclusive between the

parties would operate in prejudice of the rights of others not parties to the proceedings; nor (3) as to any incidental matter not otherwise determined than as having been the particular ground on which the Court dismissed a charge or complaint (*R.* v. *Hutchings,* 6 Q.B.D. 300, 304; *A.-G.* v. *Eriché,* 1893, A.C. 518; *Wakefield* v. *Cooke,* 1904, A.C. 31). And under certain statutes no estoppel arises—*e.g.* awards under the Workmen's Compensation Act, 1906 (6 Ed. VII. c. 58) do not estop (*Radcliffe* v. *Pacific Co.,* 26 T.L.R. 319); and the dismissal on the merits of a bastardy summons under 7 & 8 Vict. c. 101, s. 2, though evidence upon, is no bar to, a subsequent summons under the same statute (*R.* v. *Gaunt,* L.R. 2 Q.B. 466; *R.* v. *Hall,* 57 L.T. 306; *R.* v. *Robinson,* 1898 1 Q.B. 734; *McGregor* v. *Telford,* 1915, 3 K.B. 237; *R.* v. *Seddon,* 35 L.J.K.B. 806); a bastardy order is, however, *res judicata* to a limited extent (*Williams* v. *Davies,* 11 Q.B.D. 74). So, under the Vaccination Act, 1867, s. 31, repeated fines might be inflicted (*Allen* v. *Worthy,* L.R. 5 Q.B. 163; though *aliter* under s. 29, *Black* v. *Epping Union,* 49 J.P. 16; and see the Vaccination Act, 1898, ss. 3, 4; and 68 J.P. 349-50). In Ireland it has been held that the dismissal on the merits of a civil-bill ejectment, on grounds set out on its face, does not estop either as to the point decided, or as to such grounds, any more than one in the High Court, and though admissible, is not conclusive, upon subsequent proceedings between the same parties for the same cause (*Lennon* v. *Meegan,* 1905, 2 I.R. 189; *Musgrave* v. *M'Avey,* 1906, 2 I.R. 516). Nor is the dismissal of a bankruptcy petition any bar to a second notice and petition for the same debt, though vexatious reapplications will be checked (*Re Vitoria,* 1894, 2 Q.B. 387; *King* v. *Henderson,* 1898, A.C. 720, 730). So, the registrar's decision as to the validity of a debt for the purpose of granting a receiving order (*id.*), or his provisional decision on a question of title for the purpose of ordering an account (*Re Cronmire,* 1894, 2 Q.B. 246), does not estop. Moreover, in bankruptcy, the consideration for a judgment may, on account of the danger of fraud, always be inquired into, at the instance either of the trustee or of the debtor himself (*post,* 426-7); and the file of proceeding creates no estoppel (*Exp. Bacon,* 17 Ch. D. 447). So, neither a winding-up order (*Re Bowling,* 1885, 1 Ch. 663), nor a balance order under the Companies Act, 1862 (*Westmorland Co.* v. *Feilden,* 1891, 3 Ch. 15) was *res judicata.* Nor do decisions in ecclesiastical cases, when not affecting rights of property, estop (*Read* v. *Lincoln* (*Bp.*), 1892, A.C. 644, 655).

Foreign Judgments. Merger. Election. Foreign judgments *in personam* are (subject to the various grounds of impeachment mentioned *ante,* 405-6) also conclusive between parties and privies. But, while domestic judgments generally operate as a merger of the original cause of action (as to partial merger, see *Economic Life Soc.* v. *Usborne,* 1902, A.C. 147, cited *post,* 421), so that execution can issue therefrom, foreign judgments do not, and the plaintiff must therefore sue either upon the judgment itself, which will then be treated as *res judicata* (*Re Henderson,* 37 Ch.D. 255, affd. on other grounds, 15 App. Cas. 1), or upon the original cause of action, when the judgment is considered as evidence merely, but not conclusive, of the debt (*Hawkesford* v. *Giffard,* 12 App. Cas. 122). As to the effect of Scotch and Irish judgments registered in England and *vice versâ,* see *Re Low,* 1894, 1 Ch. 147; and Ann. Pr. Notes to O. 42, r. 28. Where, however, the plaintiff

has elected to take a foreign judgment in discharge of his whole cause of action, he cannot afterwards sue for the residue of the debt in England (*Taylor* v. *Hollard*, 1902, 1 K.B. 676). [Tay. s. 1786; see Piggott, Foreign Judgments, 22-32; Foote, Priv. International Law, 543-572; Nelson, International Law, 338-375; and see 2 Smith L.C., 12th ed. 813-857].

Res judicata: effect as Plea, Evidence, or Stay. The old rule, established by *R.* v. *Kingston* (*Duchess*), 20 How. St. Tr. 355, was that judgments upon the same matter and between the same parties were "as a plea a bar, and as evidence conclusive"; but later decisions have qualified the latter part of this rule, and judgments are now only conclusive as evidence where there has been no opportunity of pleading them, since if a party elect not to plead an estoppel where he may, he is deemed to waive it, and to leave the prior judgment as evidence only for the jury, who may find the contrary (Ros. N.P. 192; Steph. art. 43; see, for an instance of this result, *Conradi* v. *C.*, L.R. 1. P. & M. 514). Where the same question is involved, whether *res judicata* or not, the party may also, apart from O. 25, r 4, apply, before pleading, to have the action stayed under the inherent jurisdiction of the Court (*Stephenson* v. *Garnett*, 1898, 1 Q.B. 677; *Reichel* v. *Magrath*, 14 App. Cas. 665; *MacDougall* v. *Knight*, 25 Q.B.D. 1); as, also, if the second action has been commenced *before* judgment in the first (*Caird* v. *Moss*, 33 Ch.D. 22; *The Delta*, 1 P.D. 393, 404; *Houston* v. *Sligo*, 29 Ch.D. 448).

Principle. The grounds upon which *parties* are precluded from re-litigating the same matter between them are: (1) that of *public policy*, it being in the interest of the State that there should be an end of litigation, *interest rei publicæ ut sit finis litium;* and (2) that of *hardship to the individual*, that he should be twice vexed for the same cause, *nemo bis vexari pro eadem causâ; nemo bis puniri pro uno delicto* (*Lockyer* v. *Ferryman*, 2 App. Cas. 519, *per Lord Blackburn*). The grounds upon which *privies* are concluded, are not only *identity of interest*, but also the principle *qui sentit commodum, sentire debet et onus* (*Re Lart*, 1896, 2 Ch. 788, 795, *per Chitty J.*)

Some Parties or their Privies. Mutuality. (*a*) The term *parties* includes not only those named on the record (defendants becoming parties *after* service of the writ, *Evans* v. *Noton*, 1893, 1 Ch. 252, 264), but also those who had opportunity to attend the proceedings (*Wakefield* v. *Cooke*, 1904, A.C. pp. 36, 38; *Askew* v. *Woodhead*, 21 W.R. 573). So, in probate cases, persons cited, or even cognisant, though not cited, are bound by the judgment, though not by a compromise to which they are no parties (*post*, 431). And probably, in conformity with the rule as to admissions, all persons who are substantially interested in the result come within the same rule (Tay. ss. 1687-1688; *cp. ante*, 237-8). Thus, an infant suing by a next friend or defending by a guardian is considered a party, although the latter is not (*id.; Sinclair* v. *Sinclair*, 13 M. & W. 640; *ante*, 238); and he is bound even if the action was brought without his knowledge or consent (*Morgan* v. *Thorne*, 7 M. & W. 400; see, however, *Blair* v. *Crawford*, 1906, 1 I.R. 578); though it is otherwise in this respect with a person *sui juris* (*Bayley* v. *Buckland*, 1 Ex. 1). So, judgments as to the construction of instruments affecting any unascertained heir, next of kin, or class, are binding upon a representative appointed by the Court to represent such heir or class [O. 16, r. 32 (*a*); a member of a class will not, however, be bound as to a separate and independent right, unless he

has acquiesced in such judgment (*Re Lart,* 1896, 2 Ch. 788); nor will a person who, though cognisant of the proceedings, has no right to intervene (*Young* v. *Hollowoy,* 1895, P. 87)].

A party to be affected must, however, sue or defend in the *same right and character;* thus, a judgment against a man claiming *ex parte paternâ* will not bind him claiming *ex parte maternâ* (Stark. Ev., 4th ed. 337); nor would a judgment against him personally be evidence against him in a representative capacity or *vice versâ* (Ros. N.P. 193; and *cp.* Admissions, *ante,* 238; unless sued personally for a wrong done as such representative, *Spencer* v. *Thompson,* 6 Ir. C.L.R. 537, 566; *Jewsbury* v. *Mummery,* L.R. 8 C.P. 56; *Thompson* v. *Clarke,* 17 T.L.R. 455); and the same rule applies where he sustains two different characters (*e.g.* executor and administrator, *Robinson's Case,* 5 Rep. 32 *b*); or represents two different interests (*Leggott* v. *G.N.Ry.* 1 Q.B.D. 599).

So, a judgment in a civil action is in general no evidence of the truth of the matter decided against the same person in a criminal trial, nor *vice versâ,* since the parties are necessarily different; moreover, the burden of proof is not the same, the defendant in the criminal trial cannot avail himself of the admissions of the plaintiff in the civil one, and the jury in the latter may decide upon a mere preponderance of evidence (*Castrique* v. *Imrie,* and other cases cited, *post,* 418; Tay. s. 1693; Greenleaf, s. 537), This rule, which certainly savours of technicality, has, however, recently undergone modification, it being held that a conviction is admissible against the convict or his representatives in civil proceedings, not merely as proof of the conviction, but also as presumptive evidence of guilt, at all events where such proceedings are brought to enforce a claim to the fruits of the crime, and perhaps generally [*Re Crippen,* 1911, p. 108; *Re Hull,* 1914, P. 1; and in *Mash* v. *Darley,* 1914, 1 K.B. 1, reversed on other grounds, 1914, 3 K.B. 1226, C.A., Ridley, J., held that the principle of *Re Crippen, sup.,* applied generally]. Moreover, under various statutes, in proceedings before magistrates of a civil, and sometimes of a summary criminal, nature the rule in question does not obtain. Thus, a magistrate's award of compensation under 6 & 7 Vict. c. 86, s. 28, is a bar to an action for the same cause (*Wright* v. *L. G. Omnibus Co.,* 2 Q.B.D. 172; *post,* 423). And the converse also holds, a civil judgment being a bar to the same claim before a magistrate (*Routledge* v. *Hislop,* 29 L.J.M.C. 90; *post,* 420). So, under the Offences Against the Person Act, 1861, ss. 42-45, a summary conviction, or a certificate of dismissal (*ante,* 368), on a charge of common assault, or of aggravated assault on a woman or child, is a bar to all proceedings, *civil and criminal,* for the same cause (*Masper* v. *Brown,* 1 C.P.D. 97); and so with convictions under the Larceny Act, 1861, s. 109; the Malicious Damage Act, 1861, s. 67; and for aggravated assault under 16 & 17 Vict. c. 30, s. 1 (though not on indictment for unlawfully wounding, *Lowe* v. *Howarth,* 13 L.T. 297).

Privies. Judgments are also conclusive for or against privies, not only, as we have seen, because of the *identity of interest,* but also on the principle *qui sentit commodum, sentire debet et onus* (*Re Lart,* 1896, 2 Ch. p. 795; Tay. s. 390). Thus, as instances of successive relationship, judgments for or against an ancestor are evidence for or against his heir; those against a testator bind his executor, legatee, or devisee; and the same rule applies to

grantees, mortgagees, and assignees, provided their titles accrue subsequently to the judgment [*Doe* v. *Derby*, 1 A. & E. p. 790; *Re De Burgho's Estate*, 1896, 1 I.R. 274, where it was held that the conversion of a renewable leasehold into a fee farm grant was not the acquisition of a new estate for this purpose; Tay. s. 1686]. So, a judgment against the holder of an office will bind his successor (*Reichel* v. *Magrath*, 14 App. Cas. 665); and one against a representative class, a future member of that class (*Sewers Commissioners* v. *Gellatly*, 3 Ch.D. 610; *Llanover* v. *Homfray*, 19 Ch.D. 224). And, if successive remainders are limited by the same deed, a judgment for one remainderman is evidence for the next in succession (*Doe* v. *Tyler*, 6 Bing. 390; *Doe* v. *Harlow*, 12 A. & E. p. 42). But a judgment against a tenant for life or years does not bind a reversioner, for the latter claims independently (*Rees* v. *Watts*, 3 M. & W. 527; *Wenman* v. *Mackenzie*, 5 E. & B. 447; Tay. s. 1693); nor does a decree against a predecessor in title, restraining an injury to land, bind successors (*A.-G.* v. *Birmingham*, 17 Ch.D. 685); nor a decree against a company, bind another company to which the whole of its assets has been transferred, for here there is no privity of estate (*Mercantile Trust* v. *River Plate Trust*, 1894, 1 Ch. 578).

The privy may also be bound where the relationship is mutual and not successive. Thus, as instances of *joint liability* in contract: a judgment against a partner or joint contractor is (unless obtained after the dissolution of the partnership by death, *Re Hodgson, Beckett* v, *Ramsdale*, 31 Ch.D. 177; Partnership Act, 1890, s. 9) a bar to separate actions, or a joint action, against the rest for the same cause of action (but not for different ones, *e.g.* on a cheque and the original debt, *Wegg-Prosser* v. *Evans*, 1895, 1 Q.B. 108, overruling *Cambefort* v. *Chapman*, 19 Q.B.D. 229), although the former judgment remains unsatisfied (*King* v. *Hoare*, 13 M. & W. 494; *Kendall* v. *Hamilton*, 4 App. Cas. 504; *Isaacs* v. *Salbstein*, 1916, 2 K.B. 139, C.A.), or was rescinded with the judgment debtor's consent (*Hammond* v. *Schofield*, 1891, 1 Q.B. 453), or one of the debtors was a married woman contracting in respect of her separate estate (*Hoare* v. *Niblett*, 1891, 1 Q.B. 781), the reason being not only that the cause of action is merged in the judgment, but that the right of each debtor to be sued jointly with the rest is gone (*Kendall* v. *Hamilton, sup.*; *Pilley* v. *Robinson*, 20 Q.B.D. 155; *Isaacs* v. *Salbstein, sup.*). But although a creditor cannot sue one partner after suing the other, yet a *surety* for one of the partners may, since the rights of creditor and surety are not co-extensive (*Badeley* v. *Consolidated Bank*, 34 Ch.D. 536). And now, under the Jud. Act, the rule in *King* v. *Hoare* and *Kendall* v. *Hamilton* is restricted mainly, if not wholly, to *successive actions* against co-debtors (O. 27, r. 3); since where several partners or joint-debtors are sued in the *same action*, neither judgment in default of appearance against one, nor in default of defence against another, nor under O. 14, against a third (*Pim* v. *Coyle*, 1903, 2 I.R. 457; *Walton* v. *Tophakyan*, 53 W.R. 657), nor perhaps a consent judgment against a fourth (*Weall* v. *James*, 68 L.T. 515; *Powell* v. *Adamson*, 1895, 2 I.R. 41; *contra*, *MacLeod* v. *Power*, 1898, 2 Ch. 295), will be any bar to judgment against the rest: nor, where some are out of the jurisdiction, or difficult to serve, will the plaintiff be compelled to join them as defendants (*Robinson* v. *Geisel*, 1894, 2 Q.B. 685, qualifying *Pilley* v. *Robinson, sup.*). A judgment *in favour* of one of several joint debtors,

however, must, in order to exempt the others, have proceeded on a ground that would operate as a discharge to all (*Phillips* v. *Ward,* 33 L.J.Ex. 7).

Where the liability is *joint and several,* and the case is one of *contract,* no estoppel will arise. Thus, a separate judgment, while unsatisfied, against one debtor will not bar separate actions against the rest (*Lechmere* v. *Fletcher,* 1 C. & M. 623; *King* v. *Hoare, sup.; Drake* v. *Mitchell,* 3 East, 251; *Bermondsey Vestry* v. *Ramsey,* L.R. 6 C.P. 247); nor, it has been said, a joint judgment against all, separate actions against each (*Re Davison,* 13 Q.B.D. 50; *contra,* Lindley, Partnership, 7th ed. 286-7; and *cp. Re E.W.A.,* 1901, 2 K.B. 642). A joint liability *in tort* has been held to be extinguished by a judgment recovered against any one of the parties liable, even without satisfaction, for the cause of action being one and indivisible and having been merged in the judgment, cannot ground a fresh action (*Brinsmead* v. *Harrison,* L.R. 7 C.P. 547; *Buckland* v. *Johnson,* 15 C.B. 145; *Munster* v. *Cox,* 1 T.L.R. 542; *Kelly* v. *Hammond,* 2 T.L.R. 804; *Goldrei* v. *Sinclair,* 1918, 1 K.B. 180, C.A., where it was said that O. 27, did not alter the rule in *Brinsmead* v. *Harrison*). But where the liability is joint and several, as in breaches of trust, a joint judgment against all forms no bar to separate proceedings against each (*Re Davison, sup.*); nor a separate judgment against one any bar to actions against the rest (*Blyth* v. *Fladgate,* 1891, 1 Ch. 337; *Edwards* v. *Hood-Barrs,* 1905, 1 Ch. 20).

Where the case is not one of joint-debtors, but of *joint-creditors,* equity will hold each entitled to a separate interest. Thus, where one joint-creditor sues on a bond, neither accord and satisfaction with, nor probably judgment by, the other will bar the claim (*Steeds* v. *S.,* 22 Q.B.D. 537; *Palmer* v. *Mallett,* 36 Ch.D. 411).

Judgments against executors or administrators do not necessarily bind residuary legatees, next of kin, or devisees, since the former do not represent the estate for all purposes (*Concha* v. *C.,* 11 App. Cas. 541; *Harvey* v. *Wilde,* L.R. 14 Eq. 438; *Spencer* v. *Williams,* L. R. 2 P. & D. 230; cp. *ante,* 242); nor, in the absence of agreement, will a judgment against a principal bind his surety (*Parker* v. *Lewis,* 8 Ch. App. 1035; *Exp. Young, Re Kitchin,* 17 Ch.D. 668); nor a judgment against a wife's separate estate for an ante-nuptial debt bar a subsequent action against her husband (*Beck* v. *Pierce,* 23 Q.B.D. 316).

The rule requiring identity of parties is often expressed in another form by the maxim *Estoppels must be mutual;* it being a well-established principle that no one can take advantage of a judgment unless he would also have been concluded had it gone against him (*Wenman* v. *Mackenzie,* 5 E. & B. 447; *Spencer* v. *Williams, sup.; De Mora* v. *Concha,* 29 Ch.D. 268; for exceptions to this rule, see *post,* Judgments against Strangers, 425-30).

Same Subject-matter and Object. (*b*) In order that a former judgment should conclude the parties thereto or their privies, either as an estoppel or as evidence, the matter in dispute must be identical in both proceedings; though it is not necessary that it should be the only point determined in either [Tay. ss. 1695-1701; 1705-1710; Stark. Ev., 4th ed. 333-337; Ros. N. P. 195-196].

Under the old form of pleadings there was much less difficulty in deciding whether a matter was *res judicata* than now, when the pleadings may contain a long story, or be wholly informal, or none may be delivered (*Ripley* v.

Arthur, 86 L.T. 735, 736; *Banbury* v. *Bank of Montreal,* cited *ante,* 27). The question is for the judge, or, if the facts are in dispute, for the jury, upon the evidence adduced (Tay. s. 1695); and in order to decide it the pleadings in the former action (*Robinson* v. *Duleep Singh,* 11 Ch.D. 798); the report of the judge who tried the case (*Houston* v. *Sligo,* 29 Ch.D. 448); or oral evidence (*e.g.* the testimony of an arbitrator to explain, though not to contradict, his award, *Buccleuch* v. *Metropolitan Board of Works,* L.R. 5 H.L. 418) may be resorted to. On the one hand, the issues may be the same, although the form of action and the marshalling of the parties may be different; on the other, the issues may be distinct, though both relate to the same transaction or property. The safest test, therefore, is to inquire whether the *same evidence would support both issues* (*Furness* v. *Hall,* 25 T.L.R. 233; *R.* v. *Cork* JJ., 43 Ir. L.T.R. 154). Even, however, where the two cases are tried before the same judge, judicial notice will not be taken that the issues are the same (*Robinson* v. *R.,* 2 P.D. 75; *ante,* 21).

Same Object. It is now settled that when once a given fact has been put in issue and decided between the parties, it will conclude them and their privies from re-litigating such fact in any subsequent proceeding, although brought for a different purpose or object (*Barrs* v. *Jackson,* 1 Phill, 582; *Flitters* v. *Allfrey,* L.R. 10 C.P. 29; *Finney* v. *F.,* L.R. 1 P. & D. 483; *Priestman* v. *Thomas,* 9 P.D. 70, 210). Though, however, this is true with regard to *findings of fact,* yet to raise an estoppel on the *right determined* the two suits must, it would seem, have been brought for the same purpose and object [*Hunter* v. *Stewart,* 31 L.J.Ch. 346; *Nelson* v. *Couch,* 15 C.B. N.S. 99; *Rio Tinto Co.* v. *Société des Métaux,* 6 T.L.R. 408; *Whittaker* v. *Kershaw,* 45 Ch.D. 320, 327; at all events, this distinction, which was taken *arguendo* in *De Mora* v. *Concha,* 29 Ch.D. 268, 292, helps to reconcile many of the conflicting *dicta* on the subject].

Election. Fresh Evidence. It is, perhaps, hardly necessary to remark that, whether the issues are the same or not, the parties may be estopped, not on the ground of *res judicata,* but of *election* (*Scarf* v. *Jardine,* 7 App. Cas. 345; *Re Davison,* 13 Q.B.D. 50, 53; *Taylor* v. *Hollard,* 1902, 1 K.B. 676). So, though the parties are generally precluded from re-litigating the same point, the case may sometimes, by leave of the Court, be reopened upon the discovery of fresh evidence tending in a different direction (*Stevens* v. *Tillett,* L.R. 6 C.P. 147, 170; *Re May,* 28 Ch.D. 516; *Phosphate Sewage Co.* v. *Molleson,* 4 App. Cas. 801; *Boswell* v. *Coaks,* 6 R. 167, H.L.).

Whole Case. (*c*) The parties are also, in general, estopped as to their whole case, and will not be permitted to reopen the same subject-matter of litigation merely because they have from negligence, inadvertence, or even accident omitted a part of their case (*Henderson* v. *H.,* 3 Hare, 115; *Joint Committee, &c.,* v. *Croston,* 1897, 1 Q.B. 251; see, however, *Heath* v. *Weaversham Overseers,* 1894, 2 Q.B. 108; *post,* 423). Thus, they may not split their cause of action (*Russell* v. *Waterford Railway Co.,* 16 L.R.I. 314; *MacDougall* v. *Knight,* 25 Q.B.D. 1; and see County Courts Act, 1888, s. 81); nor their relief (*Serrao* v. *Noel,* 15 Q.B.D. 549; *Wright* v. *Lond. Gen. Omnibus Co.,* 2 Q.B.D. 271); nor set up facts which were available for them under any of the issues tried in the former action (*Jewsbury* v. *Mummery,* L.R. 8 C.P. 56; *Bagot* v. *Williams,* 3 B. & C. 239; *Dunn* v. *Murray,* 9 B. & C. 780).

And if all matters in difference are referred, this is an estoppel as to every claim falling within the scope of the reference (*Smith* v. *Johnson*, 15 East, 213; *Dunn* v. *Murray, sup.*; *Henderson* v. *H., sup.*); though not as to others outside it (*Ravee* v. *Farmer*, 4 T. R. 146; see also *Rhodes* v. *Airedale Commissioners*, 1 C.P.D. 402).

But plaintiffs are not bound, nor estopped if they fail, to join *distinct* causes of action though arising in respect of the same transaction (*Brunsden* v. *Humphrey*, 14 Q.B.D. 141); nor distinct equities entitling to the same relief (*Hunter* v. *Stewart*, 31 L.J. Ch. 346; but see *Re Hilton*, and *Shoe Machinery Co.* v. *Cutlan*, cited *post*, 424; also Piggott Foreign Judgments, 48-51). Nor formerly were defendants obliged to litigate all, or any, of their defences in a particular suit (*Howlett* v. *Tarte*, 10 C.B.N.S. 813; *Davis* v. *Hedges*, L.R. 6 Q.B. 687; *Houston* v. *Sligo*, 29 Ch. D. 448; *Caird* v. *Moss*, 33 Ch. D. 22); though, under the Jud. Acts, this rule has now to some extent been modified (*Humphries* v. *H.*, 1910, 2 K.B. 531; *Cooke* v. *Rickman*, 1911, 2 K.B. 1125; *post*, 423). And no estoppel arises if the parties had no opportunity of obtaining in the former suit the relief sought in the latter (*Nelson* v. *Couch*, 15 C.B.N.S. 99; *The Orient*, L.R. 3 P.C. 696; *The Sylph*, L.R.2 Ad. 24); nor if the question raised in the second action was not, and could not properly have been, decided in the former suit (*Bainbrigge* v. *Baddeley*, 2 Phill. 705; *Toulmin* v. *Copland*, *id.* 711; *Blake* v. *O'Kelly*, 9 Ir. R. Eq. 54; *Houston* v. *Sligo, sup.*; *Worman* v. *W.*, 43 Ch. D. 296); nor if, though in fact raised and decided, it was unnecessary to the decision (*Concha* v. *C.*, 11 App. Cas. 541).

Criminal Cases. (*d*) In criminal cases similar rules prevail; an acquittal or conviction being a bar to a second indictment for the same offence, or for any other of which the prisoner might have been convicted under the first [*R.* v. *Barron* (No. 2), 1914, 2 K.B. 570; *cp. ante*, 410]. So, where the first offence was the subject of summary proceedings, and the defendant is accused a second time, upon summons or indictment, for the same offence, whether charged in the original form, or a more aggravated one. And, under the Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 33, where an act or omission constitutes an offence under several statutes, or both by statute and common law, the offender shall not, unless a contrary intention appear, be liable to be twice punished for the same offence. [Tay. ss. 1705-1710; Russ. Cr., 7th ed., 1981-96; Archb. Cr. Pl., 23rd ed., 169-77; Ros. Cr. Ev., 13th ed., 169-72; 64 J.P. 611; and as to the effect in this country of an acquittal in a Foreign Court, see *R.* v. *Aughet*, 13 Cr. App. 101; and 68 J.P. 417]. Moreover, where a given fact has been litigated between Crown and prisoner, the judgment therein will be conclusive in a second trial (*R.* v. *Willshire*, 6 Q.B.D. 366).

EXAMPLES.

(*a*) *Same Parties, or their Privies. Mutuality.*

Admissible.	*Inadmissible.*
A. sues B. for infringement of patent, and obtains judgment on the ground that the patent is valid. In a fresh action by A. for a subsequent infringement of the	A. sues B. for infringement of patent, and B. obtains judgment on the ground that the patent is invalid. On a subsequent petition by B. for the revocation of

Admissible.

same patent, B. is estopped from impeaching the validity of the patent [*Shoe Machinery Co.* v. *Cutlan*, 1896, 1 Ch. 667; *Horrocks* v. *Stubbs*, 74 L.T. 58; *Poulton* v. *Adjustable, &c., Co.*, 1908, 2 Ch. 430; see *post*, 424).

A., as public officer of a bank, having obtained judgment against B. for a debt due to the bank, arrests him for a greater amount than is adjudged due. In a subsequent action for malicious arrest by B. against A. personally, A. is estopped from disputing the correct amount of the debt, though in the former action he sued in *autre droit* (*Spencer* v. *Thompson*, 6 Ir. C.L.R. 537).

A. sues B., as executrix of C., for a debt due from C. to A.;—B. does not defend, nor plead *plene administravit*. In a subsequent action by A. against B. personally, B. is estopped from denying that she had sufficient assets of C.'s to pay the debt (*Thompson* v. *Clarke*, 17 T.L.R. 455; *Barron* v. *Ryan*, 41 Ir.L.T.R. 39; *cp. Jewsbury* v. *Mummery*, *post*, 423).

In a probate action, B., who is made a defendant as A.'s next of kin, but not cited as A.'s heir, appears, and unsuccessfully disputes A.'s will. He cannot afterwards, as A.'s heir, dispute the will as affecting realty (*Beardsley* v. *B.*, 1899, 1 Q.B. 746; *cp. Priestman* v. *Thomas*, *post*, 422).

A., as administratrix of B. (her deceased husband), sues a railway company under Lord Campbell's Act for damages for B.'s death by a collision. B. had, before he died, accepted a sum of money in full satisfaction of all his causes of action against the company. A.'s claim held to be barred [*Read* v. *G. E. Ry.*, L.R. 3 Q.B. 555; *Griffiths* v. *Dudley*, 9 Q.B.D. 357. These cases have been supposed to conflict with *Leggot* v. *G. N. Ry.*, *opposite;* but in *Griffiths* v. *Dudley*, Cave, J., denied this. The Court decided that the Act gave no new right of action, but only substituted the right of the representative to sue, for that of the deceased].

Certain tenants of a manor, on behalf of themselves and all other tenants, sue the lord in respect of a manorial right. The judgment in this suit is conclusive in an action for the same cause between a subsequent lord and other tenants, the two sets of parties being privy in estate (*Llanover* v. *Homfray*, 19 Ch.D. 224).

A judgment in a suit between A., the incumbent of a living, and C., the patron, deciding that the living was vacant on the grounds of A.'s resignation, is conclusive in an action by B., the succeeding incumbent, against A., in which the question was whether A.'s resignation was valid (*Reichel* v. *Magrath*, 14 App. Cas. 665).

Inadmissible.

A.'s patent, A. is not estopped from again maintaining its validity, since B.'s petition is a proceeding on behalf of the public, and not one personally between A. and B. (*Re Deeley's Patent*, 1895, 1 Ch. 687).

A. is convicted of forging B.'s signature to a bill of exchange. In an action against B., by C., to whom A. has transferred the bill, A.'s conviction is not admissible to prove the forgery [*per* Blackburn, J., in *Castrique* v. *Imrie*, L.R. 4 H.L. p. 434; *Leyman* v. *Latimer*, 3 Ex.D. p. 354; *Parsons* v. *L. C. C.*, 9 T.L.R. 619; *Yates* v. *Kyffin-Taylor*, 1899, W.N. p. 141; *Caine* v. *Palace Co.*, 76 L.J.K.B. 292, 298, 302, C.A.; *Attenboro'* v. *Halford*, 55 L.Jo. 256; *cp. post*, 429; *Coffey* v. *U.S.*, 116 U.S. 443]. So, a certificate of acquittal on a charge of rape is not admissible to disprove the rape in a divorce suit founded thereon [*Virgo* v. *V.*, 69 L.T. 460, *post*, 428. For a converse case in which a civil judgment was rejected in a criminal case, see *R.* v. *Kingston*, *ante*, 410, *post*, 426].

A verdict and judgment in an action of ejectment, brought to try the validity of a will of realty.—Held not admissible in a suit respecting the same will in the Ecclesiastical Courts (*Grindall* v. *G.*, 3 Hagg. 259, since in the former action the heir alone was a party, and the verdict might have been collusive).

A., as administratrix of B. (her deceased husband), obtains judgment against a railway company, under Lord Campbell's Act, for damages for B.'s death from a collision. She is not estopped from afterwards, as administratrix, suing the company for loss to B.'s personal estate on account of his medical expenses and inability to attend to business resulting from the same accident, since in the former she represented B.'s widow and children personally, and in the latter B.'s estate merely [*Leggott* v. *G.N. Ry.*, 1 Q.B.D. 599; *Daly* v. *Dublin Ry.*, 30 L.R.I. 514; and under Workmen's Comp. Acts, see *Williams* v. *Vauxhall Colliery Co.* 1907. 2 K.B. 433. C.A.]

A judgment in a probate suit between the executor and next-of-kin of a testator, in which the domicile of the testator was declared to be English, does not estop the next-of-kin from bringing a subsequent action against the residuary legatee, in which the question was whether the domicile was not Chilian, and as such did not deprive the testator of the power to bequeath more than a quarter of his property to strangers, the executor not representing the parties in such a dispute, and also the question of domicile being unnecessary to the former decision [*Concha* v. *C.*, 11 App. Cas. 541; and see *M'Donnell* v.

Admissible.

Where A., one of three brothers, co-parceners in gavelkind, was in possession of the whole of the land and leased it to B., B. was, upon the deaths of A. and of another of the brothers, held estopped from denying that the surviving brother was entitled, as heir and privy in blood of A., to the *whole* of the land, and not merely to one-third thereof (*Weeks* v. *Birch*, 69 L.T. 759).

A. and B., co-owners of certain works, sue C. for diverting water therefrom. A judgment obtained by A., when sole owner of the works, against C. for a former diversion of the water, is admissible in favour of A. and B.;—the fact of their joint possession of the works being sufficient *prima facie* evidence of their privity of estate to let in the former judgment [*Blakemore* v. *Glamorganshire Co.*, 2 C. M. & R. 133; *cp. Eaton* v. *Swansea Waterworks*, *post*, 429; *R.* v. *Brightside Bierlow*, 13 Q.B. 923; *Mercantile Trust* v. *River Plate Co.*, 1894, 1 Ch. 578].

A. obtains an affiliation order against B., which, on appeal to Q.S., is quashed on the ground of insufficient corroborative evidence. The latter order is a decision on the merits and final, and A. cannot afterwards take fresh proceedings against B. [*R.* v. *Glynne*, L.R. 7 Q.B. 16, explained in *Anderson* v. *Collinson*, *opposite*.]

Inadmissible.

Alcorn, cited *ante*, 408]. So, a judgment against an executor does not bind a devisee (*Harvey* v. *Wilde*, L.R. 14 Eq. 438); nor, in an administration suit, does a decree against a next-of-kin who has renounced, bind *his* next-of-kin, where the latter's claim arises upon the renunciation and not through the former personally (*Spencer* v. *Williams*, L.R. 2 P. & D. 230).

A. sues B. for necessaries supplied to B.'s wife whilst living apart from him. B.'s defence is that his wife was living in adultery at the time. A verdict in former divorce proceedings finding that B.'s wife had committed adultery, but followed by a judgment dismissing B.'s petition on the ground of his own adultery, is not admissible against A. to prove the wife's adultery (*Needham* v. *Bremner*, L.R. 1 C.P. 583; *contra*, *Day* v. *Spread*, Jebb & B. 163, where a similar judgment was considered as *prima facie*, though not conclusive, evidence on the ground that A. might be considered as claiming through the wife; see also *Keegan* v. *Smith*, 5 B. & C. 375).

A. obtains an affiliation order against B., which, on appeal to Q.S., is quashed, on the ground that B. was not the father of A.'s child. In a subsequent action for seduction against B. by C., A.'s mother, C. is not estopped from proving that B. was the father, since the parties are different (*Anderson* v. *Collinson*, 1901, 2 K.B. 107).

A., the incoming tenant of a public-house, applies for, but fails to obtain, a new license. This is no bar to B., a subsequent tenant, obtaining either a new license or a transfer of the old one from A.'s predecessor [*R.* v. *Upper Osgoldcross*, 53 J.P. 823; *R.* v. *Thomas*, 1892, 1 Q.B. 426; *R* v. *Bristol JJ.*, 61 L.J.M.C. 141, where the ground of refusal was the disorderly character of the house, as to which see *Latimer* v. *Birmingham*, and *Smith* v. *Shann*, cited *ante*, 186].

(*b*) *Same Subject-matter.*

A. recovers judgment against B. for a debt, B. having pleaded, but failed to prove, payment. This judgment is conclusive proof that the debt was owing, in a subsequent action brought by B. against A. to recover the money, although B. now produced A.'s receipt for its payment (*Marriott* v. *Hampton*, 7 T.R. 269; 2 Smith, L.C., 11th ed. 421).

A., being sued by a company for unpaid premium and calls, obtains judgment on the ground that he was never legally a shareholder. This judgment is conclusive in A.'s favour in a subsequent action by him against the company to recover moneys paid by him as an alleged shareholder (*Alison's Case*, L.R. 9 Ch. 24).

A. sues B. for damages for false imprisonment and obtains judgment. A. is not barred from afterwards suing B. for damages for malicious prosecution, the cause of action being different, though the jury in the former trial were misdirected to consider B.'s malicious conduct (*Guest* v. *Warren*, 9 Ex. 379).

The owner of vessel A. recovers judgment against the owner of vessel B. for damages for a collision caused by the negligence of B.'s captain. The owner of B. is not estopped by this judgment from recovering damages from the owner of A. for the same collision as being caused by the negligence of A.'s captain (*The Cal-*

Admissible.

In a suit between A. and B. for *administration* to the goods of C., deceased, a grant is made to A. on the ground that, "as far as appears by the evidence," A. is next of kin to C. This judgment is conclusive proof that A. is nearer of kin than B., in a suit between them for the *distribution* of the effects of C. though the two suits are for different objects (*Barrs* v. *Jackson*, 1 Phil. 582; *Spencer* v. *Williams*, L.R. 2 P. & D. 230; *Re Ivory, Hankin* v. *Turner*, cited *ante*, 410; and see *Concha* v. *C.*, 11 App. Cas. 541).

A. petitions for restitution of conjugal rights with her husband B., and in these proceedings gives proof of her marriage with B. This evidence is admissible to prove their marriage in a subsequent suit for divorce by A. against B. and sufficient, unless the validity of the marriage is contested on any ground by B. (*Cowley* v. *C.* 1913, P. 159; *Verney* v. *V.*, 36 T.L.R. 203).

A. sues B. in the County Court for damages for wrongful dismissal. A judgment against A. in this action bars a subsequent claim before justices against B. to recover his wages; the question in the two proceedings being the same—*i.e.* whether the discharge was wrongful (*Routledge* v. *Hislop*, 29 L.J.M.C. 90).

A. sues B. in the County Court to recover possession of certain hereditaments. B. applies to a judge in chambers for a prohibition on the ground that their annual value exceeds £20. The dismissal of this summons estops B. from proving in the action that the premises are of greater value than £20 (*Symonds* v. *Rees*, 1 Ex. D. 41).

A. is charged under the Public Health Act, 1888, s. 3, with erecting a house which projects beyond those adjoining. The justices being equally divided, the charge is dismissed. A. cannot be again charged for continuing the same buildings on future days (*Kinnis* v. *Graves*, 19 Cox, 42; Wills, J., stated that the proper course where justices were equally divided was to adjourn and reconstitute the Court. See *R.* v. *Wardle*, 14 T.L.R. 424, where Hawkins, J., remarked that a dismissal where the Court was equally divided was not a decision on the merits).

Inadmissible.

ypso, 1 Swa. Ad. 28; *cp. Nelson* v. *Couch*, *post*, 422).—So where, in the first action, vessel B. was in tow of vessel C. at the time of the collision, and at the trial the owners of C. were let in to defend;—a judgment by A. against B. does not estop B. from bringing a subsequent action against C., the issue being different (*Shankland* v. *Baine*, 1881, cited Pritch. Adm. Dig. 660).

A., a railway company, sues B., a corporation, for a declaration that A.'s cars are personal property and so not liable to taxation as realty. A previous decision between A. and B. by another Court, which had jurisdiction to determine the *amount* of A.'s assessment, but not his *liability* thereto, is not *res judicata* (*Toronto Ry.* v. *Toronto Corp.*, 1904, A.C. 809).

A. sues B. in the County Court for damages for wrongful dismissal. B., without making any set-off or counterclaim, gives evidence, in justification of the dismissal, of A.'s negligence in damaging his property.—A judgment against B. in this action does not estop B. from seeking damages for A.'s negligence before justices, the negligence justifying compensation not being necessarily sufficient to justify dismissal (*Hindley* v. *Haslam*, 3 Q.B. D. 481).

A. obtains a magistrate's order under 2 & 3 Vict. c. 71, s. 40, against B. for the delivery up of certain *goods* under the value of £15. This is no bar to a subsequent action by A. against B. either (1) for trover of the same goods, since the former decision only involves a provisional and not an absolute finding as to their title (*Dover* v. *Child*, 1 Ex. D. 172); or (2) for damages for their detention, since the two proceedings are not for the same thing, the magistrate having no jurisdiction as to damage (*Midland Ry.* v. *Martin*, 1893, 2 Q.B. 172. Nor does the rule as to putting a party to his *election*, where there are alternative remedies for the *same* subject-matter, apply). As to delivery up of *premises*, see *id.*; and Ros. N.P. 207.

A. is convicted under the Public Health Act, 1888, s. 3, of *erecting* a house beyond those adjoining. This conviction is not admissible to prove its erection, on a subsequent charge against A. of *continuing* the house (*Pommeroy* v. *Malvern Council*, 1903, Times, July 7); nor is the A.-G. precluded thereby from suing A. for a mandatory injunction to pull down the house (*A.-G.* v. *Wimbledon*, 1904, 2 Ch. 34).

A., a house-owner, is sued by the Local Board, under the Public Health Act, 1875, s. 150, for his proportion of the expenses

Admissible.

A. excavates into B.'s mine, causing damage by an inflow of water.—A recovery by B. bars an action by him for future inflows through the same excavation, the cause of action being entire and not continuous (*Clegg* v. *Dearden* 12 Q.B. 576).

A. recovers judgment against B. for damages for misrepresentation aa to the drainage of a farm;—A. is estopped from bringing an action for future damage resulting from the same misrepresentation, the cause of action not being continuous (*Clarke* v. *Yorke*, 31 W.R. 62).

As to successive claims against a servant for absenting himself from work, which claims might have been included in a former claim, see *James* v. *Evans*, *post*, 423.

A mortgagor covenants to pay the principal sum secured by the mortgage and, by a aeparate covenant, to pay interest at 7 per cent. "so long as the principal aum, or any part thereof, remains unpaid";—a judgment recovered by the mortgagee for principal and interest precluues him from bringing a second action for interest at the higher rate accrued since the judgment (*Exp. Fewings, Re Sneyd*, 25 Ch. D. 338; approved in *Economic Life Soc.* v. *Usborne*, 1902, A. C. 147, 149-50).

In a probate suit between A. and B., a will, propounded by A., is, under a compromise, admitted to probate; afterwards B. obtaina judgment against A. in a chancery action setting aside the compromise on the ground that the will was forged. This judgment ia conclusive evidence of

Inadmissible.

of sewering a street, the summons being dismissed on the ground that "the street was a highway repairable by the inhabitants at large." Held, that this finding was beyond the jurisdiction of the justices, which was only to make or refuse the order for such expenses; and that it was no bar to a subsequent claim by the Board for A.'s proportion of the paving expenaes for the same street (*R.* v. *Hutchings*, 6 Q.B.D. 300; approved in *Wakefield* v. *Cooke*, *ante*, 409, 411; *cp. R.* v. *N. E. Ry.*, 19 Cox, 682, and *N. E. Ry.* v. *Dalton*, 1898, 2 Q.B. 66).

A, excavating in his own mine, causes damage to B.'s house by a subsidence. A recovery by B. is no bar to an action for a future subsidence from the same excavation, the cause of action being continuous, whether the damage itself is continuous or not [*Darley Co.* v. *Mitchell*, 11 App. Cas. 127; *Crumbie* v. *Wallsend Local Board*, 1891, 1 Q.B. 503; *Clarke* v. *Midland G. W. Ry.*, 1895, 2 I.R. 294. Here the cause of action is not the excavation, which was perfectly lawful, but the damage from the subsidence due to such act. And an injury to several persons by the same negligence is a separate accident to each (*South Staff. Tram Co.* v. *Sickness, &c., Co.*, 1891, 1 Q.B. 402)].

A. erects an obstruction on B.'s land.—A recovery by A. is no bar to a future action in respect of the same obstruction, the cause of action being its continued non-removal (*Holmes* v. *Wilson*, 10 A. & E. 503; *Thompson* v. *Gibson*, 7 M. & W. 456; *Clegg* v. *Dearden*, *sup.*, in which these cases are distinguished).

As to successive judgments against a servant for absenting himself from work, see *Cutler* v. *Turner*, L.R. 9 Q.B. 502, cited *post*, 423; and as to continued false imprisonment, *Hardy* v. *Ryle*, 9 B. & C. 603.

A mortgagor covenants to pay the principal sum secured by the mortgage, and by a separate covenant, to pay interest at 7 per cent. "so long as any sum remains due either on the covenants, or any judgment in respect thereof." Held, on the construction of this covenant, that a judgment recovered by the mortgagee for principal and interest does not bar a subsequent action for interest at the higher rate, accrued since the judgment (*Exp. Fewings*, and *Economic Life Soc.* v. *Usborne*, *opposite*; see *Popple* v. *Sylvester*, 22 Ch.D. 98; *Florence* v. *Jenings*, 2 C.B. N.S. 454; and *Bake* v. *French*, 122 L.T. Jo. 343).

In an administration suit to which A. and B. are parties, A. is found entitled to certain property by purchase; this is no bar to a subsequent Chancery action by B. against A. to set aside the purchase on the ground of fraud (*Widgery* v. *Tepper*, 7 Ch.D. 423).

Admissible.	*Inadmissible.*
the forgery in a further probate suit by B. against A. to revoke the probate, although the *objects* of the two suits were different and the relief sought in the former could not have been obtained in the latter action (*Priestman* v. *Thomas*, 9 P.D. 210). See also *Brunsden* v. *Humphrey*, *infra*.	In a collision cause in the Admiralty Court, A. obtains a judgment *in rem* against B.'s ship;—A. is not estopped from afterwards suing B. *in personam* if the proceeds of the sale are insufficient to pay his claim (*Nelson* v. *Couch*, 15 C.B. N.S. 99; *cp. The Calypso*, *ante*, 419-20).—So, an action to enforce the sale of mortgaged property does not bar subsequent proceedings against the debtor for the unpaid balance (*id.*); nor does an executor's action against a legateee for the sale of shares prematurely transferred to the latter, bar a subsequent action against him to refund the balance of the legacy (*Whittaker* v. *Kershaw*, 45 Ch. D. 320, 327; *cp. Wright* v. *Lond. G.O. Co.*, and *James* v. *Evans*, *post*, 423).

(c) Whole Case.

A., in a running-down case, recovers damages against B. for injury done to his carriage. A. is estopped from afterwards recovering damages for injury done to his horse by the same accident (see *Brunsden* v. *Humphrey*, 14 Q.B.D. 141.—So, if the two injuries had been to different parts of his person, *id.*). A. sues a railway company for damage done to certain sacks of flour whilst in transit, he having at the time notice from B., to whom he had sold other sacks, part of the same consignment, that such other sacks had also been injured;—A. is precluded from bringing a second action against the company for the damage done to B.'s flour, there being but one cause of action, and A. having had an opportunity of claiming for B.'s damage in the first action (*Russell* v. *Waterford Ry. Co.*, 16 L.R.Ir. 314).	A. recovers damages against B. for injury to his carriage. A. may afterwards recover damages for injury done to his person by the same accident, injury to property and injury to persons giving rise to distinct causes of action which need not be joined (*Brunsden* v. *Humphrey*, *opposite;* but *cp. Wemyss* v. *Hopkins*, *post*, 425). A. recovers judgment against B. for obstructing a watercourse, B.'s defence being a denial of the obstruction. In a second action for a subsequent obstruction, B. is not precluded from denying A.'s right to the watercourse (*Evelyn* v. *Haynes*, explained in *Outram* v. *Morewood*, 3 East, 346); so, if B. is sued for rent, and lets judgment go by default, he is not estopped in a second action for subsequent rent from raising a set-off which he omitted from the first (*Howlett* v. *Tarte*, 10 C.B.N.S. 813, but see now under the Jud. Acts, *Cooke* v. *Rickman*, 1911, 2 K.B. 1125, cited *infra*, 423). A. sues B. for the price of a kitchen-range and obtains judgment. B. is not estopped from afterwards suing A. for negligence in the construction of the range (*Rigge* v. *Burlidge*, 15 M. & W. 598; *Davis* v. *Hedges*, L.R. 6 Q.B. 687).
A. sues B. for libellous statements contained in a pamphlet;—judgment is given for B.;—A. is estopped from bringing a subsequent action against B. for other libellous statements contained in the same pamphlet (*MacDougall* v. *Knight*, 25 Q.B.D. 1). A., in a partnership suit against B., obtains a decree ordering a reference to a master to compute what is due to him upon all accounts in question in the pleadings. Under this reference only a portion of such accounts are gone into;—A. cannot afterwards sue B. in respect of the others (*Henderson* v. *H.*, 3 Hare, 115). A. sues B. for three items of an account, and recovers judgment for two. He is estopped from afterwards suing B. for the third (*Bagot* v. *Williams*, 3 B. & C. 235; *Dunn* v. *Murray*, 9 B. & C. 780; *Saunders* v. *Hamilton*, 96 L.T. 679); so,	A. sues B. in the County Court, B. pleading a cross-claim exceeding the amount recoverable in a County Court;—B. is not estopped from recovering the balance of his claim against A. in a second action (*Webster* v. *Armstrong*, 54

Admissible.

where costs might have been claimed as damages in the first (*Furness* v. *Hall*, 25 T.L.R. 233). And where B. in defence failed to plead the Statute of Frauds in the first action, he is estopped from doing so in the second (*Humphreys* v. *H.*, 1910, 2 K.B. 531). So, where he failed in the first action to plead want of consideration, he is similarly estopped. (*Cooke* v. *Rickman*, 1911, 2 K.B. 1125).

A magistrate awards compensation to a master under the Employers and Workmen Act, 1875, s. 4, for a servant leaving his employment; this bars further compensation for a second absence occurring before, and capable of being included in, the first summons (*James* v. *Evans*, 1897, 2 Q.B. 180).

A. summons B. before a magistrate for furious driving, and is awarded compensation;—he is estopped from afterwards suing B. for further compensation (*Wright* v. *London General Omnibus Co.*, 2 Q.B.D. 271).

A. obtains a judgment, finding assets against B., as executor;—in a subsequent action by A. for devastavit, B. is estopped from proving that he misapplied the assets with A.'s consent, as this is in effect a plea of no assets which B might have proved by the same facts in the former action (*Jewsbury* v. *Mummery*, L.R. 8 C.P. 56; *cp. Thompson* v. *Clarke*, *ante*, 418).

A. sues B. on a bill of exchange to which B.'s defence is a composition deed executed by A. A. consents to judgment in B.'s favour. In a subsequent action by A. against B. for non-payment of an instalment under the deed due *before* the former judgment;—held, the former proceedings were a bar to the second action, since the fact of the non-payment might have been raised in the former action (*Newington* v. *Levy*, L.R. 6 C.P. 180).

In proceedings between A. (a committee of river authorities) and B. (an Urban Board), B. consented to a County Court order against him to erect works so as to prevent the pollution of a certain "stream." At the time of the consent B. did not object, though he might have done, that the order could only extend to *tidal* portions of a stream by a license of the Local Government Board first obtained. Held, that B. was estopped from raising this point in subsequent proceedings against him by A. to enforce the order (*Joint Committee of River Ribble* v. *Croston*, 1897, 1 Q.B. 251).

Inadmissible.

L.J.Q.B. 236; *aliter* if the plaintiff abandons part of an entire claim in order to sue in the County Court, see County Courts Act, 1888, s. 81; *Vines* v. *Arnold*, 8 C.B. 632).

A recovery against a servant for absenting himself from work is no bar to proceedings for a second breach of the same hiring, occurring after the first recovery (*Cutler* v. *Turner*, L.R. 9 Q.B. 502).

A. sues B. for rescission of a contract, judgment being given for B. A. is not estopped from afterwards suing B. for damages for breach of the contract (*Callandar* v. *Dittrich*, 4 M. & G. 68).

A., as B.'s executor, files a bill against C., as executor *de son tort*, for administration of B.'s estate, also raising issues in the bill as to the validity of a transfer of stock from B. to C., and as to B.'s sanity at the time;—An ordinary decree for administration is granted without mention of these issues. This decree does not preclude A. from raising the same issues in a subsequent suit against C., as they could not have been properly determined in, and were not relevant to, the relief sought by the former suit (*Blake* v. *O'Kelly*, 9 Ir. R. Eq. 54; see *Bainbrigge* v. *Baddeley*, 2 Phil. 705).

A. sues B. on a bill of exchange, B.'s defence being a composition deed executed by A. A. consents to judgment in B.'s favour. In a fresh action by A. against B. for non-payment of an instalment due *after* the former judgment,—held, the former judgment was no bar to the second action, since the non-payment could not have been raised in the former proceedings (*Hall* v. *Levy*, L.R. 10 C.P. 154).

In proceedings in 1866 between A. (a landowner) and B. (a highway board), A. was held exempted from liability to pay a highway rate on the ground that he was liable to repair a certain road *ratione tenuræ*. The road had before this date been so altered that A.'s liability to repair it had really ceased, but this fact was unknown to the Court and the parties in 1866. Held that A. was not estopped from disputing his liability to repair the road in subsequent proceedings between B.'s successors and himself (*Heath* v. *Weaversham Overseers*, 1894, 2 Q.B. 108; *cp. Shaw* v. *Day*, and *Betts* v. *Menzies*, *post*, 427).

Admissible.	*Inadmissible.*
A. sues B. in the Chancery Division for the delivery up of certain shares, and obtains judgment by consent;—A. is estopped from afterwards suing B. in the Queen's Bench Division for damages for the detention of the shares, as the cause of action is the same, and the latter relief might, and ought to, have been sought in the former action (*Serrao* v. *Noel*, 15 Q.B.D. 549).	A. files a bill in equity against a company, claiming to be admitted as a shareholder upon the ground that he is the transferee of certain shares;—he is not estopped from afterwards filing a bill against the same company claiming to be admitted as a shareholder on the ground that the course of dealing adopted by the company with respect to the issue of shares entitled him to membership (*Hunter* v. *Stewart*, 31 L.J.Ch. 346).
In an interpleader issue, ordered in A.'s bankruptcy, as to the ownership of a debt assigned by A. to B., and the validity of which assignment C., the trustee, disputes on the ground that at the time thereof B. had notice of an act of bankruptcy, judgment is given in favour of B.—Held that C. is estopped in subsequent proceedings in the bankruptcy, from impeaching the assignment on the ground either of fraudulent preference, or that A.'s assignment was itself an act of bankruptcy, evidence as to both points having been admissible under the first issue (*Re Hilton, Exp. March*, 67 L.T. 594).	
A. gets judgment against B. for infringement of patent, B.'s defence being invalidity by reason of anticipation. In a subsequent action by A. for fresh infringements by B., B. is estopped from disputing the validity of the patent by reason of different anticipations only discovered since the prior action (*Shoe Machinery Co.* v. *Cutlan*, 1896, 1 Ch. 667. Romer, J., remarked that B. was bound to litigate his whole case, and to search and find out all grounds of invalidity that he intended to rely on in support of his plea of invalidity. *Cp. ante*, 418).	

(*d*) *Criminal Cases.*

A. is indicted for the murder of B. and acquitted. He cannot afterwards be indicted for the manslaughter of B. [2 Hale, 246; *R.* v. *Barron* (No. 2), 1914, 2 K.B. 570]; nor *vice versa* [*R.* v. *Holcroft*, 4 Rep. 46 lb.; and see *R.* v. *Gilmore*, 15 Cox 85; and *R.* v. *Tancock*, 13 Cox, 217].	A. is indicted for the murder of B. and acquitted. He may afterwards be indicted (1) for arson in setting fire to a house whereby B.'s death was caused (*R.* v. *Serne*, 107 C.C.C. Sess. Papers, 418-419); or (2) for procuring abortion upon the deceased (*R.* v. *Topham*, 28 L.Jo. 186).
So, an acquittal on a coroner's inquisition for the murder of an infant, has been held to bar a subsequent indictment for concealment of birth (*R.* v. *Ryland*, 1 Russ. Cr., 6th ed. 45 *n*).	A. is indicted for wounding with intent to kill B.; an acquittal or conviction on this charge is no bar to a subsequent indictment on the same facts for the murder of B. (*R.* v. *De Salvi*, cited in *R.* v. *Morris*, L.R. 1 C.C. p. 93). A. is convicted of wilful neglect of her child under the Children Act 1908, s. 12 (1). On the death of the child she may also be indicted for manslaughter (*R.* v. *Tonks*, 1916. 1 K.B. 443).
A. is convicted before justices of a common assault upon B.;—he cannot afterwards be indicted upon the same facts for wounding with intent to murder B. (*R.* v. *Stanton*, 5 Cox, 324; *R.* v. *Elrington*, 1 B. & S. 688); even though so charged in other counts of the first indictment upon	A. is convicted before justices of a common assault upon B.;—this conviction is no bar to a subsequent indictment upon the same facts for B.'s murder, manslaughter, or rape (*R.* v. *Friel*, 17 Cox, 325; *R.* v. *Miles*, 24 Q.B.D. 423, *per* Hawkins, J.; *R.* v. *Morris*, *sup.*).

Admissible.	*Inadmissible.*
which no verdict was given (*R.* v. *Grimwood*, 41 Sol. Jo. 98; 60 J.P. 809). So, if convicted of disorderly conduct and afterwards charged with assault (*R.* v. *Cork JJ.*, 43 Ir. L.T.R. 154).	
So, a conviction for false pretences is a bar to a subsequent indictment for larceny on the same facts (*R.* v. *King*, 1897, 1 Q.B. 214; see comments on this case in *R.* v. *Barron*, *sup.*)	A. is convicted for larceny of goods. This is no bar to a subsequent charge of pawning the same goods (*Pickford* v. *Corsi*, 84 L.T. 627).
A. is charged with poaching, and on cross-examination of a witness for the prosecution, it appearing that A. had been illegally arrested, the justices dismissed the charge. Held a bar to a second charge on the same facts, as though they did not go into the merits, yet they might have done so, and A. could not be put in peril a second time (*R.* v. *Brackenridge*, 48 J.P. 293).	A. is acquitted before a magistrate of poaching. This is no bar to his subsequent conviction for unlawfully using a dog for taking game on the same occasion (*Bollard* v. *Spring*, 51 J.P. 501; the facts not being the same, as a license was essential in one case and not in the other).
A. is convicted before justices of injuring a horse ridden by B. This is a bar to a subsequent summons for assaulting B. personally on the same occasion (*Wemyss* v. *Hopkins*, L.R. 10 Q.B. 378; but *cp. Brunsden* v. *Humphrey*, *ante*, 422).	A. is acquitted of sodomy with B. He may afterwards be charged with acts of gross indecency with B. [*R.* v. *Barron* (No. 2) 1914. 2 K.B. 570. So, if acquitted of attempting to have carnal knowledge of a female, he may afterwards be charged with indecently assaulting her (*R.* v. *Burke*, 47 Ir. L.T. Rep. 111)].
A. is charged under the Public Health Act, 1875, with exposing bad meat for sale, the summons being dismissed on the ground that the offence was committed in A.'s absence and without his knowledge. A. cannot be charged a second time on the same facts for being in possession of bad meat for purposes of sale, as he might have been convicted of such charge under the former summons (*R.* v. *Blount*, 43 J.P. 383). So, as to "exposing for sale" and "selling," during prohibited hours (*Dorrian* v. *Heugh*, 1907, 2 I.R. 464).	So, a conviction for taking game in a close time is no bar to a subsequent summons for taking game without a license (*Saunders* v. *Baldy*, L.R. 1 Q.B. 8; the former being an offence against property, the latter an offence against the Revenue). A. is summoned for contravening a statute as to collieries, the charge being dismissed because his co-owners should have been joined. Held, no bar to a second charge against A. in respect of the same facts (*R.* v. *Brown*, 7 E. & B. 757; *cp. R.* v. *Simpson*, 1914, 1 K.B. 66). So, where the former judgment had been reversed for error (*R.* v. *Drury*, 18 L.J.M.C. 189); or where the jury were improperly discharged after the trial had begun (*R.* v. *Charlesworth*, 1 B. & S. 460). See further, Atkinson, Mag. Pr., 1914, 103-71.

JUDGMENTS IN PERSONAM AS AFFECTING STRANGERS. A judgment *in personam* is no evidence of the truth either of the decision or of its grounds, between strangers, or a party and a stranger, except (1) upon questions of public and general interest: (2) in bankruptcy, administration, divorce, and patent cases, to a limited extent; or (3) when so operating by contract, admission, or acquiescence. [As to the rule, see *Natal Land Co* v. *Good*, L.R. 2 P.C. 121, 133; *R.* v. *Kingston* (*Duchess*), *ante*, 410; Tay. ss. 1682-1683, 1694; Best, s. 590; Ros. N.P. 194-195; Steph. art. 44; Wharton. ss. 820-823. As to the exceptions, see *infra*. It must be remembered, however, that a judgment *in personam* is in all cases evidence between strangers of its existence and legal effect as distinct from its truth (*ante*, 404), and that a judgment *in rem* is, in addition, evidence between strangers of the truth of its actual decision (*ante*, 407)]

Principle. *Against Strangers.* Though the above rule is well settled, the reasons for the rule are by no means so clear. Such judgments, when tendered against strangers, are sometimes said to be excluded as opinion evidence (*R.* v. *Fontaine Moreau,* 11 Q.B. 1028); sometimes as hearsay (Steph. art. 14; Whart. s. 820; though even if the judge were called as a witness he would not be competent either to pronounce or to prove his judgment); but more commonly on the ground of *res inter alios acta* (or *judicata*) *alteri nocere non debet,* it being considered unjust that a man should be affected, and still more be bound, by proceedings in which he could not make defence, cross-examine, or appeal (*R.* v. *Kingston,* 20 How. St. Tr. 538 *n*). This, however, though a legitimate ground for refusing conclusiveness to such judgments, seems no satisfactory reason for denying them admissibility, since it is to be remembered that the objection of *res inter alios acta* will not suffice to exclude other and less solemn acts of strangers if relevant to the issue (*ante,* 159-60); and *cp. Hill* v. *Clifford,* 1907, 2 Ch. 236). It is sometimes said that if a man is not to be bound by the acts of strangers, neither should they be given in evidence against him (Stark. Ev., 4th ed., 83-85; Broom's Legal Maxims, 7th ed., 731); but there is no necessary connection between the two; and even a man's own acts, though generally admissible against him if relevant, are in the vast majority of cases not conclusive. *For strangers against parties.* Judgments *in personam* are said not to be evidence for a stranger even against a party, because their operation would thus not be *mutual.* This also, however, seems an objection to conclusiveness rather than admissibility, a view that appears to be gaining increased recognition (*Re Crippen, &c.,* cited *ante,* 413, *post,* 428).

(1) **Public Rights.** Judgments and verdicts upon public or general rights are not only conclusive between parties and privies, but *primâ facie* evidence of the matter decided between strangers or a party and a stranger. They are not, however, conclusive in the latter case, for the general reasons stated *sup.* [Stark. Ev., 4th ed., 386-8; Tay. ss. 624-626; 1682-1684; Ros. N.P. 194-195; Steph. art. 44; *ante,* 298-9. In *Petrie* v. *Nuttall,* cited *post,* 428, the Court remarked indeed, that such a judgment was "possibly conclusive" and this is adopted by Steph. art. 44, illust. *f; sed qu.,* and *cp. R.* v. *Lordesmere,* 16 Cox, 65].

Such evidence is sometimes regarded as a species of judgment *in rem* (*Neill* v. *Devonshire,* 8 App. Cas. p. 147), but is more usually considered as in the nature of, though stronger than, *reputation* (Stark., 4th ed., 386; Tay. s. 624). It is not, however, receivable in other cases in which reputation is evidence—*e.g.,* in matters of pedigree (*ante,* 312-3). Nor are interlocutory judgments, awards, nor claims not prosecuted to verdict or judgment, as we have seen, admissible as reputation (*ante,* 298-9); though they may be as acts of ownership (*id.;* 113).

(2) **Bankruptcy, Administration, Divorce, Patents.** In bankruptcy, administration, and winding-up proceedings judgments are received as *primâ facie* proof of debt even against strangers.

To guard against fraud, collusion, and the miscarriage of justice, however, the Court may, on the hearing of a **Bankruptcy** petition (though not on a mere application to set aside a bankruptcy notice, *Re Easton, Exp. Dixon,* 9 T.L.R. 408), inquire into the consideration for, and if necessary reject, the

judgment, either at the instance of the trustee, or of the debtor himself (*Exp. Lennox,* 16 Q.B.D. 315; *Exp. Flateau,* 22 Q.B.D. 83; *Re G.,* 44 Sol. Jo. 345-6; *Boaler* v. *Power,* 26 T.L.R. 358); even though the High Court had refused to set it aside (*Re Miller,* 67 L.T. 601; *Re Fraser,* 1892, 2 Q.B. 633); and even though no fraud was alleged, but only a compromise which was not considered fair and reasonable (*Re Hawkins, Exp. Troup,* 1895, 1 Q.B. 404; so also as to money-lending transactions, *Re A Debtor,* 1903, 1 K.B. 705). And when the only evidence of debt was a judgment obtained *since* the bankruptcy, the proof was rejected (*Exp. Bonham, Re Tollemarsh,* 14 Q.B.D. 605). Mere irregularity in form, however, will not upset the judgment (*Re Beauchamp,* 1904, 1 K.B. 572). For bankruptcy cases in which the parties have been precluded or not, on the ground of *election,* from bringing subsequent actions, see *Re Bremner,* 10 Ch. App. 379; *Re Crook, Exp. Collins,* 66 L.T. 29. In **Divorce** proceedings, a finding against the petitioner or respondent in a previous suit may be given in evidence though between different parties (*Ruck* v. *R.,* 1896, P. 152; *Swan* v. *S.,* 1903, Times, Mar. 24). So the Queen's Proctor or co-respondent may take advantage of (*Conradi* v. *C.,* L.R. 1 P. & M. 514), though he is not necessarily bound by (*Harding* v. *H.,* 34 L.J. Mat. 129), a previous judgment between the petitioner and respondent. The reasons for these exceptions to the principle of mutuality are peculiar to the Divorce Division. In **Patent** actions, a judgment as to the construction of the specification, though not strictly an estoppel, will generally be conclusive in other actions concerning the same patent, though between different parties, unless new facts are adduced (*Edison* v. *Holland,* 6 R.P.C. 243; *Pneumatic Co.* v. *Leicester Co.* 16 *id.* 50, C.A.; affd. *id* 531, H.L.). But proof may be given that what was not formerly an anticipation is so now (*Shaw* v. *Day,* 11 R.P.C. 185, 189); or that the same terms have acquired a change of meaning (*Betts* v. *Menzies,* 10 H.L.C. 117).

(3) **Contract, Admissions, Acquiescence.** A stranger to a judgment may also be bound by it if he has expressly so contracted. Thus, if A. contract to indemnify B. against any damages recoverable against the latter by C., and B. has *bonâ fide* defended the action and paid the amount, the judgment will be conclusive of A.'s liability. But this does not apply where B. has no contract with, but merely a claim against, A. for such indemnity (*Parker* v. *Lewis,* 8 Ch. App. 1035; *Exp. Young, Re Kitchin,* 17 Ch. D. 668). A record is also sometimes received in favour of a stranger against one of the parties, as an *Admission* by such party in a judicial proceeding, with respect to a certain fact. This is no real exception, however, to the rule requiring mutuality, since the record is not received as a judgment conclusively establishing the fact, but merely as a declaration by the party which is *primâ facie* evidence thereof; it belongs therefore to the subject of admissions rather than judgments (Tay. p. 1694; Steph. art. 44). So, not appealing against an adverse judgment may operate as an admission by the party of its correctness (*Eaton* v. *Swansea Water Works,* 17 Q.B. 267; *R.* v. *Fairie,* 8 E. & B. 486). A stranger to a judgment may also be estopped, not directly, but by his *acquiescence* therein (*Re Lart,* 1896, 2 Ch. 788; *Mohan* v. *Broughton,* 1900, P. 56; *Exp. Vagg,* 1899, 2 I.R. 383; *Mercantile Co.* v. *River Plate Co.,* 1894, 1 Ch. 578; *Wilkinson* v. *Blades,* 1896, 2 Ch. 788).

EXAMPLES.

Admissible. [THE RULE.] *Inadmissible.*

A. is convicted of the murder of B., his wife, who died intestate. After A.'s execution, C., as sole executrix, and legatee under A.'s will, claims B.'s property as having passed to A., Held, that a certified copy of A.'s conviction was evidence against A. or his representatives not only as proof of A.'s conviction, but as *prima facie* evidence of his commission of the crime; and *semble* not merely in proceedings to recover the fruits of his crime, but against A. or his representatives generally [*Re Crippen* 1911. P. 108. In *Re Hall*, 1914, P. 1, 4, in proceedings by A. to recover a legacy under B.'s will, the C. A. treated A.'s conviction for the manslaughter of B. as conclusive evidence that A. had caused B.'s death].

A. applies for an affiliation order against B. as the father of her child, and in corroboration tenders proof that B. was convicted of having carnal knowledge of her, when under 16, on certain dates after her conception of the child. Held, following *Re Crippen*, *sup.*, that this conviction was presumptive evidence against B. of his commission of the crime, and so was admissible in corroboration of her testimony (*Mash* v. *Darley*, 1914, 1 K.B. 1; affirmed on other grounds, 1914, 3 K.B. 1226; *cp.*, however, *Watson* v. *Little* and *R.* v. *Dibble*, *opposite*).

In an action by A., a master, against B., his servant, for negligently injuring C.'s horse, a judgment recovered by C. against A. for such injury is not admissible to prove B.'s negligence [*Green* v. *New River Co.*, 4 T.R. 590. *Aliter* to show the amount recovered by C. For other examples, see *ante*, 404].

On the trial of A., as accessory to a felony committed by B., the *conviction* of B., though admissible to prove that fact, is no evidence of B.'s *guilt*. [See *R.* v. *Turner*, 1 Moo. C.C. 347; 1 Lewin, 121; Steph. art. 44, *d.* In *R.* v. *Smith*, 1 Leach, 288; *R.* v. *Blick*, 4 C. & P. 377; and *Com.* v. *Knapp*, 27 Mass. 483-4, however, the conviction of the thief was held *prima facie*, but not conclusive, evidence of his guilt against the receiver; and in *R.* v. *M'Cue*, Jebb, C.C. 120, on the trial of the receiver, the record of the acquittal of the thief was admitted to contradict the latter's testimony that he had committed the crime. No reasons are given; but statements used merely to contradict or corroborate a witness, are in general no evidence of their truth (*Watson* v. *Little*, cited *ante* 404; *R.* v. *Dibble*, 72 J.P. Rep. 498; *ante*, 218; *post*, 480, 488)].

A. petitions for divorce against B., her husband, upon the ground of his incestuous adultery with C., their daughter. B. had been acquitted of rape upon C. but found guilty of attempting to have carnal knowledge of her. Held, that B.'s acquittal was not evidence of his innocence in the divorce proceedings and that the rape might be proved therein (*Virgo* v. *V.* 69 L.T. 460; *ante*, 418).

A., a publican, is summoned for suffering betting on his premises on a certain date. Evidence that B., a bookmaker, was convicted of betting on A.'s premises on that date.—Held, inadmissible to prove that fact (*Taylor* v. *Wilson*, 106 L.T. 44; 22 Cox 647; 28 T.L.R. 97).

[THE EXCEPTIONS].

Admissible. *Inadmissible.*

Public Rights. A. sues B. for trespass upon his land, B.'s defence being that the land was part of a highway;—a previous conviction against A. for nuisance in obstructing the highway at the spot in question is *prima facie* evidence that such spot was part of the highway (*Petrie* v. *Nuttall*, 11 Ex. 569).—So, a previous conviction for non-repair against the inhabitants of a *district* in the parish, is evidence to rebut the presumption that the *whole parish* is liable to repair (*R.* v. *Lordesmere*, 16 Cox, 65).

Public Rights. In an action between A. and B., the question being whether A. had a *private* right of common over certain land;—a verdict in a previous action between strangers, as to such right, is not admissible as evidence of reputation (*Williams* v. *Morgan*, 15 Q.B. 782).

Admissible.	*Inadmissible.*
A. obtains a verdict and judgment against B., a tenant of adjoining lands, for trespass in taking seaweed from A.'s foreshore. These are evidence against C., another tenant of adjacent lands, who claimed to carry off seaweed in assertion of an alleged public right (*Mulholland* v. *Killin*, I.R. 9 Eq. 471; *Hemphill* v. *McKenna*, 8 Ir.L.R. 43).	
Bankruptcy. A. recovers a judgment for debt against B., who afterwards becomes bankrupt;—the judgment is *prima facie* evidence of the debt against B.'s trustee and creditors. (*Exp. Anderson, Re Tollemache*, 14 Q.B.D. 606).	
Administration. A., a creditor, recovers judgment for his debt against B.'s executors;—in a suit for the administration of B.'s estate, this judgment is *prima facie* evidence of A.'s debt against C. and D., the persons interested in the realty, though they are not privies in estate to B. (*Harvey* v. *Wilde*, L.R. 14 Eq. 438. In this case the executors were also trustees for the real estate, but that fact was held to make no difference.)	
Divorce. A. petitions for divorce by reason of his wife's adultery with B., the petition being dismissed on the ground of A.'s own adultery;—this dismissal is conclusive to prove A.'s adultery in a second petition against his wife for adultery with C., in which suit, neither the wife nor C. appearing, the Queen's Proctor had intervened (*Conradi* v. *C.*, L.R. 1 P. & M. 540). Where, however, in answer to a husband's petition, the wife pleaded his adultery;—a decree in a former suit in which he was co-respondent, which decree only stated that the respondent had committed adultery with him, but did not state in terms that he had committed adultery with her, though admissible, was held not sufficient evidence of his adultery [*Ruck* v. *R.*, 1896, P. 152; In *Swan* v. *S.*, 1903, Times, March 24, a decree awarding damages against the husband as co-respondent in a former suit was held sufficient. *Cp. Eshell* v. *E.*, 1919, W.N. 200, and *Butler* v. *B.*, *post*, 433].	*Divorce.* A. obtains a decree *nisi* for a divorce against his wife, who had pleaded, but failed to prove, A.'s own adultery. This decree does not debar the Queen's Proctor from proving A.'s adultery on an intervention in which the Queen's Proctor alleges the same charges against A., supported by fresh evidence (*Harding* v. *H.*, 34 L.J. Mat. 129; *Gladstone* v. *G.*, L.R. 3 P. & M. 260).
Admissions, &c. A. pleads *guilty* to a crime and is convicted; the record of judgment upon this plea is admissible against him in a civil action, as a solemn judicial confession of the fact (see *R.* v. *Fontaine Moreau*, 11 Q.B. 1028, 1033).	*Admissions, &c.* A. pleads *not guilty* to a crime, but is convicted;—the record of judgment upon this plea is not receivable against A. in a civil action as an admission to prove his guilt (*R.* v. *Warden of the Fleet*, 12 Mod. 339; *cp. ante*, 235, 413, 418).
A. sues B. for interruption of his right to take water from B.'s watercourse. To show that A. did not enjoy this easement as of right, B. may prove a former conviction against a servant of A., who had by the latter's orders diverted B.'s water, from which conviction *A. did not appeal* (*Eaton* v. *Swansea Waterworks*, 17 Q.B. 267; *R.* v. *Fairie*, 8 E. & B. 486, 490; and *cp. Blakemore* v. *Glamorganshire Co.*, cited *ante*, 419].	

Admissible.

A. sues B. (a carrier) for goods delivered to the latter. A previous judgment recovered by B. against C., to whom B. had entrusted the goods, but who had lost them, held admissible against B. as amounting to an admission by him that he had received the goods (*Tiley* v. *Cowling*, 1 Ld. Raymond, 744).

A., a shareholder in a company, sues B., a director, for damages in respect of an untrue statement in the prospectus, and recovers judgment. Afterwards B. sues the representative of C. and D., other directors, for contribution. Counsel for C. and D. admitted that the facts found in the action by A. against B., and stated in the report of that case, were sufficient to support the judgment therein, and that B. was liable to that extent; but they contended that the former action was *res inter alios acta*, and that the evidence in that action was not admissible in the later one. Held that these admissions made it unnecessary for B. to prove over again his liability to pay A. (*Shepheard* v. *Bray*, 1906, 2 Ch. 235; reversed, by consent, on other grounds, 1907, 2 Ch. 571, *cp. ante*, 348).

A., and her husband B., in a suit brought to determine the rights to a fund distributable under the will of A.'s father, accept payment of a part of the fund to which, by the judge's construction of the will, A. becomes entitled. A. and B. might have intervened in the suit, but did not, and discouraged the parties thereto from appealing. In a subsequent suit brought by B., after A.s death, in respect of another fund under the will and to a share of which A. was entitled in a different right, B. was held to be estopped from disputing the previous construction placed by the judge on the will (*Re Lart*, 1896, 2 Ch. 788). So, acquiescence in distributing a fund in Chancery is a bar to an application to revoke the Letters of Administration under which the distribution has taken place (*Mohan* v. *Broughton*, 1900, P. 56; *Young* v. *Holloway*, 1895, P. 87). And a debtor has been precluded from impeaching a judgment used by him to carry an arrangement beneficial to himself (*Exp. Vagg*, 1899, 2 I.R. 383; *cp. Election, ante*, 416).

Inadmissible.

CHAPTER XXXVII.

PROBATES, VERDICTS, AWARDS, REPORTS, INQUISITIONS, PLEADINGS, WRITS, AND DEPOSITIONS IN FORMER TRIALS.

PROBATES AND LETTERS OF ADMINISTRATION. Probate of Will of Personalty. Probate of a will of Personalty, whether in solemn or common form, is an adjudication *in rem,* and until revoked affords, in general, conclusive evidence against all persons of—(1) The appointment of the executor; (2) the validity of the will, and its execution according to the law of the testator's domicil (*Whicker* v. *Hume,* 7 H.L.C. 124; *Concha* v. *C.,* 11 App. Cas. 541; *Re Wernher,* 34 T.L.R. 191); as well as of (3) its contents, the original will not being even admissible for this purpose (*Pinney* v. *P.,* 8 B. & C. 335; *Pinney* v. *Hunt,* 6 Ch. D. 98; *aliter* for purposes of construction, *post,* 613, 637, 661); and this applies to every part of the will, thus the probate is conclusive proof of a legacy which might have been expunged on the ground of forgery (Williams, Exors., 10th ed., 431-34), or of a will or codicil being distinct instruments, though written on the same paper (*Baillie* v. *Butterfield,* 1 Cox, Eq. 392; but see *inf.* as to duplicate codicils).

And a decree, establishing the will and pronounced in a contentious suit, binds the next of kin, though not cited nor intervening, provided they were cognisant of the suit, and had an opportunity of intervening (*Young* v. *Holloway,* 1895, P. 87); though a decree founded on a compromise only binds the parties to the compromise (*Wytcherley* v. *Andrews,* L.R. 2 P. & D. 327; *Norman* v. *Strains,* 6 P.D. 219; *Graham* v. *M'Cashin,* 35 Ir. L.T.R. 169; *Ritchie* v. *Malcolm,* 36 *id.* 56; *Abdallah* v. *Rickards,* 4 T.L.R. 622; *ante,* 406).

So, *Letters of Administration,* even though irregularly granted, are, generally, until recalled, conclusive evidence against strangers of the title of the administrator (*Mohaynidu* v. *Pitchey,* 1894, A.C. 437); as well as, against parties and privies, of the persons who are next of kin (*Barrs* v. *Jackson;* 1 Phill. 582; *Spencer* v. *Williams,* L.R. 2 P. & D. 230; *Re Ivory, Hankin* v. *Turner,* 10 Ch. D. 372; *Concha* v. *C.,* 11 App. Cas. 541; *ante,* 406, 410, 420).

Although, however, while the probate is unrevoked, other Courts will not receive evidence to show the *insanity* of the testator (Williams, Exors., 432); or that the will, or any part of it, was procured *by fraud* (*Meluish* v. *Milton,* 3 Ch. D. 27); or that words were inserted by *mistake* and without the knowledge of the testator (*Re Bywater,* 18 *id.* p. 22); yet this rule has not been followed in the case of a compromise or payment obtained in respect of a *forged will* (*Priestman* v. *Thomas,* 9 P.D. 210; *Exp. Jolliffe,* 8 Beav. 168); or where *want of jurisdiction* is shown—*e.g.* that the supposed testator or intestate was *alive* (*Allen* v. *Dundas,* 3 T.R. 125; Tay. s. 1714; Williams, Exors., 10th ed., 1532; and see *Concha* v. *C., sup.;* and 1 Am. Law Rev. N.S.

337); or where the value requires a higher *probate stamp* (*Cormack* v. *Barragry*, 10 Ir. L.T.R. 142; see, however, Ros. N.P., 17th ed., 271), or the *seal* is forged (Williams, *sup.*; Ros. N.P. 206); and where probate was granted of two codicils as separate instruments, evidence was received to show that they were executed merely as duplicates (*Hubbard* v. *Alexander*, 3 Ch. D. 738; *Whyte* v. *W.*, 17 Eq. 50). So, where the grant has been *revoked* this may, of course, be shown (Williams, *sup.*; Ros. N.P. 206).

Probates and letters are not, as we have seen (*ante*, 409-10), conclusive, though they may, perhaps, be *primâ facie*, evidence of the following matters:—The *death* of the testator or intestate (in *French* v. *F.*, 1 Dick. 268; *Lloyd* v. *Finlayson*, 2 Esp. 564; *Reilly* v. *Fitzgerald*, 6 Ir. Eq. R. 335, 349; and *Re Spenceley*, 1892, P. 255, they were held *primâ facie* evidence; *contra*, *Thompson* v. *Donaldson*, 3 Esp. 63; *Moons* v. *De Bernales*, 1 Rus 301, 306, and *Re Beamish*, 9 W.R. 475); nor of his *domicil* (*Concha* v. *C.*, *sup.*; *Bradford* v. *Young*, 26 Ch. D. 656; in *Eames* v. *Hacon*, 18 Ch. D. p. 352, the C.A. considered letters of administration *primâ facie* evidence of domicil); nor, on a charge of forgery, of the *genuineness of the will* (*R.* v. *Buttery*, Rus. & Ry. 342; *R.* v. *Gilson*, *id.* 343 n); nor that any given property is assets of the testator (*Re M'Kenna*, 42 Ir. L.T.R. 50). The probate of a will in execution of a power is no evidence of the proper *exercise of the power* (Tay. s. 1712, and cases cited); nor is it primary evidence of a declaration contained in the will as to pedigree (*ante*, 311); nor are letters of administration any evidence of the intestate's *marriage* or the reverse (*Blackham's Case*, cited in *Barrs* v. *Jackson*, 1 Phill. 588, 589; *contra Swifte* v. *S.*, 120 L.T. Jo. 81, in which case they were, where granted to a "wife," held *primâ facie*, though not conclusive, evidence of the marriage). As to foreign probates, see *post*, 560.

Probate of Will of Realty. Under the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 1, real estate (which does not include copyhold or customary freehold) now devolves on the personal representatives, and their assent is necessary to any devise contained in the will. In such cases, therefore, the will must be proved even if there be no personalty (Jarman, Wills, 6th ed., 42-6). Prior to this Act, wills of realty were only entitled to probate if an executor was appointed therein (*Re Cubbon*, 11 P.D. 169; *Re Hornbuckle*, 15 *id.* 149), or if the realty was held under some other instrument in trust for sale or conversion (*Re Gunn*, 9 *id.* 242). *Probate*, however, while unrevoked, was conclusive evidence of the validity and contents of the will, if it had been either proved *in solemn form, or established by a decree in contentious proceedings* (20 & 21 Vict. c. 77, s. 62); but it did not affect the heir, devisee, or other person interested in the realty, unless he had been cited or made a party to the proceedings, or derived title through a person so cited or made party (s. 63). Probate in *common* form of the will was also *primâ facie* evidence of any "devise or other testamentary disposition of or affecting real estate" (but not of collateral matters—*e.g.* the appointment of a testamentary guardian, *Cope* v. *Mooney*, 14 Ir. C.L.R. 256), *provided* ten days' notice had been given to the opposite party of the intention to adduce the evidence (which notice need not have specified the purpose for which the probate was wanted), and *provided* the opposite party had not, within four days after its receipt, given counter-notice that he disputed the validity of such devise, &c. (s. 65; *Barraclough* v. *Greenhough*, L.R. 2 Q.B. 612; Tay. s. 1761).

Where such notices had not been given, the case might be adjourned either for this purpose, or to allow proof of the will, *per testes* (*Hilliard* v. *Eiffe,* L.R. 7 H.L. 39, 49). As to proof of Probates and Letters, see *post,* 560.

VERDICTS. Except upon new trials, when they are not even admissible (*O'Connor* v. *Malone,* 6 C. & F. 572), verdicts, like judgments, are conclusive evidence of the facts found as between parties and privies; but they are not admissible between strangers, or a party and a stranger, except when operating *in rem* (*ante,* 426, 428), or as evidence in the nature of *reputation* (*ante,* 298).

Where the object is merely to show a trial had, the associate's or master's certificate of the findings (or formerly the *postea* indorsed on the record) is sufficient evidence (*post,* chap. xliii.); but when the verdict is relied on either as an estoppel, or as evidence of the facts found, the judgment must be proved, for it might be that the latter was arrested, or a new trial granted (*Banner* v. *B.,* 34 L.J.M. 14; *Needham* v. *Bremner,* L.R. 1 C.P. 583; *Robinson* v. *Duleep Singh,* 11 Ch. D. 798). When the judgment has been set aside the verdict will be inadmissible, unless the setting aside was upon a ground independent of the validity of the verdict [*Butler* v. *B.,* 1894, P. 25, C.A.; in the Court below, Jeune, P., held, further, that a verdict, though conclusive as evidence, is not an estoppel, and that it is open to the party against whom it is tendered to show *inter alia* that it applied to a different subject-matter].

As to proof of convictions without production of the judgments rendered thereon, see *post,* 557. Ancient verdicts are sometimes admitted as reputation without such proof.

[Ros. N.P. 192-198; Tay. s. 1570; Whart. ss. 781, 831; Everest & Strode on Estoppel, 2nd ed., 25-26].

AWARDS. Awards are, until set aside, conclusive proof of the matters decided as between parties and privies; and this extends also to the construction of a deed by the arbitrator (*Gueret* v. *Audony,* 62 L.J.Q.B. 633). But they are not generally admissible between strangers even as evidence of reputation (*Evans* v. *Rees,* cited *ante,* 298; *R.* v. *Cotton,* 3 Camp, 444; *Wenman* v. *Mackenzie,* 5 E. & B. 447). In an issue, however, between a landlord and the execution creditor of his tenant, as to the title to certain crops seized by the creditor, an award between the landlord and tenant in which the tenancy was directed to cease and the tenant to give up possession, was held some evidence as against the creditor that the crops belonged to the landlord, though not of itself sufficient to change the property therein (*Thorpe* v. *Eyre,* 1 A. & E. 926; and see *Doe* v. *Boulter,* 6 A. & E. 675; and *Shelling* v. *Farmer,* 1 Str. 646; Russell, Arbitration, 9th ed., 328-32). So, awards are sometimes receivable, in conjunction with the submission, as acts of ownership (*Brett* v. *Beales,* 1 M. & M. 416; *Brew* v. *Haren,* Ir. R. 9 C.L. 29; affirmed Ir. R. 11 C.L. 198).

The award must be final and certain; within the scope of the authority conferred (for otherwise it is a mere nullity, *Hutcheson* v. *Eaton,* 13 Q.B.D. 861, 866); and must not prescribe what is illegal or impossible (Tay. s. 1458). Moreover, where the arbitrator has been guilty of misconduct, or the finding has been improperly procured, the award may be set aside (Arbitration Act, 1889, s. 11; Russell, Arbit., 9th ed., 366-74; *Re Palmer,* 1898, 1 Q.B. 131).

But the mere admission of matters not referred, but not shown to be irrelevant or included in the lump sum awarded, will not invalidate it (*Falkingham* v. *Victorian Rys.*, 1900, A.C. 452). As to mistake, see Russell, Arbitr., 369. And as to how far an arbitrator may explain his award, see *ante*, 196, or is bound by the rules of evidence, *post*, 689.

An award under the Lands Clauses Consolidation Act, 1845, has the same effect as the verdict of a sheriff's jury under that Act—*i.e.* it is conclusive of the amount of, but not of the right to, compensation (*Re Newbold and Metr. Ry.*, 14 C.B.N.S. 405; *Beckett* v. *Midland Ry.*, L.R. 1 C.P. 241; *R.* v. *Cambrian Ry.*, L.R. 4 Q.B. 320; *Rhodes* v. *Airedale Commissioners*, 1 C.P.D. 240; *Re East London Ry.*, 24 Q.B.D. 507). So, with an award under the Public Health Act, 1875 (*Brierley Board* v. *Pearsall*, 9 App. Cas. 595); or under the Artisans' Dwellings Act, 1875 (*Wilkins* v. *Birmingham Corp.*, 25 Ch. D. 78). An award, under the Inclosure Acts, 1845, s. 105, and 1848, ss. 13, 14, is not conclusive of the title to the lands allotted, and if made on the applications of persons not interested in the lands, is *ultra vires* (*Jacomb* v. *Turner*, 1892, 1 Q.B. 47; and see Ros. N.P. 154, 222; Tay. s. 1584).

[Tay. ss. 1583-1584, 1607, 1758; Ros. N.P. 221, 281-283, 490-496; Russell, Arbitr., 9th ed., 328-32, 366-74; Redman, *id.*, 3rd ed., 249-257.]

REPORTS OF JUDICIAL OFFICERS. Under the Arbitration Act, 1889, s. 15, sub-s. 2, the report or award of any official or special referee or arbitrator on any reference under an order of the Court or a judge in any cause or matter is, unless set aside, equivalent to the verdict of a jury; and under s. 12 it may, by leave of the Court or a judge, be enforced in the same manner as a judgment or order to the same effect (Ann. Pr., Notes to the above Act). As to reports by experts under ss. 13-14 of this Act, see *ante*, 385-6. The reports of judicial officers, other than the above, are also in certain cases receivable as evidence of the matters contained. Thus, by the Charitable Trusts Recovery Acts, 1891, s. 5 (1), the printed reports of the Charity Commissioners are, in proceedings under the Act, *primâ facie* evidence of the documents and facts therein stated (*ante*, 361). On a question of *res judicata*, the report of the judge is evidence between the parties of what was decided on the former trial (*Houston* v. *Sligo*, 29 Ch. D. 448; *ante*, 416). The report of the Official Receiver as to a bankrupt's conduct and affairs is *primâ facie* evidence of the matters contained, on an application for discharge (Bankruptcy Acts, 1914, ss. 16, 26, sub-ss. 2 and 6; *Exp. Campbell, Re Wallace*, 15 Q.B.D. 213; *Re Sharp*, 10 Morr. Rep. 114); so, it is *primâ facie* evidence, without an affidavit in support, to show grounds for the summary administration of the estate (*Re Horniblow*, 53 L.T. 155). And the report of the Board of Trade as to the grounds of its objection to a trustee, is *primâ facie* evidence of the statements therein contained, Bpy. Rules, 1915, R. 328 (2). A report by an Inspector under the Companies Act, 1908, ss. 109, 111, made to the Board of Trade, is not in the nature of a judicial inquiry or determination, and though admissible to show his opinion for the purposes of the Act, is no evidence of the facts stated (*Re Grosvenor Hotel Co.*, 76 L.T. 337; and see as to reports by the Official Receiver made in Winding-up proceedings, *Re Hobbs*, 1893, Times, Dec. 14). The report of the Committee of the Law Society as to the conduct of a solicitor has, under the Solicitors' Act, 1888, s. 13, the

same effect as that of a Master of the Court (*Re A Solicitor,* 36 Sol. Jo. 94). As to reports by the General Medical Council on the conduct of a medical man, see *Hill* v. *Clifford, ante,* 362; by medical men under the Workmen's Comp. Act, 1906, see *Johnson* v. *Oceanic Co.,* 5 B.W.C.C. 322, C.A., and *Scotstown Estate Co.* v. *Jackson,* 4 *id.* 381; by Licensing Justices under the Licensing Act, 1904, and the admission of evidence as to matters outside them, see *Howe* v. *Newington,* 52 Sol. Jo. 113; by Assessors to the Irish Land Commission, see 41 Ir. L.T.R. 33; and as to reports under the Married Women's Property Act, 1882, s. 17, see *Wilder* v. *W.,* 56 Sol. Jo. 571, C.A. As to Inquisitions and Reports as evidence of *public* matters, see *ante,* 355-62. As to Consular reports under the Merchant Shipping Act, 1894, ss. 690-1, see *Pyper* v. *Manchester Liners,* 5 L. Jo. Cy. Court Rep. 26, Ap. 15, 1916.

On the other hand, the reports of Chancery Visitors under the Lunacy Act, 1890, s. 186, are not admissible to show the state of mind of a lunatic at the time of his execution of a will, such reports being confidential and intended to be destroyed upon the death of the lunatic (*Roe* v. *Nix,* 1893, P. 55). As to the practice with respect to such reports, see *Re B.,* 1892, 3 Ch. 194; and *cp.* as to Inquisitions, Orders, &c., in lunacy, *ante,* 357. So, the decision of the Postmaster-General that a publication is a newspaper does not bind the Courts (*Wilkins* v. *Gill,* 20 T.L.R. 3). Where, also, the statutory report of a Gas Inspector had been made upon evidence supplied by one party and without informing the other, it was held bad (*R.* v. *London County Council,* 11 T.L.R. 337). As to Reports by Surveyors of Corporations, see *Cooper* v. *M.B.W., ante* 69, 246.

INQUISITIONS. Inquisitions made under public authority and for *public purposes* are, as we have seen, often receivable against strangers in proof of the facts determined (*ante,* 355-62). Inquisitions for *private purposes* are only admissible between parties and privies, and to a very limited extent. Thus, an inquisition before a sheriff's jury, under the Lands Clauses Consolidation Act, 1845, s. 68, is conclusive of the amount of, but not of the right to, compensation (*supra,* 434). An inquisition by a sheriff's jury, taken before the Interpleader Act, 1 & 2 Will. IV. c. 58, for the purpose of ascertaining to whom goods seized under a *fi. fa.* belonged, was held wholly inadmissible as not being an inquisition under the Queen's writ, but merely a proceeding by the sheriff on his own authority (*Glossop* v. *Pole,* 3 M. & S. 175; *Latkow* v. *Eamer,* 2 H. Bl. 437).

[Tay. ss. 1582, 1585, 1716-1717, 1767; Ros. N.P. 112, 198-200.]

PLEADINGS AND WRITS. Pleadings are admissible, in subsequent proceedings, to prove their own existence, the institution of the suit, and the facts in issue between the parties (Tay. s. 1753; Whart. ss. 838-839; see *Neison* v. *Walters,* 61 L.T. 872). But being regarded in other respects rather as the suggestions of counsel than the declarations of the parties, they are not receivable to prove the truth of the facts stated, even as admissions (*Re Foster, Exp. Basan,* 2 Morr. Bpy. Rep. 29, C.A.), unless verified by oath, or signed, or otherwise specifically adopted by those against whom they are tendered (*ante,* 235, 251).

Old Bills in Chancery are governed by the same rule (Ros. N.P. 201; Tay. s. 1753; see *Malcolmson* v. *O'Dea,* 10 H.L.C. 593; *Lyell* v. *Kennedy,* 14 App.

Cas. 437); but old *answers*, being upon oath, and such *pleas* as were sworn to, are receivable as admissions against the deponents or their privies (*id.*; *ante*, 235; as to their reception in cases of pedigree see *ante*, 313; and as acts of ownership, *ante*, 132). Old *demurrers* in equity are not so receivable, being merely hypothetical statements which, assuming the facts to be as alleged, denied that the defendant was bound to answer (Tay. s. 1753).

A Writ of summons is evidence of the amount claimed, but not of a debt due (*Brown* v. *Dean*, 5 B. & Ad. 848); and a writ of execution has been held *primâ facie* evidence of a judgment, without the latter's production, against parties, but not against strangers (*Doe* v. *Murless*, 6 M. & S. 119; *White* v. *Morris*, 11 C.B. 1015). [Tay. s. 1766; Ros. N.P. 198.]

DEPOSITIONS IN FORMER TRIALS. (*a*) At common law, testimony given by a witness in a civil or criminal proceeding is admissible in a subsequent (or in a later stage of the same) trial in proof of the facts stated, provided (1) That the proceedings are between the *same parties* or their privies; (2) that the *same issues* are involved; (3) that the party against whom, or whose privy, the evidence is tendered had on the former occasion a *full opportunity of cross-examination;* and (4) that the witness is *incapable of being called* on the second trial. [Tay. ss. 464-478; 546-549; Ros. N.P. 202-204; Best, s. 496; Steph. art. 32 & note xxii.; Whart. ss. 177-188. In peerage cases, evidence given before a Committee of Privileges is admissible in a hearing of the same case before a subsequent Committee (*Beaumont Peerage*, 6 C. & F. 868). As to depositions in non-judicial enquiries, *e.g.* before Receiver of Wrecks, see *ante*, 252; and *infra*, 437.]

Where any of the conditions above mentioned is absent the evidence will be rejected either as *res inter alios acta* (*ante*, 159, 426), or it is sometimes considered, as *hearsay*, since, even where the oath and right to cross-examine are present, yet the benefit of the demeanour of the witness is lost on the second trial; as to the latter ground, however, see *infra*. Depositions in former trials, though not fulfilling the above conditions, are also frequently receivable as admissions (*ante*, 234), or to contradict the same witness on the second trial (*post*, 479-81), or, after the deponent's death, to prove public rights or pedigree (*ante*, 296, 311).

Under O. 37, s. 3, evidence taken in other causes may, on *ex parte* applications, be read by leave of the judge, and in other cases on two days' previous notice to the opposite party. This provision, however, is only intended to save the expense of the order necessary under the old Chancery practice, and does not alter the law as above stated (*Printing Co.* v. *Drucker*, 1894, 2 Q.B. 801; as to depositions in earlier stages of the same trial, see fully *post*, chap. xli.).

Principle. The admission of such evidence is sometimes thought (1) to form an exception to the hearsay rule (Steph. art. 32; Best, s. 496; Gulson on Proof, s. 354); but since both oath and cross-examination were present, the essential requirements of that rule may be said to be satisfied (*ante*, 221; Wigmore, s. 1370; and see *Wright* v. *Tatham*, *infra*). Its *weight*, however, is of course affected by the loss of the demeanour of the witness. (2) Mr. Taylor considers it an exception to the rule excluding secondary evidence of documents, holding that that rule is wide enough to exclude secondary evidence of oral testimony (s. 464); *sed qu.*, and the Courts have more than once decided

that depositions are primary evidence, and of as high a nature and degree as *viva voce* testimony (*Wright* v. *Tatham*, 1 A. & E. 3, 22; *R.* v. *Christopher*, 2 C. & K. 994, 1000; *post*, 440, 519). (3) Dr. Wharton bases its admission on the consideration that the parties and the issues being the same, and full opportunity of cross-examination having been allowed, the second trial is virtually a continuation of the first (s. 177).

Qualifications. The conditions are analogous to those relating to judgments; and indeed whenever a decree in one case would be evidence of the facts decided when tendered in another, there the testimony of a witness in the former trial who was liable to cross-examination, but is incapable of being called, is receivable. So, as to mutuality, the evidence is not admissible for, unless it would also be admissible against, a party (*Morgan* v. *Nicholl*, L.R. 2 C.P. 117; Whart. s. 177; Tay. s. 469). The admissibility of the testimony, however, seems to turn rather on the right to cross-examine than on the precise identity of the parties or the issue—only a substantial identity in these respects being required (Tay. s. 467).

(1) **Former Trial.** The witness must have been duly sworn in some *judicial* proceeding to which the party against whom the evidence is tendered was legally bound to submit (Stark. Ev., 4th ed., 415-418; Tay. s. 484). Thus, depositions taken in a revived suit where a bill of revivor did not lie, have been rejected; though it was otherwise where the matter was within the jurisdiction of the Court, but the bill was dismissed merely because the subject was not proper for a decree in equity (Stark. Ev. 416), or where the depositions were taken, without objection, in judges' chambers in which it was the practice not to cross-examine (*Lawrence* v. *Maule*, 4 Drew. 472; though *cp. R.* v. *Ferry Frystone*, *ante*, 225. As to depositions taken at wreck enquiries, see *ante*, 252.

(2) **Same Parties or Privies.** If the parties to be affected are the same in both proceedings, it is no objection that their relative positions were different, or that there were also others joined with either (*Wright* v. *Tatham*, 1 A. & E. 3). Privies may also be affected by, or take advantage of, the former testimony to the same way that they may a judgment in a former trial (*Morgan* v. *Nicholl*, L.R. 2 C.P. 117), provided the title of the privy has accrued subsequently to the former trial (*Doe* v. *Derby*, 1 A. & E. p. 790; *Re De Burgho's Estate*, 1896, 1 I.R. 274). On the other hand, depositions *inter alios* are inadmissible (*Berkeley Peerage*, 4 Camp. 401). [See fully *ante*, 239, 412-5].

(3) **Same Issues.** If substantially the same question is in issue in the two proceedings, it is immaterial that they relate to different transactions or property (*Doe* v. *Foster*, 1 A. & E. 791, *n* (b); *Llanover* v. *Homfray*, 19 Ch. D. 224). And the same rule holds in criminal cases; thus, a deposition on a charge of stabbing, assault and robbery, or causing grievous bodily harm, is admissible on a trial for murder arising out of the same facts (*R.* v. *Smith*, Rus. & Ry. 339; *R.* v. *Lee*, 4 F. & F. 63; *R.* v. *Beeston*, 24 L.J.M.C. 5; *R.* v. *Dilmore*, 6 Cox, 52; *R.* v. *Williams*, 12 Cox, 101; and see *ante*, 415-7, 419-22, and *post*, 505).

(4) **Opportunity of Cross-examination.** There must have been full opportunity of cross-examination in the former proceedings; thus, if the party against whom the evidence is subsequently tendered had not due notice of

the time or place of the former examination (*Fitzgerald* v. *F.*, 3 S. & T. 397); or if the issues are so dissimilar that cross-examination as to one would only partially cover the other (*R.* v. *Beeston, sup.;* Tay. s. 468), the evidence will be rejected. But it is not essential that the opposite party should have *exercised* his right, for the evidence will be admissible if he voluntarily abstained from, or waived the absence of an opportunity for, cross-examination (*Lawrence* v. *Maule,* 4 Drew. 472; *M'Combie* v. *Anton,* 6 M. & G. 27; Tay. s. 466). And if the witness died or became insane before cross-examination in the former trial the evidence will still be receivable (*Williams* v. *W.,* 12 W. R. 663; *R.* v. *Doolin,* 1 Jebb, C.C. 123; *cp. post,* 475).

(5) **Incapable of being called.** For the purposes of the rule a witness is regarded as incapable of being called when he is either (1) *Dead* (the death must be proved, or evidence given of unsuccessful inquiries or lapse of time sufficient to raise that presumption: *Pyke* v. *Crouch,* 1 Ld. Ray. 730; *Benson* v. *Olive,* 2 Str. 919; Tay. s. 472). (2) *Insane* (*R.* v. *Eriswell,* 3 T. R. 707, 720-1; so, it seems, if the insanity be only temporary, *R.* v. *Marshall,* Car. & M. 147, but this is doubted in Taylor, s. 476, *cp. post* 452, 498, 507); and if the depositions were taken shortly before the second trial it is unnecessary to show that the witness was sane when they were taken (*R.* v. *Wall,* cited 3 Russ. Cr., 6th ed., 563, 572). (3) *Seriously ill.* The degree of illness is somewhat in doubt; if it is such that there is no probability of the witness ever being able to attend, the depositions are of course admissible (Tay. s. 477); so, probably, if it is such as to prevent his attendance within a reasonable time (see *Beaufort* v. *Crawshay,* L.R. 1 C.P. 699, deciding that the words "permanent sickness or infirmity," in 1 & 2 Will. IV. c. 22, were to be thus construed); but if the indisposition be merely temporary, the proper course is not to admit the evidence, but to postpone the trial (*Harrison* v. *Blades,* 3 Camp. 457; *R.* v. *Savage,* 5 C. & P. 143, in which the depositions of a woman about to be confined were rejected, see *post,* 506-8). (4) *Kept out of the way by the opposite side* (*R.* v. *Scaife,* 17 Q. B. 238; *Egan* v. *Larkin,* 1 Arm. M. & O. 403. Mr. Taylor remarks that this proposition rests partly on the authority of decisions in civil and criminal courts, partly on statutory analogy, but chiefly on the broad principle of justice which will not allow a party to take advantage of his own wrong, s. 478). (5) In civil proceedings (only), is either *out of the jurisdiction,* or *cannot be found after diligent search.* A witness has been considered beyond the jurisdiction who was on board ship ready to sail, but prevented by contrary winds (*Fonsick* v. *Agar,* 6 Esp. 92; *Ward* v. *Wells,* 1 Taunt. 461; *Varicas* v. *French,* 2 C. & K. 100; though see *Carruthers* v. *Graham,* C. & M. 5). Proof of diligent but unsuccessful search will probably also admit the depositions (*Falconer* v. *Hanson,* 1 Camp. 171; *Wiedemann* v. *Walpole,* 1891, Times, June 15, *per* Pollock, B., affirmed on other grounds, 1891, 2 Q.B. 534; Tay. s. 473). Neither of the above grounds will let in the deposition in criminal cases (*R.* v. *Scaife,* 17 Q.B. 238; *R.* v. *Austin,* 7 Cox, 55; *R.* v. *Hagan,* 8 C. & P. 167).

(6) **Proof of the Former Testimony; Judge's Notes.** The testimony, if *oral,* may be proved from memory or notes, by any one who swears to its accuracy, *e.g.,* judge, counsel, or reporter (*Doncaster* v. *Day,* 3 Taunt. 262; *R.* v. *Morgan,* 6 Cox, 107; *R.* v. *Bird,* 5 Cox, 11); but not, unless at least by consent, by the judge's notes (*R.* v. *Child,* 5 Cox, 197, 203; *Conradi* v. *C.,* L.R. 1 P. &

D. 514; *Griffin's Divorce Bill,* 1896, A.C. 133; *Sinclair's Divorce Bill,* 1897, A.C. 469; Tay. s. 546; Best, s. 223; but *cp. R.* v. *Rimes,* 28 T.L.R. 409). Where, however, a judge or juror becomes ill, the former's notes may be read over to the substitute and the witnesses re-sworn (*ante,* 42). And it would seem sufficient if the substance merely, and not the precise words, of the examination and cross-examination be given (Tay. ss. 546-547; though see *R.* v. *Mitchell, ante,* 320).

If *written,* it may be proved either by office copy (*post,* chap. xliii.) or examined or certified copy (Tay. ss. 1577, 1580). Old depositions in Chancery cannot, however, except as admissions, be read without proof, where this is possible, of the bill and answer, so that the judge may see whether a cause was depending and whether the parties and issues were the same; but the bill and answer do not thereby become evidence for the jury, nor can they be read or referred to by counsel. Moreover, where the depositions have been taken prior to the English Chancery Act, 1852 (15 & 16 Vict. c. 86), the party putting in the answers is obliged as part of his case to read, not only the interrogatories, but the cross-interrogatories, and answers thereto. And if the depositions have been taken under a special commission, proof of the commission and return must also be given [Tay. ss. 1576-1578].

(7) **Objections.** The evidence is open to the same objections in the subsequent trial as if the witness had been personally present thereat (Tay. ss. 548-549); *e.g.* as to leading questions (*Small* v. *Nairne,* 13 Q.B. 840); hearsay (*R.* v. *Cowle,* 71 J.P. Rep. 152); or statements of the contents of unproduced documents (*Steinkeller* v. *Newton,* 9 C. & E. 313, 319; *Tufton* v. *Whitmore,* 12 A. E. 370; save that a party cannot repudiate an illegal question previously put by his own side, *Hutchinson* v. *Bernard,* 2 M. & Rob. 1). Mr. Justice Stephen states that the credit of the declarant may be impeached in the same way as that of a witness who had denied in cross-examination the imputations suggested (art. 135); but see *ante,* 276.

EXAMPLES.

Admissible.

(*a*) In an action by A. against D.:—the depositions of a deceased witness, taken in a prior action involving the same question, and brought by A., B., and C. jointly against D., are admissible (*Wright* v. *Tatham,* 1 A. & E. 3). So, in an action by A., as heir-at-law of B., to recover certain land from C., the depositions of a deceased witness taken in a prior action by A. as heir of B. against C. to recover different lands, are admissible (*Doe* v. *Derby,* 1 A. & E. p. 791 *n*).

In a suit brought in 1870 by certain customary tenants on behalf of themselves and all other tenants of a manor against the lord, to establish a right to the minerals under their tenements:—the depositions of old persons, since deceased, taken *de bene esse* under a commission in a suit brought in 1815 by certain former tenants on behalf of themselves and all other tenants of the manor, to establish the same right, are admissible, although the plaintiffs in 1870 did not claim through any

Inadmissible.

(*a*) In an action by A. to recover land from B.'s son;—the depositions of a witness, since deceased, taken in a former action brought by A.'s son as heir-at-law of A. (whom he supposed to be dead) against B. to recover the same land, are inadmissible, as A. did not claim through his son, though his son claimed through A.; and the evidence not being admissible against, could not be admissible for, A. (*Morgan* v. *Nicholl,* L.R. 2 C.P. 117).

A., a shareholder, being sued by a company for calls, pleads misrepresentation. Depositions taken in a prior action by the company against B., another shareholder, for calls, to which B. had also pleaded misrepresentation, are not admissible against the company either at common law or under O. 37, r. 3 (*Printing, &c., Co.* v. *Drucker,* 1894, 2 Q.B. 801).

In a settlement case, to prove the place of birth of A., a deceased pauper:—depositions were tendered which had been taken on oath, but *ex parte* and without

Admissible.

of the former plaintiffs, and the former lord, though he joined in the commission, did not in fact cross-examine the deponents (*Llanover* v. *Homfray*, 19 Ch.D. 224).

A. sues B., C., and D., and also, in another actiou, C., D., and E. The facts in both actions are the same, but the relief claimed is different. Held, that A. might, on notice, read in the second action the affidavits and depositions, taken in the first, against such defendants as were common to both (*Brown* v. *White*, 24 W.R. 456).

A. sues B. for damages for a collision between two vessels, alleged to have been caused by the negligence of B's servants. The deposition of a witness, taken before the coroner, on an inquiry into the death of A.'s son caused by the collision, was held admissible on behalf of B., the witness himself being out of the jurisdiction (*Sills* v. *Brown*, C. & P. 601; *sed qu.* and see *post*, 512).

A. is indicted for uttering a forged note; the depositions of witnesses, since unable to travel, taken before a magistrate upon a former charge against A., arising out of the same transaction, of obtaining money by false pretences, are admissible (*R.* v. *Williams*, 12 Cox, 101).

In an action between A. & B., to prove the execution of a deed, the depositions of a deceased attesting witness in a former trial between the same parties,—Held admissible without calling a second and surviving attesting witness who was available (*Wright* v. *Tatham*, 1 A. & E. 3; *post*, 519).

Inadmissible.

cross-examination, on a former hearing before two magistrates. Held, inadmissible [*R.* v. *Ferry Frystone*, 2 East 54; *R.* v. *Abergwilly*, *id.* 63. In the earlier case of *R.* v. *Eriswell*, 3 T.R. 707, 712, the evidence having been received in the Court below, was admitted on appeal, the Court being equally divided on the point; *ante*, 225-6].

In an action for damages for collision between two ships,—depositions made on oath before the Receiver of Wrecks under the Merchant Shipping Act 1854, by the captain and crew.—Held, not admissible either for or against the owners, and whether the deponents were living or deceased at the hearing of the action, although by s. 449 of the Act the depositions were expressly made evidence of the truth of the matters stated [*The Little Lizzie*, L.R. 3 A. & E. 56, on the ground that the deponents were not subject to cross-examination; *The Henry Coxon*, 3 P.D. 156; *The Solway*, 10 P.D. 137; *ante*, 252, 361].

BOOK II.

ADMISSIBILITY OF EVIDENCE

PART II. WITNESSES

CHAPTER XXXVIII.

PROCESS, KINDS OF. ATTENDANCE, WITH OR WITHOUT DOCUMENTS. SERVICE. EXPENSES. DISOBEDIENCE. ABUSE OF PROCESS. PROTECTION OF WITNESSES.

PROCESS. There are three methods by which the attendance of witnesses may ordinarily be enforced in judicial proceedings—*subpœna* (which may be either *ad testificandum,* or if the production of documents in the witnesses' possession or control is required, *duces tecum*), *recognisance,* and *summons.* [For the history of Compulsory Process, see Wigmore Ev. s. 2190.]

Subpœna ad testificandum. A writ of subpœna (which may be issued at any stage of the proceedings and without leave) is the process employed when the proceedings are in the *High Court* (O. 37, rr. 26-34A; if in Chambers, the writ issues on a note from the judge or master, as the case may be, Ann. Pr. Notes to O. 37, r. 28); or before an examiner (O. 37, r. 20); and an affidavit witness may be ordered to attend for cross-examination by this process, as well as by notice under O. 38, r. 28 (*Re Baker, Connell,* v. *Baker,* 29 Ch.D. 711). The same process prevails in the *Bankruptcy Court* (Bankruptcy Rules, 1915, rr. 60-72), which has also special power to summons persons likely to give information as to the debtor's property or affairs (Bankruptcy Act, 1914, s. 25; *cp. Re Franks,* 1892, 1 Q.B. 646); and applies to hearings before an *Arbitrator* (Arbitration Act, 1889, ss. 8, 18) or Official or Special Referee (O. 36, r. 49); as well as to the trial of election petitions (Tay. s. 1283); and it may also be adopted in *Criminal Cases* (*inf.* Recognisance). As to subpœna for the purpose of confrontation only, see, however, *Farulli* v. *F.,* cited, *post,* 466.

Witnesses *present in Court* cannot, however, in criminal cases, decline to be sworn or to answer, on the ground that they have not been duly served with a subpœna (*R.* v. *Sadler,* 1 C. & P. 218; *R.* v. *Flavell,* 14 Q.B.D. 364; *cp.* 69 J.P. 347); though it is otherwise in civil cases (*Bowles* v. *Johnson,* 1 W. Bl. 36; and see *Stuart* v. *Balkis Co.,* 32 W.R. 676; *contra, Blackburn* v. *Hargreaves,* 2 Lew, C.C. 259, which, however, is doubted by Mr. Taylor, s. 1242 *n*).

Subpœna duces tecum. Judge's Order. The production of documents in the possession either of *strangers,* or of *parties* (in criminal proceedings, except the accused on whom a *notice to produce* only should be served, *post,* 537), may, in general, be secured by *subpœna duces tecum,* which must specify, and be confined to, the particular documents in the witness's possession of which production is required (*Newland* v. *Steere,* 13 W.R. 1014); a general direction is bad as amounting to a bill of discovery against the witness. Thus, a subpœna describing particular documents and then directing the production of "all documents relating to the questions in issue," is not enforceable, unless the witness admits their possession (*Lee* v. *Angas,* 2 Eq. 59; *Re Emma Silver Mining Co.,* 10 Ch. App. 194); nor is a subpœna to produce "documents relating to the case if he has any," as this requires the witness to decide upon their relevancy (*Burchard* v. *McFarlane,* 1891, 2 Q.B. 241, 247). As there is no discovery obtainable against the Crown, the departmental officer having the actual custody of the document must be subpœnaed (*Imperial Cold Storage Co.* v. *R.,* 1909, Times, Nov. 9). If a witness, served with a *subpœna duces tecum,* is merely required to produce the document and not to testify, he need not be sworn (*post,* 462).

By O. 37, r. 7, "The Court or a judge may in any cause or matter at any stage of the proceedings order the attendance of any person for the purpose of producing any writings or other documents named in the order which the court or judge may think fit to be produced: provided that no person shall be compelled to produce under any such order any writing or other document which he could not be compelled to produce at the hearing or trial." The object of this order was to remove the difficulties which existed in compelling the production of documents *before* or *after* the trial, at the hearing of motions, petitions, summonses, or examinations before official referees or examiners (*Elder* v. *Carter,* 25 Q.B.D. 194, 199). It thus only relates to production as *auxiliary to examination* for the purposes of a particular motion, &c. (*Burchard* v. *McFarlane,* and *Elder* v. *Carter, sup.; O'Shea* v. *Wood,* 1891, P. 237, 286); but, under it, a non-party may be compelled to produce documents upon such examination (*Zumbeck* v. *Biggs,* 48 W.R. 507; *Re Smith,* 1891, 1 Ch. 323), though not for private inspection for trial (*Straker* v. *Reynolds,* 22 Q.B.D. 262). The order may be made *ex parte* and is equivalent to a *subpœna duces tecum* (*Re Smith, sup.*).

In the case of certain *public* documents (*e.g.* a parish register, *Sayer* v. *Glossop,* 2 Ex. 409, though not a rate-book, *R.* v. *Llanfeathly,* cited *post,* 537), production cannot be compelled under subpœna; and a judge's order, and not a subpœna, is the proper means of obtaining production of an original *judicial* document (*post,* 537, 543, 556) or *banker's* book (*ante,* 375). Where, however, the document is a *private* one the witness must, in general, whether possession be held for himself or for another (*e.g.* solicitor for client), attend with the document and submit the question of privilege to the judge (*R.* v. *Greenaway,* 7 Q.B. 126; *Imperial Cold Storage Co.* v. *R., sup.*). As to what documents are privileged from production in civil cases, see *ante,* chaps. xv.-xvi.; and in the following cases a witness cannot be compelled to produce his principal's documents:—A steward having the title-deeds of the estate, for his possession is that of his employer (*Falmouth* v. *Moss,* 11 Price, 455); a secretary of a company, whose directors have forbidden

him to produce, or not been shown to have consented to his producing, the company's books (*Crowther* v. *Appleby,* L.R. 9 C.P. 23; *R.* v. *Stuart,* 2 T.L.R. 144; *Eccles* v. *Louisville Ry Co.,* 1911, 1K.B. 135, C.A.; *cp. Balfour* v. *Tillett,* 29 T.L.R. 332, C.A.); a clerk in a public office, with respect to official papers (*Austin* v. *Evans,* 2 M. & G. 430); or, under the Bankruptcy Act, 1914, s. 25, the managing clerk of a creditor (see *Re Higgs, Exp. Leicester,* 66 L.T. 296). The partner of a party, however, may be compelled to produce on subpœna his own fully executed counterpart of the joint deed, although his other co-partners object, for each partner has a property in his own copy (*Forbes* v. *Samuel,* 1913, 3 K.B. 706, 721-5; and *cp. Rattenbery* v. *Munro,* 103 L.T. 560), though this does not apply to documents and letters belonging to the firm. In criminal cases, however, the document must be given up, notwithstanding any instructions from the depositor (*R.* v. *Daye,* 1908, 2 K.B. 333).

Recognisance. In indictable offences (and several others in which an appeal lies to the sessions from a conviction by one or more justices, Tay. ss. 1237-1238), the witnesses both for the *prosecution* (11 & 12 Vict. c. 42, s. 20, amended by 42 & 43 Vict. c. 49) and the *defence* (30 & 31 Vict. c. 35, s. 3, except witnesses to character) may be, and generally are, bound over by the committing magistrate to give evidence at the trial. And a similar power is given to coroners to enforce the attendance of Crown witnesses at trials for murder or manslaughter (The Coroners Act, 1887, s. 5). Where the witness has not been bound over, or is an infant (for then his recognisance cannot be estreated, *R.* v. *Smith,* 17 Cox, 601), he should be served with a *subpœna* issued by the Clerk of Quarter Sessions or Assize, as the case may be, or from the Crown Office, the advantage of the latter being that it may be served anywhere in the United Kingdom and that proceedings upon it for contempt are more speedy and effective (Ros. Cr. Ev. 94). A Crown Office subpœna may also be resorted to, instead of a *"backed" summons* in the case of a witness out of the Petty Sessions district (*infra*). Under the Criminal Appeal Act 1907, s. 9, the Court of Cr. App. may order the production of any witness or document material to the case and exercise various other powers in respect to evidence.

Summons. A summons, which may contain a clause for the production of documents, is the process in use where the attendance of witness is required before the Chief Clerk in the High Court (O. 55, rr. 16, 17; Ann. Pr., App. L.); and a Chief Clerk's summons, and not a subpœna, is the proper process in *winding-up proceedings* under the Companies Act, 1908, s. 174 (*Re Westmoreland C.,* 40 W.R. 171; *Re Great Kruger Co., Exp. Barnard,* 1892, 3 Ch. 307; and *Re Trust and Investment Corp. of S. Africa, id.* 332). The same process is also employed in the *County Courts* (C.C. Act. 1888, s. 110; C.C.R. 1903, O. 18, r. 3); before *magistrates* [who, if the summons will probably be disobeyed, may in lieu thereof issue a warrant under 11 & 12 Vict. c. 42, s. 16, or. *id.* c. 43, s. 7; and if the witness be out of the jurisdiction, such summons or warrant may be "backed" by the local justice, or a Crown Office subpœna may be obtained; and under the Criminal Justice Administration Act, 1914, s. 29, the above sections shall be deemed to include the power to order production of documents and articles likely to be material on the hearing of any charge, information or complaint, and the provisions as

to the witness's neglect or refusal shall apply accordingly]; *Coroners* (The *Coroners Act,* 1887, s. 19, sub-s. 2; Tay. s. 1290); and *Revising Barristers* (6 & 7 Vict. c. 18, ss. 35, 50, 51; 41 & 42 Vict. c. 26, s. 36).

Witnesses in Court. Persons present in court, though not subpœnæd, are in criminal cases bound, if called, to be sworn and give evidence (*R.* v. *Sadler,* 4 C. & P. 218); and this applies also, it seems, to bastardy cases, though not to other proceedings before magistrates under 11 & 12 Vict. c. 43 (*R.* v. *Flavell,* 14 Q.B.D. 364).

Witnesses in Prison. The attendance of a witness when (1) *in custody on civil process* (or detained in a lunatic asylum, *Fennell* v. *Tait,* 1 C.M. & R. 584; or by his superior officer in the army or navy, Tay. s. 1275) may be enforced in civil or criminal trials (or arbitrations, Arbitration Act, 1889, s. 18), by a writ of *habeas corpus ad testificandum,* issued by a judge of the High Court in Chambers (44 Geo. III .c. 102; Ann. Pr., App. J. Form 2; Tay. ss. 1272-1275; see, however, *Jenks* v. *Ditton,* 76 L.T. 591, where Stirling, J., held that a judge's order on the governor of the prisoner, and not a writ, was the proper method, following Seton, pp. 89, 94); and (2) when in *custody on a criminal charge,* by a warrant or order of a judge of the High Court (16 & 17 Vict. c. 30, s. 9; Prison Act, 1898, Sched.), or of a County Court, where the proceedings are in the latter (C.C. Act, 1888, s. 112). And prisoners electing to give evidence at Coroners' Inquests may do so under an order of the Home Office, issued May 1894, upon giving formal notice to the governor of the prison, who is instructed to warn them in the customary manner, and afford facilities for their attendance (58 J.P. 369). Now, also, by the Prison Act, 1898, s. 11, a Secretary of State, on proof to his satisfaction that the presence of a prisoner at any place is required in the interest of justice or for the purpose of any public inquiry may, by writing under his hand, order the prisoner to be taken thither.

Witnesses out of Jurisdiction. The attendance of witnesses resident in parts of the United Kingdom beyond the jurisdiction of the Court issuing the process is regulated as follows: *Civil Actions.* By 17 & 18 Vict. c. 34, ss. 1, 2, amended by the Judicature Act, 1884, s. 16, a writ of subpœna may at any time be issued by special leave of a judge of the High Court, to compel the attendance at trials therein (or before a referee or arbitrator, Arbitration Act, 1889, s. 18) of witnesses resident in Scotland and Ireland. So, County Court summonses to witnesses, to be served either in the home of any foreign district, may be issued without leave (C.C. Act, 1888, s. 110; C.C.R. 1903, O. 18, r. 3). *Criminal Cases.* As subpœnas issued by the clerks of the peace at sessions, or of assize at assizes, are only effectual within their respective jurisdictions, it is necessary when the witness is resident beyond these limits to obtain a Crown Office subpœna, which is available in any part of the United Kingdom (45 Geo. III. c. 92, ss. 3, 4). The attendance before a magistrate of witnesses resident "in England" beyond his jurisdiction, is effected by means of a summons issued by such magistrate, and backed by another in the witness's district (Summary Jurisdiction Act, 1879, s. 36); and their attendance when in "England, Wales, Ireland, Scotland, or the Channel Islands" may be enforced by warrant, backed by any justice of such locality (11 & 12 Vict. c. 42, ss. 11-16; *id.* c. 43, ss. 3, 7); or, in either case, by means of a Crown Office subpœna.

SERVICE OF PROCESS. Subpœna. Service of a supœna issued by the High Court, or by Court of Assize or Quarter Sessions, is effected by personally delivering to the witness a copy of the writ and of the indorsement thereon, and at the same time producing the original (O. 37, r. 32; Tay. s. 1244; Ros. Cr. Ev. 95). The service must be made within twelve weeks from the *teste* of the writ (O. 37, r. 34), and a reasonable time before the trial; service on the day of trial, even where the witness resides in the same town, not being sufficient unless he is actually within the precincts of the Court, or has admitted the sufficiency of the service, as by promising to attend (*Maunsell* v. *Ainsworth,* 8 Dowl. 869). The subpœna remains in force until the end of the sitting or assize for which it is issued; after which the former writ must be re-issued and re-served, or a new one obtained (Tay. s. 1241). The service may be proved by affidavit (O. 37, r. 33; Tay. s. 1244).

Summons. An ordinary witness summons, issued without leave by a *County Court,* is served by the bailiff, but it may, by leave of the judge or registrar, be issued in blank and served by the party applying for the same, or by his solicitor, or by some person in the permanent and exclusive employment of the party or his solicitor (C.C. Act, 1888, s. 110; C.C.R. 1903, O. 18, r. 3). The service should be effected personally, or by delivering it to some person apparently of the age of sixteen, at the house, or place of dwelling, or place of business of the witness; but no place is to be deemed his place of business unless he is the master, or one of the masters, of it (C.C.R. 1903, O. 18, r. 4; Ann. C.C. Pr., 1911, 228). Proof of service may be by indorsement on the copy (C.C. Act, 1888, s. 78). Service of a *Police Court* summons may be effected by "a constable, peace-officer, or other person," by leaving it with the witness, or with some person for him, at his last or most usual place of abode (11 & 12 Vict. c. 43, s. 1)—*e.g.* service upon a servant apparently residing at the witness's address, coupled with an explanation of its purport, is sufficient (*R.* v. *Chandler,* 14 East, 267). Proof of such a service may be by declaration before a justice, commissioner for oaths, clerk of the peace, or registrar of a County Court (42 & 43 Vict. c. 49, s. 41; Greenwood's Police Guide, 37-38, 41).

Attendance waives Irregularity. Attendance in obedience to a subpœna or summons will waive any irregularity in the service thereof (*Wisden* v. *W.,* 6 Hare, 549; *R.* v. *Widdop,* L.R. 2 C.C. 3; *R.* v. *Fletcher,* 51 L.T. 334).

TENDER OF EXPENSES. Civil Cases. In civil cases a witness is not bound to attend unless his reasonable expenses of going to, staying at, and returning from the place of trial are tendered to him, either with his subpœna, or at a reasonable time before the trial (*Dowdell* v. *Australian Co.,* 3 E. & B. 902; *Brocas* v. *Lloyd,* 23 Beav. 129; *Re Harvey,* 23 T.L.R. 433); though he cannot refuse for non-payment for former attendances (*Gaunt* v. *Johnson,* 6 Hare, 551). Nor, if he attends (which as we have seen waives any irregularity in the service of the process), is he bound to give evidence unless such expenses together with, in the case at any rate of professional witnesses, compensation for loss of time, are paid or tendered to him; and this seems to hold even though he has been already sworn (*Re Working Men's Society,* 21 Ch.D. 831); or the party subpœnaing sues *in formâ*

pauperis (*Jacobs* v. *Lindow,* 1898, Times, May 25). But payments made by one side may be taken into account on a subpœna from the other (*Allen* v. *Yoxall,* 1 C. & K. 315; *Betteley* v. *McLeod,* 3 Bing, N.C. 405); and witnesses may waive their right to a tender of expenses, either expressly, as by agreeing to take a less sum, or to bear their own expense (*Betteley* v. *McLeod, sup.; Goff* v. *Mills,* 13 L.J.Q.B. 227); or impliedly, as by accompanying the parties to the place of trial without making any previous claim (*Newton* v. *Harland,* 1 M. & G. 956; Tay. s. 1249). An action will also lie against the client to recover the witnesses' expenses (*Chamberlain* v. *Stoneham,* 25 Q.B.D. 113); though not against the solicitor, unless the latter has expressly bound himself, or the action is a speculative one (*Robins* v. *Bridge,* 3 M. & W. 114; *Miller* v. *Appleton,* 50 Sol. Jo. 184, 192). Where the witness is a married woman the tender should be made to her and not to her husband (Tay. s. 1249). If a party attends on his own account, he is not entitled to conduct money when subpœnaed by his adversary; though a successful party, when a necessary witness in his own cause, will on taxation be allowed his proved expenses (*Wiltshire* v. *Naylor,* 43 Ir. L.T.R. 167).

Criminal Cases. In *Indictable Offences,* a witness living *within* the jurisdiction is bound to attend when subpœnaed or summoned by the Crown or prisoner without any tender of expenses (*Pell* v. *Daubeny,* 5 Ex. 955, 957; *R.* v. *Cooke,* 1 C. & P. 321); but power is given to the Court in all cases of felony, and in many of misdemeanour, to order payment of their expenses to Crown witnesses attending on recognisance or subpœna, and to witnesses for the prisoner attending on recognisance (Tay. ss. 1252-1263; Ros. Cr. Ev. 98, 210-214). Witnesses residing in a distant part of the United Kingdom *without* the jurisdiction, cannot be punished for contempt unless at the time of service a sufficient sum was tendered to them for their expenses in coming, attending, and returning (45 Geo. III. c. 92, s. 4; and see 44 & 45 Vict. c. 24, s. 4, sub-s. 3; and 44 & 45 Vict. c. 69, ss. 15, 27). In *Summary Cases,* a witness is not bound to attend unless paid his expenses with his summons, nor can a warrant issue for his attendance unless such payment has been made (11 & 12 Vict. c. 43, s. 7).

DISOBEDIENCE TO PROCESS. Subpœna. Wilful failure to attend a trial in obedience to a subpœna issued by the High Court, is a contempt, and punishable in both civil and criminal cases by *attachment* (Tay. ss. 1265-1269; Ros. Cr. Ev. 97); as well as, in civil cases, by an *action of debt,* wherein the aggrieved party may recover a penalty of £10, with such further compensation as the Court issuing the process may assess (5 Eliz. c. 9, s. 12, made perpetual by 26 & 27 Vict. c. 125; Tay. s. 1270); or, as is more usual, provided the party can prove actual loss or detriment by the non-attendance, an action at Common Law for damages (*Crewe* v. *Field,* 12 T.L.R. 405; Tay. s. 1271; Archb. Pr. 568-570). If a witness, duly served and having his expenses paid, refuses in court to be sworn, to answer, or to sign his deposition, he is guilty of a contempt, and may, in the Superior Courts, be punished instanter, by fine and imprisonment (*Exp. Fernandez,* 10 C.B.N.S. 3; *R.* v. *Clement,* 4 B. & Ald. 218; *Re Keller,* 22 L.R.I. 158; *Kingston* v. *Cooper,* 41 L.Jo. 317); nor can he appeal against the order unless he attends the Court (*Gordon* v. *G.,* 1904, P. 163, 166, C.A.) So, if a witness subpœnaed

before an examiner refuses to attend, or, having attended, refuses to be sworn or to answer any lawful question, such refusal may be certified to the Central Office by the examiner; and the Court may, on the application of the aggrieved party, made either *ex parte,* or on notice, order the witness to attend at his own expense, or be sworn, or answer, as the case may be (O. 37, r. 13; *Stuart* v. *Balkis Co.,* 32 W.R. 676; *Exp. Fernandez, supra; post,* 498); and in default thereof motion may be made for leave to issue a writ of attachment (*Evans* v. *Noton,* 1893, 1 Ch. 252). And the same practice applies where a witness is summoned by the Chief Clerk under O. 55, r. 17 (*Powell* v. *Nevitt,* 55 L.T. 728). Where the subpœna has been issued, not by the High Court, but by a Court of Assize or Quarter Sessions, a non-attending witness may be fined, or indicted (*R.* v. *Clement,* 4 B. & Ald. 218; Tay. s. 1268; Ros. Cr. Ev. 97); and an attending witness, who refuses to be sworn or to answer, may be committed, or fined, and imprisoned until the fine is paid (Ros. Cr. Ev. 97; *R.* v. *Preston,* 1 Salk. 278). Disobedience to a subpœna issued *out of the jurisdiction in* Scotland or Ireland under 45 Geo. III. c. 92, or 17 & 18 Vict. c. 34 *ante,* 425, may be certified to, and punished by, the Superior Courts of those countries (Archb. Prac., 14th ed. 570-571). As to refusal to make an *affidavit,* see *post,* 446-7; to prove a will, *Re Sweet,* 1891, P. 400, and *Re Bays,* 54 Sol. Jo. 200; and to attend an order of the Divorce Court, *Townend* v. *T.,* 93 L.T. 680, and O. 41, r. 5.

Recognisance. If a witness refuses to be bound over, he may be committed (11 & 12 Vict. c. 42, s. 20); and if he fails to appear, after being bound, his recognisance may be forfeited and the penalty levied. (As to the practice in such cases see Tay. c. 1235; Ros. Cr. Ev. 93-94.)

Summons. Failure to attend, or refusal to give evidence or produce documents, in pursuance of a County Court summons, subjects the witness to such penalty, not exceeding £10, as the judge may think proper (C.C. Act, 1888, s. 111). Obedience to a magistrate's or justice's summons is enforceable by warrant; and if the witness refuses to be sworn, or to answer, he may be committed for not more than seven days (11 & 12. Vict. c. 42, s. 16; *id.* c. 43, s. 7; in bastardy cases, but not in proceedings under Jervis's Act, a witness who has voluntarily appeared, without a summons, can it seems be also so committed, *R.* v. *Flavell, ante,* 424). Obedience to a summons may also be enforced by warrant, both in Bankruptcy (Bpy. Act, 1914, s. 25, sub-s. 2; and this, and not committal, is the proper course where the refusal to attend is owing to insufficient tender of conduct-money, *Re Batson, Exp. Hastie,* 70 L.T. 382), and under the Companies Act, 1908, ss. 174, 226.

ABUSE OF PROCESS. PROTECTION OF WITNESSES. Every Court has inherent power to prevent an abuse of its process, *e.g.* service of a subpœna when the cause cannot be tried in the current sittings (*London Corp.* v. *Kaufman,* 48 W.R. 458), or of one which is oppressive as to the number or nature of the documents required (*Steele* v. *Savory,* 8 T.L.R. 94.), or the expense entailed (*Raymond* v. *Tapson,* 22 Ch.D. 430), or when the object is not *bonâ fide* to obtain relevant evidence (*R.* v. *Baines,* 1909, 1 K.B. 258), or when attendance is required merely for confrontation (*Farulli* v. *F.,* 1917, P. 28; *post,* 465-6). So, as to a notice to attend for cross-examination served for some indirect motive (*Re Mundell,* cited *post,* 475; as to oppressive ques-

tions during cross-examination see *post,* 478-9). As to calling an undue multiplicity of witnesses, see *post,* 484. Moreover, in order to encourage the giving of voluntary testimony, witnesses are protected from *arrest on civil process, eundo, morando, et redeundo, e.g.* under a commitment for non-payment of rates (*Hobern* v. *Fowler,* 62 L.J.Q.B. 49; Tay. ss. 1330-1340). This protection applies to attendance in good faith, even without a subpœna; and extends to a reasonable time for coming and returning, as well as to the time occupied by the witness in waiting for the trial to come on. Thus, a witness who comes to town to be examined, is protected the whole time he *bonâ fide* remains there for that purpose; though it is otherwise with a witness who already resides in the town (*Gibbs* v. *Phillipson,* 1 Russ, & Myl. 19). If the witness has been improperly arrested, the Court issuing the subpœna, or the judge of the Court in which the case has been, or is to be, tried, will order his discharge (Ros. Cr. Ev. 99; *Hobern* v. *Fowler, sup.*). There is no protection, however, from *arrest on criminal process, e.g.* for disobedience by a solicitor to an order against him as an officer of the Court (*Re Freston,* 11 Q.B.D. 545; *Re Dudley,* 12 *id.* 44; *Re Grey,* 1892, 2 Q.B. 440), or by a receiver to an order to pay his balance into court (*Re Gent.* 40 Ch.D. 190).

It is a contempt to threaten (*Shaw* v. *S.,* 31 L.J. P. & M. 35), bribe (*Re Hooley,* 79 L.T. 306), or publicly calumniate (*R.* v. *Onslow,* 12 Cox, 358) a probable witness, with intent to influence, or prevent his testimony; and it is an indictable misdemeanour to intimidate a Crown witness (*R.* v. *Loughran,* 1 Crawf. & Dix, 79), or to endeavour to dissuade him from giving evidence of a certain character, or to alter the evidence he has given at a preliminary hearing (*R.* v. *Greenberg,* 147 L.T. Jo. 48, C.C.A.) The above protection is not confined to witnesses in courts of law, but extends to military courts as well (*Dawkins* v. *Rokeby,* L.R. 7 H.L. 744). As to protection in respect of evidence, whether on oath or not, before Parliamentary Committees and Royal Commissions, or on special statutory inquiries, see the Witnesses' Protection Act, 1892.

On grounds of public policy, no action lies against a witness in respect of his testimony in court (*Dawkins* v. *Rokeby, sup.; Seaman* v. *Netherclift,* 2 C.P.D. 53), or of proofs supplied to the solicitor (*Watson* v. *Jones,* 1905, A.C. 480); nor will one lie for false evidence negligently given, which has procured the plaintiff's conviction, unless such conviction has first been reversed (*Bynoe* v. *Bk. of England,* 1902, 1 K.B. 467). Evidence given in an inquiry under the Pluralities Acts is similarly protected (*Barratt* v. *Kearns,* 1905, 1 K.B. 504).

CHAPTER XXXIX.

COMPETENCY AND COMPELLABILITY. OATH AND AFFIRMATION.

COMPETENCY. With the two exceptions mentioned below, all persons are now competent, as distinct from compellable, to give evidence in judicial proceedings, including the *Sovereign* (Tay. s. 1381; Best s. 183; and see *Berkeley Peerage,* Times, June 27, 1891, *R.* v. *Mylius,* Times, Feb. 2, 1911; and *post,* 457, 463); *Judges* (*ante,* 19, 196); *Counsel* [*ante,* 197; advocates may in strictness, although the practice is highly undesirable, testify either for or against the party whose case they are conducting, *Cobbett* v. *Hudson,* 1 E. & B. 11, not following *Stones* v. *Byron,* 4 Dowl. & L. 393, and *Deane* v. *Packwood, id.* 395 *n;* Best, ss. 184-6; Tay. s. 1391; as to when their evidence may be given without oath, see *post,* 441]; *Arbitrators* (*ante,* 196); *Jurymen* (*ante,* 19, 197; *R.* v. *Rosser,* 7 C. & P. 648; *Manley* v. *Shaw,* Car. & M. 361; Best, s. 188; Tay. s. 1379); the *parties* in civil cases (14 & 15 Vict. c. 99, s. 2), and their wives or husbands (16 & 17 Vict. c. 83, s. 1; 32 & 33 Vict. c. 68, ss. 2, 3); *persons interested* in the result (3 & 4 Will. IV. c. 42, s. 26; 6 & 7 Vict. c. 85, s. 1); *bankrupts* (the debtor is also competent to prove the petitioning creditor's debt, *Re Haes,* 1902, 2 K.B. 98); *believers* of all creeds, as well as *Atheists* (providing they comply with the provisions of the Oaths Act, 1888, *post,* 451, 458); *deaf mutes,* providing the Court is satisfied that they understand the nature of an oath (Tay. s. 1376; Steph. art. 107; see *post,* 465); *accomplices* (*post,* 486); and *convicts* [6 & 7 Vict. c. 85, s. 1; *R.* v. *Dytche, ante,* 144; even a person convicted of perjury is competent (*see* 65 J.P. 496; *contra,* Oke's Mag. Synop., 14th ed. 879), as also is a murderer under sentence of death (*R.* v. *Fitzgerald,* 1884, Dublin, Nov. 6, *per* Harrison, J., cited Tay. s. 1347 *n,* not following *R.* v. *Webb,* 11 Cox, 133, *contra,* which case is doubted both in Tay. s. 1347 *n* and Steph. art. 107 *n*; see also 31 L.Jo. 368)] As to the competency of *attesting witnesses,* see *post,* 519-23; of *experts, ante,* 386-9; *of infants, lunatics* and *drunkards, post,* 452.

Former Disqualifications: Interest (Parties, Consorts, other Witnesses), Atheism, Crime. *History.* Prior to 1833, every person having an *interest,* however minute, in the result of the proceedings, was absolutely barred from being a witness. The history of this topic is somewhat obscure. In the older modes of trial, preceding the jury, interest in a witness, far from being a disqualification, was always permissible and often essential. Even when witnesses in the modern sense first appear in courts of justice, as well as for something like a century afterwards (*i.e.* from about 1400 to 1500) the fact that they were relatives or servants of the parties was considered natural and proper, while testimony from independent sources was not merely deemed

officious, but ran the risk of being punished as maintenance. Within the course of the succeeding century, however, a complete reversal of ideas is apparent, what was formerly encouraged now becoming a bar. Thus, in 1582 the rule *nemo in propriâ causâ testis esse debet* emerged as something well established (*Dymoke's Case,* Savile, 34 pl. 81, where the joinder of a person as party unless done by covin was recognised as invalidating his testimony), and by 1627 this rule had by analogy become extended to all interested witnesses, even though not parties (Co. Litt. 6*a*). The cause of this change is by no means clear. It is true that in Roman law, and in the English Ecclesiastical Courts whose procedure was modelled thereon, the disqualification of interest had always prevailed. But so also had others which were not imported into the civil courts. Moreover, the rivalry between the two jurisdictions, particularly at this period, was sufficiently keen to discourage mutual borrowings. Prof. Wigmore suggests, therefore, that from the very beginning the parties themselves must always have been incompetent as witnesses in jury trials. The oath was, at that epoch, a solemn and determinative proceeding, a separate form of trial, and in wager of law alone could a party have the benefit of this method of decision (*cp.* Best, s. 59). Although therefore, the Court itself sometimes heard affidavit evidence from the parties, both in civil and criminal cases, *e.g.* on questions of bail (*R.* v. *Bell,* 95 E.R. 300, 362) or to explain some collateral point (*Turner* v. *Warren, id.* 302), the parties, when before the jury, did not swear, they pleaded orally, or argued, or alleged things in evidence, either by themselves or their counsel; but they did not take an oath, for to have done so would have been to import into jury trials generally a distinct and privileged mode of procedure rigidly confined to a narrow class of cases. With regard to *Criminal* trials, there appears, before Coke's time, to have been no disqualification of witnesses for the prosecution on the ground of interest; and even when introduced it was but feebly enforced. In jury trials, as distinct from those before Parliament and other bodies (*ante,* 211-3), the accused himself was not sworn as a witness, though he might urge what he pleased orally by way of law, evidence, or argument, and he was also freely questioned by the Court, such interrogation, indeed, forming down to the Civil wars, the most important part of the trial, and being still in vogue under the Stuarts. After the revolution of 1688, however, this practice died out, and the civil rule that parties were incompetent as witnesses became extended to criminal trials [Steph. Hist. Cr. Law, Vol. I. 439-42; *id,* General View, 2nd ed. 186-7; Wigmore Ev. s. 575; Best, s. 622 a.; Tay. 8th ed. ss. 1356-82]. At common law the accused could not even call witnesses (see *R.* v. *Turner,* 1664, 6 How. St. Tr. 566); though in 1589 and 1606 (31 Eliz. c. 4; 4 Jac. I. c. I.) this was partially allowed, the witnesses, however, not being sworn (*R.* v. *Hulet,* 5 How St. Tr. 1179, 1191; *R.* v. *Morley,* 6 *id.* 770; *R.* v. *Pembroke,* 6 *id.* 1338; Gilbert Ev. 1st ed. 159). Later, compulsory process for these was allowed him (*R.* v. *Twyn,* 6 *id.* 516); and finally, in 1695 and 1701 (7 Will. III. c. 3. s. 1; 1 Anne, c. 9. s. 3) they were sworn in treason and felony, the usual disqualifications thenceforth attaching. In Equity, the early Chancellors appear to have adopted a hybrid practice, based partly on the civil, or canon law, and partly on the common law, precedents. Thus, though the parties were disqualified as witnesses for themselves, they could be compulsorily examined

by their opponents. Those parts of the defendent's sworn answer which consisted of admissions were, of course, evidence *against* him, but the denials, unless read by the plaintiff as part of the admissions, were not evidence *for* him, being considered merely as a plea of not guilty, which put the plaintiff to the proof in a particular way; and as the answer happened to be on oath, and the practice grew up of requiring either two witnesses, or one witness and corroborating circumstances on the other side (*Attwood* v. *Small,* 6 C. & F. 295, 297). The American rule, indeed, still regards the responsive answer in equity as positive evidence for the defendant (Story, s. 1528; 43 Am. Law Register, 537). [Wigmore, s. 575; Thayer, Cas. Ev., 2nd ed. 1066-7; Best, ss. 137-41; Gest, 43 Am. L. Register, 537-75.] *Husband and Wife.* Amongst witnesses, whether in civil or criminal proceedings, the wives or husbands of the *parties* were at Common Law early considered incompetent to testify, either for or against each other, by reason of their unity of person and interest. Even at Common Law, however, an exception was always made, from necessity, in cases of personal violence or forcible marriage, and perhaps also, from public policy, in those of treason. By statute also this general incompetency has been gradually removed, both in civil cases (see 21 Jac. c. 19, s. 6; the County Courts Act, 1846, s. 83; The Ev. Amendment Act, 1853, s. 1 and the Ev. Further Amendment Act, 1869, s. 31) and to a large extent in Criminal trials, by a series of Acts culminating in but superseded by the Criminal Ev. Act, 1898, as to which see fully *infra,* 453-7 [Co. Litt. 6 *b* (1613); Gilbert Ev. 1st ed. 135-6 (before 1726); Lush, Law of Husband and Wife, 3rd ed. 522-6; Tay. (8th ed.) ss. 1348-72; Best. ss. 173-181; 622 a; Cohen, Spouse-witnesses (1913); *R.* v. *Lord Mayor of London,* 16 Q.B.D. 772; *Director of P.P.* v. *Blady,* 1912, 2 K.B. 89, 92; *Leach* v. *R.,* 1912, A.C. 305. For the history of spouse unity generally, see 2 Poll. and Mait. Hist. Eng. Law, 403]. *Atheism.* At Common Law, *Atheists* [*Maden* v. *Catanach,* (1861) 7 H. & N. 360; Tay, s. 1382; Best, ss. 134-6; 159-66] and such *Infidels* (*i.e.* non-Christians) as were atheists, but not those that believed in a God who would punish for false swearing [*Omichund* v. *Barker,* Willes, 538] were incompetent to be sworn or to testify. These disabilities have, however, since been removed by statute [Ev. Further Amend. Act, 1869; Oaths Act, 1888; *post,* 458]. *Crime.* Originally crime does not appear to have disqualified; but from the beginning of the seventeenth century (see *Browne* v. *Crashaw,* 1613, Bulstr. 154) the rule grew up that conviction for treason, felony or the misdemeanours of perjury, forgery and conspiracy, rendered a witness infamous and incompetent. His competency was, however, restored on reversal of the judgment, pardon, or completion of the sentence. Disqualification for crime was at length totally abolished by 6 & 7 Vict. c. 85, s. 1, *ante,* 449. [Best, ss. 141-2; Wigmore, ss. 519-24].

Objections. How taken. Objections to competency, most of which now go merely to credit (*e.g.* crime and interest), or give rise to privilege (*e.g.* matrimonial communications), used to be decided by the judge examining the witness on the *voir dire* (*i.e. vrai dire*), the witness being sworn "to answer truly all such questions as the Court shall demand of him"; but since, if he can be sworn on his examination, he can also be sworn in chief, and if incompetent on the latter, he must also be so on the former, this test was not very satisfactory (Whart, s. 492). The modern practice is either

to interrogate the witness before swearing him, or to elicit the facts upon his examination or cross-examination, when, if his incompetency appears at any stage, his evidence will be rejected (*R.* v. *Whitehead,* L.R. 1 C.C. 33; *R.* v. *Moore,* 61 L.J.M.C. 80).

(1) **Incompetency from Defective Intellect.** No witness is competent who is prevented from *Lunacy, Drunkenness, Infancy,* and the like, from understanding the nature of an oath and giving rational testimony But the incapacity is only co-extensive with the defect; thus, a lunatic is competent during a lucid interval, a monomaniac upon all subjects save the one, a drunkard upon his return to sobriety (*R.* v. *Hill,* 2 Den. 254; *Spittle* v. *Walton,* L.R. 11 Eq. 420; *ante,* 400; Tay. s. 1375). And generally, the question is one of degree and weight. Thus, in *Durham* v. *D.,* 10 P.D. 80, 86, Hannen J., remarked: "I have known instances of persons of unsound mind giving evidence in Courts of Justice of facts within their own knowledge, and their statements have been acted on. But it is evident that statements made in such circumstances must be received with caution, and they must be considered by, or be considered with, the other evidence of the facts in question." Their testimony has even, as we have seen, been received where the issue was as to their own sanity (*Hunter* v. *Edney,* 10 P.D. 93; *ante,* 400). Where incapacity is merely temporary, the judge may, in his discretion, provided the application be made before the jury are sworn, postpone the trial until it is removed (*R.* v. *Wade,* 1 Moo. C.C. 86; *R.* v. *White,* 1 Lea. 430 *n; cp. ante,* 438, *post,* 507).

Infancy. No precise rule can be laid down as to the limit of age, or degree of knowledge and intelligence, which will exclude the testimony of *Infants.* Their competency, however, depends not so much on years as ability to understand the nature of an oath and the consequences of falsehood (*R.* v. *Brasier,* 1 East, P.C. 443; *R.* v. *Dent,* 71 J.P. Rep. 511; as to their *unsworn* testimony, see *post,* 461-2). Thus, children of seven (*Shewring* v. *S.,* 1892, Times, Nov. 11), six (*R.* v. *Holmes,* 2 F. & F. 788; *R.* v. *Perkins,* 2 Moo. C.C. 135), or even five years of age (*R.* v. *Brasier, sup.;* in another report, 1 Lea. 199, the age is stated as under seven) have been allowed to testify, upon the Court being satisfied on the above points; while, where not satisfied, the testimony of a child of seven (*R.* v. *Forsyth,* 93 L.T. Jo. 247), or even eight (*R.* v. *Williams,* 7 C. & P. 320), has been rejected; as also in *R.* v. *Pike,* 3 C. & P. 598, the dying declarations of a girl of four, the Court remarking that it was impossible her understanding could be sufficient for the purpose. The following answers have sufficed to admit the testimony: "What becomes of a liar?" "He goes to hell"; or, "Is it a good or bad thing to tell lies?" "A bad thing" (*R.* v. *Holmes, sup.*). A child destitute of religious education has been allowed to be qualified therein with a view to the trial (*R.* v. *Murphy,* 1 Lea. 430 *n; R* v. *Milton,* Ir. Cir. R. 16; *R.* v. *Baylis,* 4 Cox, 23; *contra, R.* v. *Williams,* 7 C. & P. 320; *R.* v. *Charlesworth,* 1 B. & S. 460, 525; *per* Blackburn, J., citing *R.* v. *Wade, inf; R.* v. *Nicholas,* 2 C. & K. 246, where an application to postpone the trial for this purpose was rejected, but Pollock, C.B., considered there were cases in which it might be granted, and see *R.* v. *Cox,* 62 J.P. 89). Such an application must, it has been held, be made before the jury are sworn (*R.* v. *Wade,* 1 Moo. C.C. 86; *contra, R.* v. *Cox, sup.*). On a claim for damages by the next friend of an infant of nine, who did not

understand the meaning of an oath, Judge Cluer, of the Shoreditch County Court, adjourned the case for the child to be instructed in the oath (Evening Standard, Nov. 8th, 1918). [Tay. s. 1377; Ros. N.P. 163-164; Ros. Cr. Ev. 100-101; Steph. art. 107.] As to the reception of unsworn testimony by children under the Criminal Law Amendment Act, 1885, and the Children Act, 1908, see *post,* 461-2.

(2) **Incompetency in Criminal Proceedings.** *Witnesses for the Prosecution.* In criminal proceedings the accused (*R.* v. *Rhodes,* 1899, 1 Q.B. 77); the wife or husband of the accused (except in the cases *post,* 455-6); any person jointly indicated and jointly tried with the accused (*R.* v. *Payne,* L.R. 1 C.C. 349; *R.* v. *Hadwen,* 1902, 1 K.B. 882, 886); and the wife or husband of such person (*R.* v. *Sheriff,* 35 L. Jo. 644; *R.* v. *Thompson,* L.R. 1 C.C. 377); are incompetent as witnesses *for the prosecution.* To render co-defendants or their consorts competent to be called by the prosecution, such co-defendants must have been acquitted, or have obtained a *nolle prosequi,* or have pleaded guilty (*R.* v. *Tomey,* 2 Cr. App. R. 329; *R.* v. *Gallagher,* 39 J.P. 502), or must be tried separately (*Winsor* v. *R.,* L.R. 1 Q.B. 289, 390; *R.* v. *Sheriff, sup.*). Revenue proceedings in the Q.B.D. are not criminal within the rule (39 & 40 Vict. c. 36, s. 259); nor those for non-repair, &c., of highways or bridges (40 & 41 Vict. c. 14; Cr. Ev. Act, 1898, s. 6); nor charges before justices not resulting in summary conviction, and commenced by complaint as distinguished from information—*e.g.* affiliation cases (*R.* v. *Lightfoot,* 6 E & B. 822).

Witnesses for the Defence. By the Criminal Evidence Act, 1898,* which supersedes various prior statutory provisions on the subject [*Charnock* v. *Merchant,* 1900, 1 Q.B. 474); but does not apply to Ireland (see further *post,* 456), except under the Motor Car Act, 1903, s. 19, nor to Courts-Martial, except in certain cases (see ss. 6, 7)]—Every person charged with an offence, whether solely or jointly, and the wife or husband of such person, is by sec. 1 rendered a competent witness *for the defence* at every stage of the proceedings [*i.e.* before the magistrate both in summary and indictable cases (*R.* v. *Bird,* 19 Cox, 180); in extradition proceedings (Biron and Chalmers on Extradition, p. 41); at the trial; after verdict, in mitigation of punishment (*R.* v. *Wheeler,* 1917, 1 K.B. 283, overruling *R.* v. *Hodgkinson,* 64 J.P. 808); but not before the Grand Jury (*R.* v. *Rhodes,* 1899, 1 Q.B. 77)]. The judge ought in all cases to inform accused persons of their right to give evidence, though his failure to do so will not invalidate a conviction (*R.* v. *Warren,* 25 T.L.R. 633; *cp. R.* v. *Saunders,* 63 J.P. 24). Moreover, witnesses under the Act are, unless otherwise ordered, to testify from the witness-box (sec. 1 (*g*)); and are punishable for perjury (*R.* v. *Wookey,* 63 J.P. 409); but their failure to give evidence, though it may be commented upon by the judge in any manner he thinks fit (*R.* v. *Smith,* 84 L.J.K.B. 2153; *R.* v. *Rhodes, sup.; cp. Kops* v. *R.,* 1894, A.C. 650), is not to be made the subject of any comment by the prosecution (sec. 1 (*b*)); comment made by the prosecution to the magistrate, or even to the jury, though it is improper and should be checked by the Court, will not, however, necessarily invalidate the conviction (*Ross* v. *Boyd,* 10 Sc. L.T. Rep. 750; *McAttee* v. *Hogg, id.* 751; distinguishing *Charnock* v. *Merchant,* 1900, 1 Q.B. 474).

* The full text of the Act (annotated) is given in the Appendix.

Evidence given under the Act is subject to the following qualifications:

(*a*) *The Accused.* By sec. 1 (*a*) the accused may not be called as a witness except upon his *own* application; though where he has testified before the magistrate, but declines to do so at the trial, this evidence may, without his consent, be put in by the prosecution before closing their case (*ante*, 44, *post*, 509-10); while, if he has declined to testify (*R.* v. *King*, 10 Cr. App. R. 44) or call witnesses (*R.* v. *Livock*, *id.* 264), at the trial, he will not be allowed to do so on appeal. By sec. 1 (*e*) he may, when so called, be asked any question upon cross-examination notwithstanding that it would criminate him as to the *offence charged*, though he is probably not compellable to answer (*R.* v. *Senior*, 34 L. Jo. 100); but by sec 1 (*f*) he may not be asked, and if asked shall not be required to answer, any question tending to show that he has committed, or been convicted of, or charged with, any *other offence*, or is of *bad character* [where he was compelled, after objection by his counsel to answer such questions (*Charnock* v. *Merchant*, 1900, 1 Q.B. 474), or placed in the dilemma of having to commit perjury, or admit being in prison on a date referred to (*R.* v. *Haslam*, 114 L.T. 617), the conviction was quashed; this protection, however, should be claimed at the trial and may be too late on appeal (*R.* v. *Bridgwater*, 1905, 1 K.B. 131, 135; *R.* v. *Benson*, 3 Cr. App. R. 70; *R.* v. *Hudson*, 1912, 2 K.B. 464); and a question asked, but disallowed, will not necessarily invalidate a conviction (*Bartle* v. *Arnold*, 1911, 2 K.B. 120; as to proof of previous convictions before verdict generally, see fully, *ante*, 41-2] unless:

(i) The proof that he has committed or been convicted of such other offence is admissible to show that he is guilty of the offence charged [*e.g.* proof of similar crimes, if either part of the same transaction under chap. vi., relevant under chaps. xi.-xii., or as corroboration under chap. xli.; or even dissimilar crimes if relevant under chap. ix (*R.* v. *Ball*, *ante*, 137; *R.* v. *Donnellan*, *ante*, 142]; but not if merely impeaching credit (*R.* v. *Ellis*, 1910, 2 K.B. 746; *R.* v. *Biggin*, 1920, 1 K.B. 213); or

(ii) He has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establishing his own good character (questions merely negativing the particular charge but not asserting general good character are insufficient for this purpose, *R.* v. *Ellis*, *sup.*, p. 762), or has given evidence of his good character (*ante*, 188; *R.* v. *Ferguson*, 2 Cr. App. R. 250), or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution, *e.g.* that the prosecutrix *consented* to the alleged rape [*R.* v. *Fisher*, 43 Sol. Jo. 218, *per* Day, J.; *R.* v. *Wright*, 5 Cr. App. R. p. 132, *per* Phillimore, J.; *contra*, *R.* v. *Sheean*, 21 Cox, 561, *per* Jelf, J.; *per* Ld. Alverstone, C.J., see 120 L.T. Jo. 70; and *R.* v. *Biggin*, 1920, 1 K.B. 213, 217, *per* Avory, J.]; or was a drunken wastrel (*R.* v. *Holmes*, 43 Sol. Jo. 219); or that a witness for the prosecution had committed the offence (*R.* v. *Hudson*, 1912, 2 K.B. 464; *R.* v. *Marshall*, 63 J.P. 36); or was immoral (*R.* v. *Jones*, 26 T.L.R. 59); or had kept a disorderly house (*R.* v. *Morrison*, 6 Cr. App. R. 159, 169); or was connected with rogues and got money out of people without repaying it (*R.* v. *Wilson*, 11 *id.* 251); or had bribed the accused to confess (*R.* v.

Wright, 5 Cr. App. R. 131); or that "his brother won't speak to him, he is a horrible liar" (*R.* v. *Rappolt,* 5 id. 156); or that a witness for the prosecution, put forward as an accomplice and of bad character, had committed crimes other than those opened by the prosecution (*R.* v. *Cohen,* 10 Cr. App. R. 91; *R.* v. *Watson,* 8 *id.* 249); or that the police had used bribes of threats to extort defendant's admissions (*R.* v. *Wright,* 5 Cr. App. R. 131); or that "the whole evidence for the prosecution was concocted," if this was really made a basis of defence (*R.* v. *Westfall,* 7 *id.* 176, 179). But not that some particular evidence given by the prosecutor was a lie, "he is a liar" (*R.* v. *Rouse,* 1904, 1 K.B. 184; *R.* v. *Grout,* 26 T.L.R. 60); nor the mere unconsidered remark that the identification of the accused was "a put up job" (*R.* v. *Preston, sup.*); nor that the prosecutor "had overcharged him" (*R.* v. *Morgan,* 5 Cr. App. R. 157); nor that the prosecutor was an habitual drunkard (*R.* v. *Westfall, sup.*); nor that the accused was only acting under the orders of a detective, for this was merely developing the prisoner's defence (*R.* v. *Bridgwater,* 1905, 1 K.B. 131, 135); nor will imputations on the magistrate, or on the police, if not called as witnesses (*R.* v. *Westfall,* 107 L.T. 863; 1 Cr. App. R. 176), or on the character of a deceased "prosecutor" (*R.* v. *Biggin,* 1920, 1 K.B. 213), deprive the accused of the statutory protection.

(iii) He has given evidence against any other person charged with the same offence (*R.* v. *Hadwen,* 1902, 1 K.B. 882; cited *inf.*).

Where the *only* witness to the facts of the case called by the defence is the person charged, he is to be called immediately after the close of the case for the prosecution (sec. 2; *ante,* 43-4; and *cp.* 68 J.P. 34, 93). By sec. 1 (*h*), however, nothing in the Act is to affect the right of the accused to make an unsworn statement either before the magistrate under the Indictable Offences Act, 1848, sec. 18 (*post,* 508-9), or at the trial (*ante,* 44-5); and evidence by the prosecution to rebut such statements is probably admissible (*cp. R.* v. *Chantler,* 12 New S. Wales L.R. 116), as also to rebut his explanations made out of court (*R.* v. *Wilson,* 26 L.J.M.C. 45; *ante,* 40). Moreover, in cases where the right of reply depends on whether evidence has been called for the defence, the calling of the accused as a witness shall not of itself give the prosecution the right of reply (sec. 3; *ante,* 43-5).

(*b*) *The Wife or Husband of the Accused.* By sec. 1 (*c*) the wife or husband of the accused may not, save in the scheduled cases mentioned below, be called as a witness in pursuance of the Act, except upon the accused's application. By sec. 4, the wife or husband of a person charged with an offence under any enactment in the Schedule to the Act may be called as a witness either by the *prosecution or defence* and *without the consent* of the accused; though, when so called, communications made between them during marriage are to be privileged (sec. 1 (*d*); *ante,* 210-1). The scheduled offences affecting England, under this or other Acts, are:

(i) Neglect to maintain, or desertion of, wife or family under the Vagrancy Act, 1824 [or living, wholly or in part, on the earnings of prostitution, whether of wife or other female, under the Vagrancy Act, 1898, s. 1 (see Cr. Law Amded. Act, 1912, s. 7 (6), which overrides *Director of Pub. Pros.* v. *Blady,* 1912, 2 K.B. 89)].

(ii) The following offences under the Offences Against the Person Act, 1861—Rape (s. 48); Indecent Assault (s. 53); and Abduction of women or girls [ss. 53-55; sections 49-51, which are also mentioned, are repealed, and in charges under other sections the first wife cannot be called without the prisoner's consent, *R.* v. *Green,* 63 J.P. 745; though as to Bigamy, the wife or husband of the accused may now, by the Cr. Justice Administration Act, 1914, s. 28, be called either for the prosecution or defence and without the consent of the accused].

(iii) Theft by husband or wife of each other's property under the Married Women's Property Act, 1882, ss. 12, 16. [Amended by the M.W.P. Act, 1884, s. 1, under which either consort is an admissible and, except when defendant, a *compellable* witness.]

(iv) Offences against women and girls under the Criminal Law Amendment Act, 1885 (whole Act).

(v) Offences against children under the Prevention of Cruelty to Children Act, 1894 (whole Act). [This Act was repealed, but re-enacted with amendments, by the P.C.C. Act, 1904, by s. 12 of which the accused, or the wife or husband of the accused, is a competent but not compellable witness in respect of offences under the Act. Other parts of the latter Act and section were repealed by the Children Act, 1908, 8 Ed. VII. c. 67.]

(vi) Offences under the Children (Employment Abroad) Act, 1913 [see s. 3 (4)].

(vii) Offences under the Punishment of Incest Act, 1908 [see sec. 4 (4)). Although this Act applies to Ireland, it does not render the main Act applicable thereto, or enable a wife to be called against her husband on charges of incest there (*R.* v. *H.*, 47 Ir. L.T. Rep. 154)].

By sec. 4 (2) nothing in the Act is to affect cases where the wife or husband of the accused may at *Common Law* be called without the latter's consent, *i.e.* cases of personal injury (including threats, or attempts thereof), forcible or fraudulent marriage, and possibly treason (*R.* v. *London* (*Lord Mayor*), 16 Q.B.D. 775-6; *R.* v. *Wakefield,* 2 Lewin, C.C. 279; *Reeve* v. *Wood,* 10 Cox, 58; *Director of Pub. Pros.* v. *Blady,* 1912, 2 K.B. 89,92; *Leach* v. *R.*, 1912, A.C. 305; Tay., 8th ed., ss. 371-2; Cohen, Spouse-witnesses, 23-31).

Summary: (*Competency*). The short effect of the above provisions is that, for the *Prosecution,* the consort of the accused is only competent (1) in the Common Law cases of personal violence, forcible marriage and possibly treason; and (2) in the scheduled cases under the Ev. Act, 1898, as extended by later Acts; while, for the *Defence,* the consort is always competent on the accused's application. (*Compellability*). For the *Prosecution,* the consort of the accused may, both in cases (1) and (2), be called without the consent of the accused; but not without such consort's own consent, unless expressly so provided by statute, as under the M.W. Property Act, 1884, s. 1, cited *sup.* (*Leach* v. *R.*, 1912, A.C. 305; *R.* v. *Acaster,* 106 L.T. 384). For the *Defence,* the consort of the accused can also probably not be called without such consort's own consent, unless expressly so provided by statute (*id.*; see the observations of the L.C. in the former, and of Darling, J., in the latter case), *e.g.* under the Sale of Food and Drugs Act, 1875, s. 21; the Army Act, 1881, s. 156 (3); the Explosive Substances Act, 1883, s. 4 (2); the M.W. Property

Act, 1884, s. 1; the Merchandize Marks Act, 1887, s. 28, and the Betting and Loans (Infants) Act, 1892, s. 6.

(*c*) *Co-Defendants and their Wives or Husbands.* Under sec. 1 (*sup.*) every person charged with an offence *jointly* with another is a competent witness *for the defence* (either of himself, or a co-prisoner, *R.* v. *McDonnell,* 25 T.L.R. 808), but may only be called upon his own application. If, when called on his own behalf, his evidence implicates his co-defendants, the judge should warn the jury that it is not evidence against the latter; but as this direction may not prove a sufficient protection, the witness may be cross-examined not only by the prosecution, but by his co-defendants, both generally (*R.* v. *Hawden,* 1902, 1 K.B. 882; *Hackston* v. *Millar,* 43 Sc. L.R. 395; *Allen* v. *A.,* 1894, P. 248; *post,* 474), and as to other offences and bad character under sec. 1 (*e*) and (*f*); if, however, called not for himself but for a co-defendant, he may be cross-examined, not only to discredit his testimony, but to criminate himself (*R.* v. *Rowland,* 1910, 1 K.B. 458). So, by sec. 1, the wife or husband of a person jointly charged is competent for the *defence,* but can only be called upon the latter's application (sec. 1 (*c*)), except in cases falling under sec. 4 (*sup.*). As to the Common Law cases in which a wife may be called by the *prosecution* against her husband's co-defendants, see *supra.* The wife or husband of the person prosecuting or complaining is, of course, competent and compellable, either for the prosecution or the defence (*R.* v. *Hulton,* Jebb, C.C. 24; Tay. s. 1364).

COMPELLABILITY. All witnesses competent to give evidence are in general compellable to do so. To this rule the Sovereign forms an exception (Best, ss. 125, 183; Tay. s. 1381); and also, it seems, ambassadors of foreign States (Dana's Wheaton, *notes* 125, 129). So, where prisoners or their wives or co-defendants are rendered competent to testify they are not generally compellable (*sup.*). And under the Bankers' Books Evidence Act, 1879, s. 6, bankers, when not parties to the proceedings, can, as we have seen, only be compelled to produce, or to appear as witnesses to prove, their books by order of a judge for special cause (*ante,* 202, 375). It is sometimes said (*e.g.* Wills, Ev., 2nd ed., 130-1; Cockle, Lead. Cas. on Ev., 2nd ed., 205, 3rd ed. 247), that the *parties* in Breach of Promise and Divorce proceedings are not compellable witnesses since the Evidence Act, 1869, ss. 2-3, uses the word "competent" merely; but that Act, having by s. 1 repealed the exceptions contained in the Ev. Acts, 1851 and 1853, as to breach of promise and divorce, placed the parties and their husbands and wives in such proceedings in the same position as to compellability as ordinary witnesses, as was pointed out by Lopes, J., in *Guardians of Nottingham* v. *Tomkinson,* 4 C.P.D. p. 50, and Tay., 8th ed., ss. 1353-5.

General compellability to be sworn must, however, be distinguished from compellability, when sworn, to answer certain specific questions; as to a witness's privilege in the latter case, see *ante,* chaps. xv.-xvi.

A party, when competent, may also *insist* on his evidence being taken, even though the judge is about to decide in his favour; and if this has not been done, the Court of Appeal will allow it to be taken before deciding the case (*Exp. Jacobson, Re Pincoffs,* 22 Ch. D. 312; *Singer Co.* v. *Wilson,* 3 App. Cas. 376; *Fletcher* v. *L. & N. W. Ry.,* 1892, 1 Q.B. 122; *Jones* v. *J.,* 1895, P. 201; *ante,* 13, 39).

OATHS AND AFFIRMATIONS. Subject to the exceptions mentioned, *post,* 461-3, oral evidence must in all cases be given under the sanction of an oath or solemn affirmation, the administration of which will vary according as the witness has, or has not, a religious belief. [For the history of this subject, see Tyler on Oaths, 2nd ed., 1835; Wigmore, Ev. s. 1815; and a valuable article on Oaths in Judicial Proceedings, by Prof. White, 42 Am. Law Register, N.S. p. 372 (1903)].

Believers. When it appears that a witness has a religious belief he must either be *sworn* (in the usual way, or, if he object, in some other that he declares to be binding upon him, see *inf.,* Form of Oath); or if he objects to be sworn, and states as the ground of such objection that the taking of an oath is contrary to his religious belief, he will be allowed to *affirm* (Oaths Act, 1888, s. 1). It is the duty of the judge, however, to see that the statutory conditions are strictly complied with before permitting an affirmation (*R.* v. *Moore,* 61 L.J.M.C. 80; *Nash* v. *Ali Khan,* 8 T.L.R. 444); and if the witness objects on grounds other than the above, or, though not objecting to an oath, considers it not binding upon him, and will not state what form is binding, he cannot affirm (*Nash* v. *Ali Khan, sup.*); nor can he, it is presumed, if he be too young to object. If, however, he has been sworn *without objection* in the usual form, no subsequent objection can be taken to his testimony, on the ground that being of a different faith, the oath is not in a form affecting his conscience (*Sells* v. *Hoare,* 3 Brod. & Bing. 232; *R.* v. *Simons,* 117 C.C.C. Sess. Pap. pp. 562-3; Tay. s. 1388 and *note*); or that some other form is more binding (*The Queen's Case,* 2 Brod. & Bing. 284).

Atheists. The testimony of an Atheist is receivable (1) if he has been *sworn without objection* (Oaths Act, 1888, s. 3; the words of the section are, "Where an oath has been duly administered and taken, the fact that the person to whom the same was administered had, at the time of taking such oath, no religious belief shall not for any purpose affect the validity of such oath"). (2) If he objects to be sworn, and states as the ground of such objection that he has no religious belief,—in which case he will be *allowed to affirm* (*id.* s. 1). Before the Ev. Act of 1869 (*ante,* 451), the testimony of atheists was wholly inadmissible, the test of competency being belief in a God who would punish for false swearing (*Omichund* v. *Barker,* Willes, 538; *Miller* v. *Salomons,* 8 Ex. 778; *Maden* v. *Catanach,* 7 H. & N. 360).

Forms of Oath or Affirmation. Oaths are binding which are administered in the statutory form given below; or in such other form and with such ceremonies as the witness may declare to be binding (1 & 2 Vict. c. 105, s. 1), and in order to ascertain what other form is so binding the judge should inquire from the witness himself before he is sworn (Tay. s. 1388).

Usual Form. By the Oaths Act, 1909 (9 Ed. VII. c. 39) s. 2, it is provided as follows:

(1) Any oath may be administered and taken in the form and manner following:—The person taking the oath shall hold the New Testament, or, in the case of a Jew, the Old Testament, in his uplifted hand, and shall say or repeat after the officer administering the oath, the words "I swear by Almighty God that . . .," followed by the words of the oath prescribed by law. [These latter words are: "The evidence that I shall give to the Court" (or in jury trials "and jury") "*touching the matter in question* shall be the

truth, the whole truth, and nothing but the truth." While in criminal cases, instead of the words italicised, are substituted, "sworn between our Sovereign Lord the King and the prisoner at the bar" (or "defendant," where the accused is not in custody). The old ending "so help me God" has been held unnecessary and no part of the oath (Stringer, Oaths, 3rd ed., p. 136 *n*)]. (2) The officer shall (unless the person about to take the oath voluntarily objects thereto, or is physically incapable of so taking the oath) administer the oath in the form and manner aforesaid without question: Provided that, in the case of a person who is neither a Christian nor a Jew, the oath shall be administered in any manner which is now lawful.

Kissing the Book. If a witness voluntarily objects to the above form and requests to be sworn, as formerly, by kissing the book, he may still do so, and may use his own testament (*Rabey* v. *Birch,* 72 J.P. 106; 47 Ir L.T. Jo. 92, *per* Holmes, L.J.) [see 4th ed, of this work, p. 428; and as to the history of this subject, an article by Judge Parry in the Contemporary Rev. Ap. 1909, and an answer thereto in 54 Sol. Jo. 78].

Scotch Form. If a witness "desires to swear with uplifted hand in the form and manner in which an oath is usually administered in Scotland," he shall be permitted to do so, without further question (Oaths Act, 1888, s. 5; see *R.* v. *Mildrone,* 1 Lea. 412). In this case the witness stands, and holding up his right hand, repeats after the officer, no book being used,—"I swear by Almighty God [as I shall answer to God at the Great Day of Judgment] that I will speak the truth, the whole truth, and nothing but the truth." This is the full *form* in use in Scotland, but not the *manner,* for there the presiding judge, who administers the oath, himself stands with uplifted hand and uttering each clause pauses till the witness repeats it audibly after him. Sometimes, however, the judges omit the words in brackets (Stringer, on Oaths, 3rd ed., 85-8; 1906, Times, Aug. 31; *R.* v. *Mildrone,* 1786, 1 Lea. 412, where almost the same form is given; and see the Home Office Circular, 37 Sol. Jo. 542). This form is said to be as old as Abraham, who, when he swore that he would take nothing from the King of Sodom, "lifted up his hand to the most High God."

Other Forms. In Ireland, *Roman Catholics* are sworn upon the New Testament, with a crucifix or cross upon it (McNally, Ev. 97). A *Methodist* on objecting to be sworn on the New Testament, was allowed to be sworn on the Old (*Edmonds* v. *Rowe,* R. & M. 77). *Jews* are sworn in the usual form on the Old Testament (Oaths Act, 1909, s. 2), with head covered or uncovered (Willes, 543; Stringer, 3rd ed., 82, 135; and see further, 41 L. Jo. 600). *Quakers* and *Moravians* may affirm either under the Oaths Act, 1888, s. 2, or if they so claim, under their special Acts which are still unrepealed (Stringer, 3rd ed., 102-3, 105-6). A member of the *Greek Church* has been allowed to swear by pointing two fingers of his left hand upwards and calling on Heaven to witness his statements (Times, Jan. 26, 1918, p. 3).

With regard to *Heathen* forms, our whole system of heathen judicial oaths is founded on the assumption that such oaths are in ordinary use in their own native courts. But this is generally a mistake, and in many cases, notably that of Chinese witnesses, the forms adopted are really exotics of European origin (3 Jur. Soc. Pap. 371-99). On this assumption *Mohammedans* are sworn on the Koran (*R.* v. *Morgan,* 1 Lea. 54), the witness

placing his right hand flat upon the book, putting his left upon his forehead, and bringing his head down to the book; the officer then asks if he is bound by this ceremony to speak the truth, and the witness replies that he is. It is, however, very doubtful if Mohammedans should be sworn; and in India, both Hindus and Mohammedans are allowed to affirm (Stringer, 3rd ed., 106-7, 139-140). Perhaps the better course is to adopt the provisions of the Oaths Act, 1888, s. 2; but if they have a religious belief, and have no objection to being sworn, and yet cannot indicate any form binding on their conscience, their evidence cannot be received (*R.* v. *Moore,* and *Nash* v. *Ali Khan, ante,* 458). *Hindus* are sworn (if indeed an oath be appropriate at all, 3 Jur. Soc. Pap. 377) on the Vedas, or other sacred books (but see *sup.*); *Parsees* on the Zendavesta (see, for the forms of oath to these, Stringer, 3rd ed., 140-1; a member of a sect which objects to the ceremony of kissing, was sworn without it, *Mee* v. *Reid,* Peake, R. 23); *Sikhs,* in India, on a book called the Gruntham (*R.* v. *Moore, sup.*). The *Chinese* are usually sworn by the ceremony of breaking a saucer, with the admonition:—"You shall tell the truth and the whole truth; the saucer is cracked, and if you do not tell the truth your soul will be cracked like the saucer" (*R.* v. *Entreham,* Car. & M. 248: *The Orianada,* 1907, 122 L.T. Jo. 531, *per* Deane, J.). Another form is for the witness to write sacred characters upon paper, which he burns, praying that his soul may be similarly burnt if he swears falsely (in British Columbia the established form is to burn a paper with the witness' name thereon, *R.* v. *Lai Ping,* 1904, 11 Br. Col. 102), while the most binding of all is said to consist in the witness cutting off a cock's head with a like invocation. It is to be observed, however, that in the Chinese native Courts testimonial oaths are unknown; and that the last two forms appear to be oaths not of testimony but of ordeal, while the saucer may have affinity to the ancient Roman custom whereby the witness holding a flint stone in his right hand dropped it with the words:—"Si sciens fallo, tum me Diespiter, salvâ urbe arceque, bonis ejiciat, ut ego hunc lapidem" (3 Jur. Soc. Pap. 379-91; Tay. s. 1388 *n*). In one case, a Chinese elected to be sworn in the Scotch fashion (*The Globe newspaper,* 25 Aug. 1913). As to *Buddhists,* Mr. Stringer gives a form of oath (3rd ed. p. 139); but in native courts their evidence is unsworn, and a Japanese Buddhist, objecting to an oath, was allowed to sign the words:—"The statement I shall make before the Court shall be in the whole nothing but the truth, according to the custom, religion and belief of this country and my own" (3 Jur. Soc. Pap. 375; *cp.* 38 Ir. L.T. Jo. 108); while another, unable to say what form was binding, as oaths were unknown in Japan, was directed to snuff a lighted candle, declaring that, if speaking falsely, his soul would be extinguished like the flame [45 L. Jo. 581; 129 L.T. Jo. 432 (1910)].

Affirmation. The form of oral affirmation provided by the Oaths Act, 1888, s. 2, is as follows:—"I, A.B., do solemnly, sincerely, and truly declare and affirm that the evidence I shall give to the Court, &c., shall be the truth, the whole truth, and nothing but the truth"; any words of imprecation, or calling to witness, being omitted.

Who may administer Oaths. *In England,* "every Court, judge, justice, officer, commissioner, arbitrator, or other person now or hereafter having by law or by consent of parties, *authority to hear, receive, and examine evidence,*

is hereby empowered to administer an oath to all such witnesses as are legally called before them respectively" (14 & 15 Vict., c. 99, s. 16; Tay. s. 1386; Steph. art. 124); and by the Commissioners of Oaths Act, 1889, s. 2, "every person who being an officer of, or performing duties in relation to, any Court is for the time being so authorised by a judge, or by any rules or orders regulating the procedure of the Court, and every person so directed to take an examination in any cause or matter in the Supreme Court, may administer an oath," for the purposes for which they are so empowered (see *R.* v. *McDonald,* 21 Cox, 70). These and other statutory provisions or Rules include Examiners (O. 37, r. 19); Chief Clerks (now Masters) in Chancery (O. 55, rr. 16, 17); Taxing Masters (O. 65, r. 27 (25)); Masters, and first or second class Clerks in the Filing and Record Department (O. 61, r. 5); first and second class Clerks in the Crown Office Depart. (Cr. Off. R.R. 1906, r. 7); District Registrars (Jud. Act, 1873, s. 62; O. 38, r. 4); Official Receivers in Bankruptcy (Bpy. Act, 1914, s. 72); and Trustees in relation to proofs (*id.* Sched. II. r. 27); but not Justices at a merely informal licensing meeting (*R.* v. *Shaw,* 104 L.T. 112). And a person authorised to administer oath may do so to himself (*Wilson* v. *De Coulon,* 22 Ch. D. 841; *Pitcher* v. *Bourn,* 10 T.L.R. 245).

In general, a solicitor's commission only lasts so long as he continues to practise; but in certain cases it continues until revoked. When the latter is the case, he may administer an oath, although struck off the rolls (*Ward* v. *Gamgee,* 65 L.T. 610). Under the Commissioners for Oaths Act, 1889, s. 1 (3), however, a commissioner may not act in any proceeding in which he is (or is the clerk of) the solicitor to *any of the parties,* or *in which he is interested* (*Re Bagley,* 1911, 1 K.B. 317); and O. 38, rr. 16, 17, further provide that no affidavit is sufficient, if sworn before the party using it, or his solicitor, or the latter's agent, correspondent, clerk, or partner. These provisions extend to declarations in non-contentious matters arising in the commissioner's own affairs (35 Sol. Jo. 689). And an affidavit taken before the solicitor to the grantee of a bill of sale will invalidate the registration (*Baker* v. *Ambrose,* 65 L.J.Q.B. 589). A defendant may, however, be criminally liable for false declarations even though the commissioner be interested (*R.* v. *Willmott,* 120 C.C.C. Sess. Pap. pp. 1149-50).

Out of England. With respects to affidavits, &c., sworn out of England, but required for use therein, oaths may be administered by any person having authority to administer an oath in that place (C.O. Act, 1889, s. 3, sub-s. 1); and where such authority is conferred otherwise than by the law of a foreign country, judicial notice will be taken of the seal or signature of the persons so authorized (s. 3, sub-s. 2; see *ante,* 23-4). Such last-mentioned persons are—in *Scotland, Ireland, the Channel Islands and Colonies*—any judge, Court, notary public or other person lawfully authorised for the purpose (O. 38, r. 6); and in *foreign countries*—the various British diplomatic and consular agents therein (*id.;* C.O. Act, 1889, s. 1; C.O. Act, 1891, s. 2). In Ireland, an affidavit sworn before an English commissioner, but not one sworn before an English J.P., has been held sufficient (120 Ir. L.T. Jo. 239). As to affidavits, &c., sworn in foreign countries before *foreign* officials, see *ante,* 24, and *post,* 563.

Witnesses who need not Swear or Affirm. (1) *Children.* In proceedings for any offence under the Children Act, 1908, Part II.; or under the Offences

Against the Person Act, 1861 (24 and 25 Vict. c. 100), ss. 27, 55, 56; or for any offence against a child or young person under ss. 5, 42, 43, 52, or 62, of that Act, or under the Criminal Law Amendment Act, 1885; or for any offence under the Dangerous Performances Acts, 1879 and 1897; or any other offence involving bodily injury to a child or young person;—where the child in respect of whom the offence is charged to have been committed, or any other child of tender years who is tendered a witness, does not in the opinion of the Court understand the nature of an oath, its evidence may be received, though not given upon oath, if in the opinion of the Court the child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth. (Children Act, 1908, s. 30; extended generally to other offences by the Cr. Just. Admn. Act, 1914, s. 28 (2); as to the unsworn Depositions of children under the former Act, see, fully, *post,* 511). Such testimony, however, must be "corroborated by some other material evidence in support thereof implicating the accused," and is *punishable if false* (Children Act, 1908, s. 30; as to evidence inadmissible in corroboration, see *R.* v. *Christie, post,* 494); and the judge should so direct the jury, though possibly, if there were no such direction but ample corroboration, a conviction might not be quashed (*R.* v. *Davies,* 85 L.J.K.B. 208; *R.* v. *Murray,* 30 L.T.R. 196; as to the extent of the child's understanding in such cases, see *R.* v. *Dent,* 71 J.P. Rep. 511). Where such evidence was received in support of a charge under s. 4 of the Cr. Law Am. Act, 1885, of unlawfully and carnally knowing a girl under thirteen, and the prisoner was acquitted of that charge, but under the provisions of s. 9 was convicted in the alternative of an indecent assault, the conviction was upheld, although such evidence would have been inadmissible upon the latter charge *per se* (*R.* v. *Wealand,* 20 Q.B.D. 827; and see *R.* v. *Owen, id.* 829). Where, however, a prisoner was charged in one count with an *attempt* to commit the felony specified in s. 4, and in a separate count with an indecent assault—and being acquitted of the former, was found guilty of the latter upon unsworn evidence—the conviction was quashed upon the ground that the jury had no power under the former court to convict alternatively of an indecent assault, and therefore that the reception of evidence which was inadmissible under the latter *per se* was fatal (*R.* v. *Paul,* 25 Q.B.D. 202).

(2) *Witness merely Producing Documents.* A witness called merely for the purpose of producing a document need not be sworn (*Perry* v. *Gibson,* 1 A. & E. 48; Tay. s. 1429). (3) *Counsel and Judges.* The evidence of counsel, when merely required to explain a case in which they have acted as such, but not otherwise, may be given from their places and without oath (*Hickman* v. *Berens,* 1895, 2 Ch. 638; *Kempshall* v. *Holland,* 14 R. 336); though they may waive their privilege and be sworn, examined, and cross-examined either in their places (*Wilding* v. *Sanderson,* 76 L.T. 346), or in the witness-box (*Oxley* v. *Pitts,* 1904, Times, Dec. 1). The same rule applies to Judges (40 L. Jo. 415). (4) In a non-contentious probate proceeding, the unsworn declaration of a German, resident in Germany, who objected to be sworn as contrary to the law of his country, was received, the R.S.C. not applying to such proceeding (*Re Caspari,* 75 L.T. 663; *cp. Re Vaughan,* and *Re Lambert, post,* 501-2). (5) *Licensing Cases, etc.* On applications for new licenses, unsworn evidence may be received; so, also, on objections to renewals, though

the justices have a discretion to refuse such evidence (*R.* v. *Sharman,* 1898, 1 Q.B. 578). But Monopoly Value must be determined on sworn evidence, not on the report of a Valuer (*R.* v. *Jackson,* 71 J.P. Rep. 25); and so also when a Compensation Authority is acting in a judicial capacity (*Colchester Brewery Co.* v. *Tendring JJ.,* 1916, 2 K.B. 126; *post,* 689). (6) *The Sovereign.* The evidence of the Sovereign is, probably, also admissible, though unsworn [see discussion in *Berkeley Peerage,* cited *ante,* 449; and *cp. Mighell* v. *Johore* (*Sultan*), cited *ante,* 364, and *R.* v. *Mylius,* Times, Feb. 3, 1911; *contra,* 2 Roll. Abr. 686. ed. 1688; *Omichund* v. *Barker,* Willes, p. 550; Best, s. 183; Tay., 10th ed., s. 1381; and *cp.* 26 L. Jo. 443-4]. A foreign Sovereign must, however, give discovery on oath (*Prioleau* v. *U.S.A.,* L.R. 2 Eq. at 663-664; *cp. Costa Rica Republic* v. *Erlanger,* 1 Ch. D. 171).

Unsworn Evidence by Mistake. Re-swearing Witnesses. Where a witness before a magistrate had, by mistake, not been sworn, and the case was accordingly re-heard on sworn testimony the same day, the second hearing was held justified as the first was a nullity and never placed the defendant in peril (*Re Marsham,* 1912, 2 K.B. 362). So, where the Lord Lieutenant in Ireland had given evidence on his attestation of honour as a peer, without oath, this was held illegal, but as the losing party who had called him had acquiesced, no new trial was granted [*Birch* v. *Somerville,* 2 Ir. C.L.R. 253 (1852); see *Richards* v. *Hough,* 51 L.J.Q.B. 361]. As to re-swearing witnesses before a fresh judge, jury, or jurors, see *ante,* 42.

CHAPTER XL.

EVIDENCE TAKEN AT THE TRIAL. EXAMINATION, CROSS-EXAMINATION, RE-EXAMINATION. NUMBER OF WITNESSES. CORROBORATION.

WITNESSES at the trial of any action, assessment of damages, or criminal charge, must, subject to the exceptions mentioned in chap. xli., be examined *vivâ voce* and in open court; and the case must be heard throughout before the same tribunal.

Thus, in criminal trials, where the witnesses are *capable* of being called, their previous depositions are inadmissible; and if these have been relied on to prove any material fact, the conviction will be quashed (*R.* v. *Rimes,* 28 T.L.R. 409; *R.* v. *Metz,* 84 L.J.K.B. 1462, where the fact was only a formal one and the objection not having been taken at the trial, was held too late on appeal; *R.* v. *Guerin,* 58 L.J.M.C. 42). So, a decision by one magistrate, based partly on evidence taken before another, cannot stand, the proper course being to re-swear the witnesses and read over their evidence again (*R.* v. *Guerin, sup.; ante,* 42). Similarly, on new trials, or re-hearings, the case must be proved *de novo,* and the evidence, verdict, and judgment at the first trial, are inadmissible (*Roe* v. *Naylor* and *O'Connor* v. *Malone,* cited *post,* 501). As to hearing a second case before deciding the first, see *ante,* 29.

Hearings in Camerâ, or in the Absence of the Prisoner. Apart from statute, (*e.g.* the Children Act, 1908, s. 114; the Incest Act, 1908, s. 5), there is no jurisdiction to hear cases *in camerâ,* except (1) those affecting lunatics and wards of Court; (2) those where publicity would defeat the object of the action, *e.g.* proceedings to restrain disclosure of confidential communications (*Mellor* v. *Thomson,* 31 Ch. D. 55), or actions involving a secret process (*Badische* v. *Levinstein,* 24 Ch. D. 156; *Andrews* v. *Raeburn,* 9 Ch. App. 522); or (3) those where publicity would, in some other way, prevent justice being done [*Scott* v. *S.,* 1913, A.C. 417]. Under the last named head, witnesses in divorce cases who could not give their evidence properly in public, have been heard *in camerâ* (*Moosebrugger* v. *M.,* 29 T.L.R. 658; *Cleland* v. *C.,* 109 L.T. 744); and so, also, as to cases where publicity would imperil the public safety (*Norman* v. *Mathews,* 32 T.L.R. 369, C.A.; *R.* v. *Gov. of Lewes Prison,* W.N. 1917, p. 91). As to hearing criminal cases *in the absence of the prisoner,* see *R.* v. *Loettun,* 1916, 1 K.B. 337; *R.* v. *Browne,* 70 J.P. Rep. 472.

Exclusion and Separation of Unexamined Witnesses. The practice of separating witnesses dates back to the biblical example of Susanna and the Elders. But it was also freely employed in the earlier modes of trial preceding the jury, and was afterwards continued in the State Trials and other cases down to the present day (Wigmore, Ev., s. 1837). When required in the interests of justice, therefore, the unexamined witnesses on both sides may

(except during the reading of affidavit evidence, *Penniman* v. *Hill,* 24 W. R. 245), be ordered out of Court by the judge, both in civil and criminal cases, and either on his own motion, or at the instance of either party, who, however, cannot demand it as of right (*Selfe* v. *Isaacson,* 1 F. & F. 194; Tay. s. 1400). In Probate, Admiralty, and Divorce cases, the unexamined witnesses are excluded under a standing rule (*Savage* v. *S.,* 43 L. Jo. 167). When excluded they must not be communicated with as to the proceedings of the case; and those already examined should remain in Court till the others have testified (Best, s. 636; *Streeten* v. *Black,* cited *id.;* 1877, W.N. 297, *mem. per* M.R.). The exclusion has been held to embrace the *parties* to an action, since these are now competent as witnesses [*Outram* v. *O.,* 1877, W.N. 75, *per* C.A.; *Usher* v. *Henwood,* 26 Sol. Jo. 598; Tay. s. 1400; *contra, Selfe* v. *Isaacson, sup.; Charnock* v. *Dewings,* 3 C. & K. 378; *Russell* v. *Pilson,* 28 L. Jo. 810, where Wills and Wright, JJ., considered that the judge had no power to exclude the parties, the question being one not of competency, but of natural justice]; the *prosecutor* in a criminal case, if he is to be called as a witness, but not otherwise (*R.* v. *Newman,* 3 C. & K. 252, 260); the *solicitors* on the record, unless their presence is stated by counsel to be necessary for the proper conduct of the case (*Everett* v. *Lowdham,* 5 C. & P. 91; *Pomeroy* v. *Baddeley,* Ry. & M. 430; *R.* v. *Webb, id.* 431 *n*); and *experts,* who, however, are generally permitted to remain, at least until the expert evidence is reached (Tay. s. 1400; Ros. Cr. Ev. 119). If a witness remain in Court after being ordered to withdraw, he may be fined and imprisoned for contempt; but his evidence, although open to strong observation, cannot be rejected (*Chandler* v. *Horne,* 2 M. & R. 423; *Cobbett* v. *Hudson,* 1 E. & B. 11), except in Revenue cases (*Thomas* v. *David,* 7 C. & P. 350).

Deaf or Foreign Witnesses. Interpreters. Deaf-mutes, if literate, may testify either in writing, or by signs (*Bartholomew* v. *George,* cited Best, s. 148, *per* Ld. Campbell, not following *Morrison* v. *Lennard,* 3 C. & P. 127, where writing was considered essential); but the testimony of a witness deaf from childhood, and unable to understand, or express herself intelligibly, has been rejected (*R.* v. *Imrie,* 12 Cr. App. R. 282; *ante,* 449). Foreign witnesses, or British ones where different languages prevail, *e.g.,* Irish or Welsh, may testify in whatever tongue they are most accustomed to (108 L.T. Jo. 531; *cp. R.* v. *Burke, post,* 481). Where the accused, whether defended or not, is a foreigner, the evidence must be translated, unless his counsel waives the point and the judge permits (*R.* v. *Lee Kun,* 1916, 1 K.B. 337).

Confrontation. Prof. Wigmore remarks that when *ex parte* depositions were still used against a party, the latter frequently protested, demanding to be publicly confronted with the witnesses against him. The final establishment of the Hearsay rule in the early 1700's meant the allowance or requirement of this. The process has two purposes: a main one to secure the opportunity of cross-examination, and a minor one to enable the Court and parties to observe the demeanour of the witnesses (ss. 1395-9). Bentham's reasons are different. The operation, he says, has two professed objects: one to establish the identity of the defendant as the person of whom the witnesses are speaking, the other to enable him to extract from them undisclosed facts favourable to himself (Bk. III. ch. xix.). Mr. Taylor deals with another

aspect of this subject, remarking that formerly, when the evidence of witnesses on opposite sides directly conflicted, the Court would often order the witnesses to be confronted; and on one occasion no less than four were for this purpose placed together in the box (*Annesley* v. *Anglesea,* 17 How. St. Tr. 1350; Tay. 8th ed., s. 1478). This practice, which has now fallen into disuse at *Nisi Prius,* still obtains in the Ecclesiastical Courts and in the Divorce Court, in those cases in which the ecclesiastical procedure is by statute directed to be followed (see the Matrimonial Causes Act, 1857, s. 22); thus, in suits for nullity (*Enticknap* v. *Rice,* 4 Sw. & Tr. 136), but not, it has been held in those for dissolution (*Hooke* v. *H., id.* 236), decrees of confrontation may still be made. Even in suits of dissolution, however, there is power to order a petitioner to attend for identification (s. 43; *Lloyd* v. *L.,* L.R. 1 P. & D. 222), and in spite, apparently, of *Hooke* v. *H., sup.,* confrontation has also been ordered in the cases both of respondents and co-respondents (*Hindmarsh* v. *H.,* L.R. 1 P. & D. 24; *Sykes* v. *S.,* 38 L.J.P. 12). In *Farulli* v. *F.,* 1917, P. 28, however, where a respondent, who had entered no appearance, had been subpœnaed to attend for identification and was requested to stand up for this purpose, Shearman, J., forbade it, saying it was not humane nor proper and he was not the first judge who had so acted, though others had allowed it. He added that it was a well understood practice for a witness to be confronted with a person in Court, and that was quite right if by the latter's *consent,* but otherwise it was an abuse of the subpœna. Confrontation still, also, prevails in the County Courts (Tay., 8th ed., s. 1478). The production of opposing witnesses simultaneously, instead of merely successively, is, in Mr. Taylor's opinion, an excellent means of contrasting demeanour and testing credit, while it also provides an opportunity of explaining apparent contradictions, or of rectifying mistakes where both witnesses have intended to state nothing but the truth (*id.*).

EXAMINATION IN CHIEF. Object and Scope. After the witness has been sworn or has affirmed, it is the province of the party by whom he is called to examine him in chief, sometimes called the direct examination, the object of which is to elicit from the witnesses all the facts he can prove in support of such party's case. These may embrace facts *in issue* (*ante,* 56, 65); facts *relevant to the issue* (provided they are not excluded by public policy or privilege); in certain cases *hearsay and opinions,* as to such facts (*infra*); and any facts which affect the *admissibility* or *weight* of the evidence tendered (*ante,* 193). Thus, facts showing any special means of knowledge, opportunities of observation, reasons for recollection or belief, or other circumstances increasing the witness's competency to speak of the particular case, may be elicited in chief, as well as impugned in cross-examination (*post,* 477).

Personal Knowledge—Direct Testimony. The facts testified to by such witness must, however, only be those which have occurred within his own personal knowledge, *i.e.,* which he has himself seen, heard, or otherwise perceived. This rule, which dates back to modes of trial long preceding the jury (*ante,* 223), and has been said to have no exceptions whatever (Steph. Note xxvii.), must be distinguished from the hearsay rule, which is of later growth and has many. Each rule, however, to some extent implies the requirements of the other; though it must be remembered that, even where hearsay is admissible, it must still be proved under the present rule by a witness who

actually heard it and so has personal knowledge of the fact that the statement was made, though he may have none of the facts to which it relates. Not only are assertions made out of Court, *i.e.*, hearsay in its ordinary sense, excluded, but also facts which, though purporting to be directly attested by the witness, really rest on a hearsay basis, *e.g.*, the date or place of his own birth, or the fact of his illegitimacy. [*R.* v. *Rishworth*, 2 Q.B. 476; and *cp. R.* v. *Trowbridge*, 7 B. & C. 252; in *Staben* v. *Freeman*, 1906, Standard, Aug. 17, Judge Lumley Smith, and in *Blackmore* v. *Huxley*, 1908, Daily Telegraph, Mar. 5, Judge Woodfall rejected the testimony of a minor in proof of his infancy, and the late Commissioner Kerr several times ruled to the same effect; see also 50 Sol. Jo. 798. It is said, however, that at Chelmsford Assizes, Nov. 1893, Coleridge, C.J., in a criminal case, allowed a child, in the absence of the mother through illness, to prove its own age (Hall, Law of Children, 3rd ed., 155 *n;* in America the cases are conflicting, 19 Harv. L. Rev. 302; Wigmore, Ev. s. 667; and in non-contentious proceedings a witness has been allowed to identify his own certificate of baptism, *ante*, 343]. As to a witness's competency on the question of his own sanity, see *ante*, 400, and as to competent knowledge in the case of experts, see *ante*, 386, and of witnesses to handwriting, *ante*, 399.

[Gilbert, Ev., 1st ed., 152; *R.* v. *Bushell*, Vaughan, 142; Steph. art. 62, and note xxvii.; Tay. ss. 567, 1406, 1414; Gulson, ss. 346-8; Chamberlayne, ss. 2707-11].

Closely allied also to the present topic, is the rule that witnesses must in general speak only to *facts*, and not to their *inferences, opinions, or beliefs*. Mr. Gulson remarks that the witness's knowledge "must not only have been gained by his own personal observation, but it must also have reached his perceptive faculties *directly, i.e.*, he must not have *inferred* the fact from what he has observed, for it is the function of the jury to draw inferences and not of the witnesses. A witness would not be allowed, for instance, to state that he saw that a horse had just fallen down, where he really inferred that fact from seeing that his knees were cut and bleeding; he must depose only to what he actually saw, viz., the state of the horse's knees, leaving the jury, if they choose, to draw the conclusion that the horse had just fallen down" [s. 347; *ante*, 56, 65; and see fully, Opinion evidence, *ante*, chap. xxxv.]

Documents. Witnesses may, in general, testify to the execution and identity of unattested documents, but not, in the first instance, to their contents; and may prove facts to interpret, but not usually to contradict or vary their terms (*post*, 476-7; 523; chaps. xlii-vi). A witness called to explain a series of documents produced in court has also been allowed, in order to save time, to state their *result*, subject to cross-examination as to particulars (*Rowe* v. *Brenton*, 3 Man. & Ry. p. 212). So, a witness has been allowed to state what was the general balance of voluminous accounts which were not produced (*Roberts* v. *Doxon*, Pea. N.P.C. 83; but production must be given if required, *Johnson* v. *Kershaw*, 1 De G. & S. 260); or whether a party's books showed his insolvency or the reverse (*Meyer* v. *Sefton*, 2 Stark. R. 274); or, in what manner bills have invariably been drawn (*Spencer* v. *Billing*, 3 Camp. 310); he will not, however, be allowed to give his *impressions* derived from unproduced documents, for these are matters of inference or construction which belong to the tribunal (*Topham* v. *McGregor*, 1 C. & K. 320). [See Tay. s. 462; Stark. Ev., 4th ed., 179, 645; Steph. art. 71 (h).]

Suppression of Witness's Name, &c. Where the interests of justice require it, Courts have a discretion, which it not subject to review, to suppress the name or address of a witness (*R.* v. *Gordon.* 8 Cr. App. R. 237; 57 Sol. Jo. 240, quoting statement of law officers in the H. of Commons; *cp. ante,* 205, 207.).

Leading Questions. Generally a party may not, either in direct or re-examination, elicit the facts of his case by means of leading questions—*i.e.* questions which suggest the desired answer, or which put disputed matters to the witness in a form permitting of the simple reply of "yes" or "no." Thus, a witness called to prove that A. stole a watch from B.'s shop, must not be asked, "Did you see A. enter B.'s shop and take a watch?" The proper inquiry is, what he saw A. do at the time and place in question (*ante,* 65, 391, 401). [Tay. ss. 1404, 1405; Best, ss. 641, 642; Ros. N.P., 18th ed., 166-167; Ros. Cr. Ev., 13th ed., 116-117; Steph. art. 128. As to leading questions in cross-examination, see *post,* 476].

Grounds of Exclusion. The reasons of the rule are that the witness is presumed to be favourable to the party calling him, who, knowing exactly what the former can prove, might prompt him to give only the advantageous answers. Such evidence would obviously be open to suspicion, as being rather the pre-arranged version of the party than the spontaneous narrative of the witness (Best, s. 641; Stark. Ev. 166).

Exceptions. As the rule is merely intended to prevent the examination from being conducted unfairly, the judge has a discretion, which is not open to review, to relax it whenever he considers it necessary in the interests of justice (*Exp. Bottomley,* 1909, 2 K.B. 14, 16; *Lawder* v. *L.,* 5 Ir. C. L. R. 27), and it is always relaxed in the following cases:—

(1) *Introductory or undisputed Matter.* To shorten proceedings, and bring the witness as quickly as possible to the material points of the case, it is not only permissible, but proper, to lead him as to matters which are introductory, or not really in dispute.

(2) *Identification.* So, for the purpose of identifying persons or things, his attention may be directly pointed to them. Thus, a witness has been allowed to be asked if the prisoner in the dock is the person he has referred to (*R.* v. *Watson,* 2 Stark. 116, 128). Still, identification so prompted is often worthless, and a conviction founded thereon is liable to be quashed (*ante,* 399; Best. s. 643). The proper question is, 'Do you see the person referred to in Court?' (Powell, Ev. 9th ed. 528-9).

(3) *Assisting Memory.* A question which merely directs the attention of the witness to a particular topic, without suggesting the answer required, is not objectionable. Thus, to prove a slander imputing that "A. was a bankrupt whose name was in the Bankruptcy List, and would appear in the next Gazette," a witness who had only proved the first two statements was allowed to be asked, "Was anything said about the Gazette?" (*Nicholls* v. *Dowding,* 1 Stark. 81). So, where a witness stated that he could not remember the names of the members of a firm so as to repeat them without suggestion, but thought that he might recognise them if read to him, this was allowed to be done (*Acerro* v. *Petroni,* 1 Stark. 100).

(4) *Contradiction.* Where one witness is called to contradict another as to expressions used by the latter, the former may be asked not merely what

was said, but whether the particular expressions were used, since otherwise a contradiction might never be arrived at (*Edmonds* v. *Walter,* 3 Stark. 7; *Courteen* v. *Touse,* 1 Camp. 43). Where, however, the conversation is not proved merely for the purpose of contradiction, the latter question is improper (*Hallet* v. *Cousens,* 2 M. & R. 238).

(5) *Adverse or Hostile Witness.* If a witness by his conduct shows that he is hostile to the party calling him, the latter may, in the discretion of the judge which, save in very exceptional circumstances, is not open to appeal (*Rice* v. *Howard,* 16 Q.B.D. 681; *R.* v. *Williams,* 29 T.L.R. 128), be allowed to lead, or rather cross-examine him (*Coles* v. *Coles,* L.R 1 P & D. 70); but the matter is wholly for the Court, and a party, though called by his opponent, cannot as of right be treated as hostile (*Price* v. *Manning,* 42 Ch.D. 372, C.A., overruling *Clarke* v. *Saffery,* Ry. & M. 126; as to *discrediting* a party's own witness, when hostile, see *post,* 471-3).

Refreshing Memory. A witness may refresh his memory by reference to any writing made or verified by himself concerning, and contemporaneously with, the facts to which he testifies; but such documents are no evidence *per se* of the matters contained. If the witness has become *blind,* the paper may be read over to him (*Catt.* v. *Howard,* 3 Stark. R. 3; *Vaughan* v. *Martin,* 1 Esp. 440). An expert may also, irrespective of the present rule, refer to professional works to refresh his memory, or correct or confirm his opinion, although they were not written by himself or made contemporaneously (*ante,* 392-3). As to refreshing the memory of the judge, see *ante,* 26. [Tay. ss. 1405-1413; Ros. N.P. 178-179; Ros. Cr. Ev., 12th ed. 126-127; Steph. art. 136; Whart. ss. 516-526.]

Principle. The reason of the rule has been said to be, that a witness should not suffer from a mistake, and may explain an inconsistency (*Halliday* v. *Holgate,* 17 L.T. 18, *per* Montague Smith, J.).

(1) *By whom Document may be written.* The writing may have been made either by the witness himself, or by others, providing in the latter case that it was read by him when the facts were fresh in his memory, and he knew the statement to be correct (Tay. s. 1410; Steph. art. 136).

Thus, a solicitor may refer to his diary (*R.* v. *Dexter,* 19 Cox, 360); or an ordinary witness to a newspaper report read by him when the facts were fresh in his mind (*Dyer* v. *Best,* 4 H. & C. 189); or an official shorthand writer to his notes at trial, even though copies of these may be privileged from production to a non-party who has subpœnaed him (*James* v. *J., ex rel.* May 21, 1919, *per* Roche, J.). And a workman's time-book may be used to refresh the memory of the cashier, who read it every fortnight, when paying the wages in accordance therewith (*R.* v. *Langton,* 2 Q.B.D. 296); or a log-book kept by the mate, and inspected by the captain a week afterwards, to refresh the memory of either (*Anderson* v. *Whalley,* 3 C. & K. 54; *Burrough* v. *Martin,* 2 Camp. 112). So, depositions taken before a magistrate or coroner may be referred to at the trial, either by the witness who signed (*R.* v. *Williams,* 6 Cox, 343; *Wood* v. *Cooper,* 1 C. & K. 645), or the clerk who wrote them (*R.* v. *Mann,* 49 J.P. 743; *post,* 508). And a shorthand writer has been allowed to prove a speech from a *partial* note thereof taken by him (*R.* v. *O'Connell,* Arm. & Tr. 165-167).

On the other hand, a witness will not be allowed to refer to proceedings in a former trial to refresh his memory as to what he stated thereat (*Halliday* v. *Holgate, sup.*); nor, under the old law, having denied on cross-examination the imputation of imprisonment, could a copy of the conviction be produced to refresh his memory (*Meagoe* v. *Simmons,* 3 C. & P. 75; see now *post,* 482); and some old cases, in which the witnesses were allowed to refer to the brief notes of counsel taken at the former trial, seem not to be law (Tay. s. 1410).

(2) *Contemporaneousness.* The document must have been written either at the time of the transaction, or so shortly afterwards that the facts were probably fresh in his memory (*Burrough* v. *Martin,* 2 Camp. 112; *Whitfield* v. *Aland,* 2 C. & K. 1015; *Talbot* v. *Cusack,* 17 Ir. C.L.R. 213). A delay of a fortnight will not be fatal (*R.* v. *Langton,* 2 Q.B.D. 296); but an interval of several weeks (*R.* v. *Kinloch,* 25 How. St. Tr. 934-937), or six months (*Jones* v. *Stroud,* 2 C. & P. 196; *Whitfield* v. *Aland, sup.; Steinkeller* v. *Newton,* 9 C. & P. 315), has been held to exclude [*cp. ante,* 288]. The documents, however, must not have been written *post litem motam* (*Dysart Peerage,* 6 App. Cas. 489, 497).

(3) *Independent Recollection.* It is not essential that the witness should have any independent recollection of the facts. Thus, an attesting witness, from seeing his own signature to a deed, may say he is sure that the party has executed it (*Maugham* v. *Hubbard,* 8 B. & C. 14); so, a barrister may refer to notes on his brief, though he has no recollection of the case (*R.* v. *Guinea,* Ir. Cir. R. 167); or an agent who had made a memorandum of the terms of a lease, but forgotten the transaction, may swear from seeing the memorandum he has no doubt the lease was granted (*R.* v. *St. Martin's,* 2 A. & E. 210; Tay. s. 1412). And, as we shall see, a journalist may refer to the copy of an article written by him, though he has forgotten the facts narrated (*Topham* v. *McGregor,* 1 C. & K. 320).

(4) *Originals and Copies.* As to the admissibility of *copies* of the original writing, the result of the cases seems to be as follows: (*a*) Where the copy was made or verified by the witness while the facts were fresh in his recollection, it will be admissible, on the footing of a duplicate or a quasi-original. Thus, a sale was allowed to be proved by a clerk who refreshed his memory from a ledger, copied under his supervision from a waste-book kept by himself (*Burton* v. *Plummer,* 2 A. & E. 341); and a surveyor has been allowed to refer to a printed copy of a written report made by him to his employers, which report was substantially but not literally transcribed from rough notes taken by him at the time (*Horne* v. *Mackenzie,* 6 C. & F. 628; *contra, Murray* v. *Mahon,* 18 Ir. T.L.R. 8). (*b*) Where the original is in existence, and the witness has no recollection of the facts otherwise than from it, a copy is inadmissible, and the original must be produced (*Doe* v. *Perkins,* 3 T.R. 749; *Tanner* v. *Taylor, id.* p. 754; *R.* v. *St. Martin's,* 2 A. & E. 210; *R.* v. *Harvey,* 11 Cox, 546, where, to identify the number of a bank note paid in by a customer, a bank clerk who had entered the number in one of the books of the bank at the time, was not allowed to refer to a memo. copied from the book; *infra,* 471). (*c*) Where the original has been lost or destroyed, a copy proved to be correct either by the witness or same third person, may be used. Thus, a journalist has been allowed to refresh his memory by a

copy of the paper fourteen years old, although he had no recollection of the facts, proof being given by the editor that the MS. was lost, and that the paper was a copy of it, and by the witness, that he had no doubt the facts stated therein were true (*Topham* v. *McGregor, sup.; Burton* v. *Plummer, sup., per* Patteson, J.; *Talbot* v. *Cusack*, 17 Ir. C.L.R. 213. In *Jones* v. *Stroud*, 2 C. & P. 196, discussed in *Talbot* v. *Cusack, sup.*, however, the Court rejected a copy made six months after an original, which was produced, but was illegible). (*d*) Where the copy is either not proved to be correct (*Alcock* v. *Roy. Ex. Assur.*, 13 Q.B. 292; *Talbot* v. *Cusack, sup.*); or consists of an imperfect extract made by the witness (*Doe* v. *Perkins, sup.*, explained by Patteson, J., in *R.* v. *St. Martin's, sup.*), or has been revised and transcribed with the help of the solicitor to the case (*Anon.*, cited by Lord Kenyon in *Doe* v. *Perkins, sup.*), it cannot be used to refresh memory, whether the original is in existence or not.

(5) *Inadmissible Documents may be used.* The document need not be admissible in evidence *per se*. Thus, an invalid lease (*Bolton* v. *Tomlin*, 5 A. & E. 836), or an irregular deposition (*R.* v. *Mann*, 49 J.P. 743), or an unstamped document (*Birchall* v. *Bullough*, 1896, 1 Q.B. 325; *post*, 531), may be referred to; and user for this purpose does not make it evidence in the case (*Alcock* v. *Roy. Ex. Assur., sup.; Payne* v. *Ibbotson*, 27 L.J. Ex. 341).

(6) *Production. Inspection. Cross-examination.* Where the witness has no independent recollection of the facts, the document used to refresh his memory *must* be produced (*Howard* v. *Canfield*, 5 Dowl. 417; *Beech* v. *Jones*, 5 C.B. 696; *sup.* 470); and even where he has such recollection this course *should* be adopted, in order that the opponent may have the benefit of cross-examination and of the witness refreshing his memory by every part (*id.;* Tay. s. 1413). The shorthand notes of an interview cannot, however, be put in *en bloc*, though specific questions and answers may be referred to (*R.* v. *Veltheim*, 148 C.C.C. Sess. Pap. 583, *per* Phillimore, J.). If produced, the opponent has a right to inspect those parts only which refer to the subject-matter of the case (*Burgess* v. *Bennett*, 20 W.R. 720; though in *Betts* v. *B.*, 33 T.L.R. 200, Low, J., allowed a general inspection), and also, of course, to cross-examine thereon. But cross-examination on the portions referred to by the witness does not make the document evidence against the cross-examiner (*Gregory* v. *Tavernor*, 6 C. & P. 280, 281; *Payne* v. *Ibbotson*, 27 L.J. Ex. 341), though it is otherwise with cross-examination upon independent parts (*Gregory* v. *Tavernor, sup.; Stephens* v. *Foster*, 6 C. & P. 289). And if the document fails to refresh the witness's memory, or if it is used not to refresh memory but merely to prove the handwriting, the opposite party is not entitled to see it further than to enable him to re-examine about the writing or recognise the document if afterwards put in (*Peck* v. *Peck*, 21 L.T. N.S. 670; *R.* v. *Duncombe*, 8 C. & P. 369; Tay. s. 1413; *post*, 477); and if he does more, or comment on the contents, he may be required to put it in as his own evidence (*Palmer* v. *Maclear*, 1 S. & T. 149). Alterations or corrections in the document will affect its weight, but not exclude it (*Slaney* v. *Wade*, 1 Myl. & Cr. p. 355).

Discrediting or Contradicting Party's own Witness. Since the fact of calling a witness is supposed to represent him to the Court as worthy of credit, it has been provided that—"A party producing a witness shall not be

allowed to impeach his credit by *general* evidence of bad character (*post,* 482); but he may, in case the witness shall *in the opinion of the judge* prove adverse, contradict him by other evidence, or, *by leave of the judge,* prove that he has made at other times a statement inconsistent with his present testimony; but before such last-mentioned proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement" (28 & 29 Vict. c. 18, s. 3, extending C.L.Pr. Act, 1854, ss. 22-3, which are now repealed by the St. L. Rev. Act. 1892; *post,* 480). [Tay. ss. 1426-1427; Ros. N.P. 176-177; Ros. Cr. Ev. 97-98; Steph. art. 131; Whart. s. 549.]

When the Witness is adverse., i.e. *hostile. Opponents. Attesting Witnesses. Debtors.* A witness is considered adverse only when, in the opinion of the judge, (which is final, *ante,* 469), he bears a hostile *animus* to the party calling him and so does not give his evidence fairly and with a desire to tell the truth to the Court; he is not adverse in the statutory sense when his testimony merely contradicts his proof [*Greenough* v. *Eccles,* 5 C.B. N.S. 786; *Coles* v. *C.,* L.R. 1 P. & D. 70; *Reed* v. *King,* 30 L.T. 290; *R.* v. *Smith,* 2 Cr. App. R. 86, 106, *per* Jelf, J., disapproving the decision of Coleridge, J., at the trial; Tay. s. 1426; Steph. art. 131; *contra, Faulkner* v. *Brine,* 1 F. & F. 255; *Dear* v. *Knight, id.* 433; *Pound* v. *Wilson,* 4 F. & F. 301; *Anstell* v. *Alexander,* 16 L.T. 830; *R.* v. *Little,* 15 Cox, 319; *R.* v. *Williams,* 29 T.L.R. 128, where 'adverse' was considered to include the latter condition as well]. It is now settled that a party when called by his *opponent* cannot as of right be treated as hostile, the matter being solely in the discretion of the Court (*Price* v. *Manning,* 42 Ch.D. 372, C.A.). With regard to *attesting witnesses,* the old rule was that these, being necessary witnesses whom it was compulsory to call, and who might therefore be considered rather the witnesses of the Court than of the party, could be cross-examined and discredited by their own side (*Bowman* v. *B.,* 2 M. & R. 501; *Jackson* v. *Thomason,* 1 B. & S. 745, and *Coles* v. *C., sup.*), and this has recently been confirmed (*Jones* v. *J.,* 24 T.L.R. 839, *per* Barnes, P.); though in the earlier case of *Phillips* v. *Davis,* 1907, Times, Dec. 13, *per* Deane, J., leave of the judge so to treat them was assumed to be now necessary, and the case of *Price* v. *Manning, sup.,* seems to favour the latter rather than the former view. In Bankruptcy, a party calling the *debtor* may as of right elicit from him any previous contradictory statement (*Re Cunningham,* 80 L.T. 503).

Contradicting Witness when not adverse. Although by the above statutes both the opinion of the judge that the witness is adverse, and the former's previous leave, are conditions precedent to the proof of contradictory *statements* by the witness: yet, in spite of these statutes, a party may, as of right, without obtaining such opinion or leave, contradict his own witness, whether adverse in the above sense or not, by *other evidence* relevant to the issue, and thus indirectly discredit him—*e.g.* where an attesting witness denies his own signature. Mr. Justice Stephen remarks that "the words 'he may in case the witness shall, in the opinion of the judge, prove adverse, contradict him by other evidence,' suggest that he cannot do so unless the judge is of that opinion. This is not, and never was, the law" (Dig. note xlvii.; and see *Greenough* v. *Eccles, sup.;* Ros. N.P. 173, 174). Where, however, two

equally credible witnesses called by the same party contradict each other, the party may not accredit one and discredit the other by contradicting him on vital points: though *aliter*, if such testimony be unexpected, or relate merely to matters of detail (*Sumner* v. *Brown*, 25 T.L.R. 745, *per* Hamilton, J.).

Putting-in Documents. In Chancery, it has been held that no document, even though included in the admissions, is evidence unless formally put in and marked by the registrar (*Watson* v. *Rodwell*, 22 Ch. D. p. 153, *per* James L.J.); though this, it seems, applies only to documents produced to a witness, or whose admissibility is in question (28 Sol. Jo. 729, *per* C.A.). In jury trials, however, any document which has been read to the jury, even though not formally put in, is treated as evidence; while if neither read, nor put in, it cannot be referred to, even if admitted by the parties (*Altone* v. *Delmeanny*, 15 L.T. 217, *per* Blackburn, J., and *cp. R.* v. *Rimes*, *ante*, 464). As to what dealing with documents will give a right to reply, see *ante*, 43, 44. Documents which have not been inspected by one side cannot, however, be put in *en bloc* by the other, and the producing witness examined *seriatim* upon them; though the hearing may be adjourned to select those that are material (*re Maplin Sands*, 71 L.T. 594, C.A.). As to written reports by the witness to his principal, see *ante*, 194, 209, 246; or by a constable to his superintendent, see *post*, 479, and 65 J.P. 209; and as to privileged documents generally, *ante*, 194-217. As to schedules of evidence used at trials and required for appeal, see O. 62, R. 14C-D.

CROSS-EXAMINATION. Liability to. When a witness has been intentionally called and sworn by either party, the opposite party has a right, if the examination in chief is waived (*R.* v. *Brooke*, 2 Stark. R. 472; *Phillips* v. *Eamer*, 1 Esp. p. 357); or if the counsel changes his mind and asks no questions (88 L.T. Jo. 340, *per* Stephen, J.); or if the examination is closed, to cross-examine him. So, a deponent, whether party or stranger, who has filed an affidavit for the purpose of being used at the *trial*, is liable to cross-examination thereon, though the affidavit has been withdrawn (*Re Quartz Co., Exp. Young*, 21 Ch.D. 642; O. 38, r. 28, *aliter* in bankruptcy, where an affidavit, though filed, can only be cross-examined on if read, *Exp. Child, Re Ottoway*, 20 Ch.D. 126); on *motions*, however, the matter is discretionary with the judge, *post*, 500.

In *Criminal cases*, although the prosecution is not in strictness bound to call every witness named on the back of the indictment, it is usual to do so in order to afford the prisoner's counsel an opportunity to cross-examine them; and if the prosecution will not call them, the judge in his discretion may (*R.* v. *Simmonds*, 1 C. & P. 84; *R.* v. *Bull*, 9 C. & P. 22). So, on charges of homicide, and perhaps in other serious cases, witnesses, who, though not so named, were present at the transaction, are sometimes called by the judge for the furtherance of justice (*id.; R.* v. *Holden*, 8 C. & P. 606; *R.* v. *Stroner*, 1 C. & K. 650; *R.* v. *Chapman*, 8 C. & P. 558; *R.* v. *Orchard*, *id.* p. 559 *n; post*, 484). If this has been done at the instance of the prisoner, and no question is put to them by the prosecution, they become so far the prisoners' witnesses, that, though he may cross-examine, he cannot contradict them (*R.* v. *Bodle*, 6 C. & P. 186); and the prosecution can only re-examine as to matters arising out of the cross-examination (*R.* v. *Beezley*, 4 C. & P.

220), and perhaps, if there has been a refusal to call the witness, not even as to these (*R.* v. *Harris*, 7 C. & P. 581). *Accused.* As to cross-examination of the accused, and their wives or husbands, &c., see *ante*, 454-7.

Party's own Witness. A party cannot, in general, cross-examine his own witness, though he may contradict him by independent evidence (*ante*, 469, 472). But when such witness proves *adverse* (*ante*, 469, 472), he may not only (1) cross-examine him (*ante*, 469); but (2) by leave of the judge, prove that he has previously made statements inconsistent with his present testimony (*ante*, 471-2). So, (3) when an expert advanced an extraordinary theory, he was allowed to be cross-examined by his own side (*R.* v. *Cook*, 147 C.C.C. Sess. Pap. p. 466, *per* Darling, J.). (4) Whether the right to cross-examine survives if the cross-examiner afterwards calls his opponent's witness to prove his own case, seems doubtful; but the better opinion is that it does not; and that the witness cannot be asked leading questions on his second examination, while he may afterwards be cross-examined by the party who originally called him (*Malone* v. *Spillessy*, Ir. Cir. Rep. 504; *Lord* v. *Colvin*, 3 Drew. 222; *Re Woodfine*, 26 W.R. 678; *contra, Dickinson* v. *Shee*, 4 Esp. 67, is doubted in Tay. s. 1433). As to cross-examination of *attesting witnesses*, see *ante*, 472.

Co-defendants. A defendant may cross-examine a co-defendant or any other witness who has given evidence against him, and reply on such evidence, though there is no issue joined between them (*Lord* v. *Colvin*, 3 Drew, 222; *Allen* v. *A.*, 1894, P. 248, C.A.; *Re Wagstaff*, 96 L.T. 605). And the same right exists between respondent and co-respondent in divorce cases (*Allen* v. *A.*, *sup.*), provided either is hostile to the other, for if friendly, *e.g.* where both deny the adultery, each can only be examined as the other's witness and not cross-examined (*Dunhill* v. *D.*, 29 L.Jo. 368). So, where several prisoners are tried on the same indictment and separately defended, any witness, whether a co-defendant or not, called by one may be cross-examined by the others against whom they have given incriminatory evidence, or by the Crown to elicit such evidence; and the parties against whom such evidence is given have a right to reply thereon (*R.* v. *Hawden*, 1902, 1 K.B. 882; *R.* v. *Paul*, 1920, W.N. 121; *ante*, 457).

Exemptions. (1) *A witness called merely to produce a document* under *a subpœna duces tecum*, need not be sworn if the document either requires no proof, or is to be proved by other means; and if not sworn (*Summers* v. *Moseley*, 2 Cr. & M. 477; *Perry* v. *Gibson*, 1 A. & E. 48), or unnecessarily sworn (*Rush* v. *Smith*, 1 Cr. M. & R. 94), he cannot be cross-examined. (2) *A witness sworn by mistake* either of the counsel or officer of the Court, and whose examination has not substantially begun, is not liable to cross-examination (*Wood* v. *Mackinson*, 2 Moo. & Rob. 273; *Clifford* v. *Hunter*, 3 C. & P. 16; *Reed* v. *James*, 1 Stark. 132). But the mistake must arise from his inability to speak to the transaction, and not from the imprudence of having him called (*Wood* v. *Mackinson*, *sup.*); so, where the witness can speak to the transaction, but the counsel changes his mind, and after the witness is sworn, asks no questions, the right to cross-examine remains (88 L.T.Jo. 340, *per* Stephen, J.). (3) *A witness whose examination has been stopped by the judge* before any material question has been put, is not liable to cross-examination (*Creevy* v. *Carr*, 7 C. & P. 64). (4) *A witness called by the judge* can only be cross-examined by leave (*post*, 484). (5) A witness who

has *given no evidence in chief,* may not be cross-examined *as to credit* (*Bracegirdle* v. *Bailey,* 1 F. & F. 536). (6) The Court may disallow cross-examination used simply *to oppress and not for the purposes of justice* (*Re Mundell, Fenton* v. *Camberlege,* 48 L.T. 776, where an affidavit witness was not allowed to be subpœnaed for cross-examination, the object of the cross-examination being to injure her for having employed a particular solicitor). (7) Witnesses to character, though liable to be, are in fact rarely, cross-examined (*ante,* 188).

Death, &c., before Cross-examination. When the witness dies or falls ill before cross-examination, his evidence in chief is admissible though its weight may be slight (*R.* v. *Doolin,* Jebb, C.C. 123; *People* v. *Cole,* 43 N.Y. 508). So, the affidavit of a witness who could not be produced for cross-examination by reason of death (*Abadom* v. *A.,* 24 Beav. 243; *Morley* v. *M.,* 5 DeG.M. & G. 610; *Davies* v. *Otty,* 13 W.R. 484; *Elias* v. *Griffith,* 46 L.J.Ch. 806; *Tanswell* v. *Scurrah,* 11 L.T. 761), insanity (*Ridley* v. *R.,* 34 Beav. 329), or paralysis (*Braithwaite* v. *Kearns,* 34 Beav. 202), has been received. But absence from the country (*Bingley* v. *Marshall,* 6 L.T. 682; *Dunne* v. *English,* 18 Eq. 524), or temporary illness (*Nason* v. *Clamp,* 12 W.R. 973), has been held insufficient, the proper course being to adjourn the trial or issue a commission; though Farwell, J., rejected *in toto* the evidence of a plaintiff who fainted and was unable to be cross-examined (45 Sol. Jo. 569; *sed qu.*). So, the Court has refused to act on the affidavit of a witness who had absconded before cross-examination (*Shea* v. *Green,* 2 T. L. R. 533; and see *The Parisian,* 13 P.D. 16; though it is not wholly inadmissible). [*Cp. post,* 497.]

Object and Scope of. The object of cross-examination is two-fold—to weaken, qualify, or destroy the case of the opponent; and to establish the party's own case by means of his opponent's witnesses. It is not confined to matters proved in chief; the slightest direct examination, even for formal proof, opens up the whole of the cross-examiner's case (*Berwick* v. *Murray.* 19 L.J. Ch. 281, 286; *Morgan* v. *Brydges,* 2 Stark. R. 314; *R.* v. *Murphy,* 1 Arm. M. & O. 206; Tay. s. 1432). In *Re Woodfine,* 26 W.R. 678, where the issues on a claim and counter-claim were distinct and separately tried, Fry, J., without laying down any general rule, directed for convenience that cross-examination on the claim should not include the subject-matter of the counter-claim; and in a suit for nullity, where there was no plea of want of sincerity, though there was a cross-action for dissolution on the ground of petitioner's adultery, cross-examination as to the latter fact, as showing want of sincerity, was disallowed (*S.* v. *S.,* 23 T.L.R. 460).

With the above view, the witness may be asked not only as to facts in issue, or directly relevant thereto, but all questions which, though otherwise irrelevant, tend to impeach his credit in the manner provided, *post,* 477-83.

Notice to witness. Omission to cross-examine. As a rule a party should put to each of his opponent's witnesses in turn so much of his own case as concerns that particular witness, or in which he had a share, *e.g.* if the witness has deposed to a conversation, the opposing counsel should indicate how much he accepts of such version, or suggest to the witness a different one. If he asks no questions he will in England, though not perhaps in Ireland, generally be taken to accept the witness's account (*Flanagan* v. *Fahy,* 1918, 2 I.R. 361, 388-9, C.A.; *Browne* v. *Dunn,* 6 R., 67, 76-7; H.L.; Odgers, Pleading, 6th ed. 304.)

Moreover where it is intended to suggest that the witness is not speaking the truth upon a particular point his attention must first be directed to the fact by cross-examination, so that he may have an opportunity of explanation (*Browne* v. *Dunn, sup.*); and this probably applies to all cases in which it is proposed to impeach the witness's credit (Tay. s. 1451; *post,* 479-80). Such questions are, indeed, rendered by statute a condition precedent to proof of a previous contradictory statement by the witness (*post,* 479-81). Failure to cross-examine, however, will not always amount to an acceptance of the witness's testimony, *e.g.* if the witness has had notice to the contrary beforehand, or the story is itself of an incredible or romancing character (*Browne* v. *Dunn, sup.*), or the abstention arises from mere motives of delicacy, as where young children are called as witnesses for their parents in divorce cases. And where several witnesses are called to the same point it is not always necessary to cross-examine them all.

What Cross-examination lets in. On the other hand, an incautious cross-examination may let in matter which would be inadmissible in chief, *e.g.* the independent portions of a document used to refresh the witness's memory (*ante,* 471; *post,* 477). So, questions as to the contents of a document, put to a witness called merely to prove handwriting, let in the whole against the cross-examiner (*id.*); and if a plaintiff's witness be asked in cross-examination, "Didn't you meet A., and didn't he tell you so-and-so?" the plaintiff in re-examination may ask what A. really did say, although he could not do so in chief because the defendant was not present (Odgers, *sup.*). If it is imputed in cross-examination that the witness has recently fabricated his story, this will, in rebuttal, let in proof that he told the same story at an earlier date (*Flanagan* v. *Fahy,* 1918, 2 I.R. 361, 374, 388, C.A.; (*post.* 488). Where, however in an action for libel the plaintiff had not pleaded loss of particular customers by way of special damage and such evidence was consequently rejected in chief, it was held by Manisty, J., that cross-examining one of such customers (called upon a different point) as to his reason for ceasing to employ the plaintiff, did not let in general evidence of such loss (*Bluck* v. *Lovering, ex rel.,* reported on other points, 1 T.L.R. 497).

Leading Questions. Though leading questions may be put in cross-examination, whether the witness be favourable to the cross-examiner or not (*Parkin* v. *Moon,* 7 C. & P.; Steph. art. 128), yet where a vehement desire is betrayed to serve the interrogator, it is certainly improper, and greatly lessens the value of the evidence, to put the very words into the mouth of the witness which he is expected to echo back (*R.* v. *Hardy,* 24 How. St. Tr. p. 755; Tay. s. 1431).

Cross-examination as to Documents. *Execution and Contents.* A witness, whether a party or not, cannot be asked, nor compelled on cross-examination, to admit the *execution* of documents required by law to be attested (*Whyman* v. *Garth,* 8 Ex. 803; *post,* 519, 522-3). Nor can he be cross-examined upon a document inadmissible for want of a stamp (*Baker* v. *Dale,* 1 F. & F. 271; *cp. Interleaf Publishing Co.* v. *Phillips,* 1 Cab. and Ell., 315; *post,* 480, 531). Nor can a witness, if not a party, be asked as to the *contents* of unproduced documents (other than previous inconsistent statements in writing made by himself, *post,* 479-80), without a foundation for secondary evidence first being laid (*Darby* v. *Ouseley,* 1 H. & N. 1, 5; *Henman* v. *Lester,* 12 C.B. N.S. 776;

Macdonnell v. *Evans,* 11 C.B. 930; *cp. R.* v. *Banks,* 12 Cr. App. R. 74; Ros. N.P. 18th ed. 179-80). And although, if the witness be a party, his admissions out of court are primary evidence against him of the contents of unproduced documents, and he may also be *asked* in the box as to such contents (*Farrow* v. *Blomfield,* 1 F. & F. 653), yet he cannot be *compelled* to answer the question (*Henman* v. *Lester, Darby* v. *Ouseley, R.* v. *Banks, sup;* Tay., 8th ed. s. 1462; Ros. N.P. 180). The existence of a transaction, however, being separable from the contents of the record, may, it seems, be inquired into (*Henman* v. *Lester, sup.*). *Documents produced, or referred to, by Witness.* When a party calls for a document which he has given his opponent notice to produce, and the latter does not produce it, he may not afterwards give the document in evidence without the former's consent (*Edmonds* v. *Challis,* 7 C.B. 413; *Doe* v. *Hodgson,* 12 A. & E. 135). If he does produce the document and the party calling inspects it, the latter is bound to give it in evidence if it is material and the former so requires (*Calvert* v. *Flower,* 7 C. & P. 386; *Wilson* v. *Bowie,* 1 C. & P. 8; *Wharam* v. *Routledge,* 5 Esp. 235). [Tay. ss. 1817-1818; Steph. arts. 138-139. As to production under *subpœna* or order, see *ante,* 442-3.] If the cross-examiner, after putting a paper in the witness's hands, merely questions him as to its general nature or identity, this does not make it evidence (*Collier* v. *Nokes,* 2 C. & K. 1012), and his adversary has no right to see the document, though if he does, he may be required to put it in evidence (*Palmer* v. *Maclear,* 1 S. & T. 149). But if the paper be used to refresh memory, or questions are put as to its handwriting or contents, inspection may be demanded, though it cannot be read through or commented on till actually put in by the cross-examiner [Tay. s. 1452; *ante,* 471, 476]. If a joint affidavit has been made by the witness and another, only the part sworn to by the former and relating to the cross-examining party may be cross-examined upon (*R.* v. *Bond,* 9 C. P. 189; *cp. Dawkins* v. *Rokeby,* 4 F. & F. 806, 817). Where a witness based a theory as to the identity of a mining reef partly upon his own knowledge and partly on records and reports made by others connected with the mine, these were allowed to be read to him and the witness to be asked how he reconciled them with his theory (*Amalgamated Properties* v. *Globe & Phœnix Co.,* Times, 3 Nov. 1915).

CREDIT. The credibility of a witness is compounded of his knowledge of the facts—his disinterestedness—his integrity—his veracity. Proportioned to these is the degree of credit his testimony deserves from the Court or jury (Archb., Cr. P., 23rd. ed. 403).

Knowledge, Observation, Memory. Amongst the more obvious matter affecting the weight of a witness's evidence may be classed, his means of knowledge—opportunities of observation—reasons for recollection or belief—powers of memory and perception, and any special circumstances affecting his competency to speak to the particular case—all of which may be inquired into either in direct examination to enhance (*ante,* 466), or in cross-examination to impeach, the value of his testimony.

Errors, Omissions, &c. So, all questions may be asked in cross-examination which tend to expose the errors, omissions, inconsistencies, exaggerations, or improbabilities of the witness's testimony.

Antecedents, Associations, Character, &c. *Matters Admissible.* In addition to the above facts, and subject to the qualifications mentioned below, a witness may, upon cross-examination, be *asked* any question concerning his antecedents, associations, or mode of life, which, although *irrelevant to the issue,* would be likely to discredit his testimony or degrade his character; but he cannot always be *compelled to answer,* and his answers cannot, unless otherwise relevant to the issue, be *contradicted* (*post,* 479-82). Thus, in cases of rape, the prosecutrix may be cross-examined as to her connection not only with the prisoner, but with other men (*ante,* 190); and in an action for an indecent assault, the defendant, as to alleged improprieties with other females (*Tolman* v. *Johnstone,* 2 F. & F. 66). So, where a partnership is denied by one of the alleged partners, instances of their partnership in other matters are admissible on cross-examination to discredit such denial (*Kennedy* v. *Dodson, ante,* 166); and in an action for damages for false representation, the defendant was allowed to be asked, as testing his credit, whether a verdict had not been obtained against him for a previous similar representation, although this fact was matter of record (*Henman* v. *Lester, ante,* 477), though where the similar facts do not affect the credit of the witness, he may not even be *asked* about them, must less discredited by mere contradiction (*Spenceey* v. *De Willott,* 7 East. 108; *Tennant* v. *Hamilton,* 7 C. & F. 122; *ante,* chaps. xi.-xii.). So, as to the fact of his bankruptcy, though this, too, is matter of record (Tay. s. 1462; *Henman* v. *Lester, sup.*). And to test the credit of a prosecutor, he may be cross-examined as to the truth of a libel, though no justification is pleaded (*R.* v. *Perryman,* 112 C.C.C. Sess. Pap. 655-6; *ante,* 191); so, of a witness for the defence as to whether the prisoner, his brother, was not rumoured to have been connected with a prior robbery, they both being concerned in the case under trial (*R.* v. *Spitzell,* 114 *id.* p. 1097).

Matters not Admissible. "The judge may in all cases disallow any questions put in cross-examination of any party or other witness which may appear to him to be vexatious and not relevant to any matter proper to be inquired into in the cause or matter" (O. 36, s. 38); *e.g.* probably questions as to alleged improprieties of remote date, or of such a nature as not seriously to affect present credibility (Tay. s. 1460; 36 Sol. Jo. 158; Steph., General View, 2nd ed., 27). So, witnesses cannot be asked to draw inferences of fact discreditable to themselves (*e.g.* whether a reporter, who had attended a meeting, went there "as a spy," *R.* v. *Bernard,* 1 F. & F. 240); nor are inquiries as to their religious belief admissible to discredit them (*Darby* v. *Ouseley,* 1 H. & N. 1; formerly a witness could not be compelled to answer whether he was a Roman Catholic, as this might subject him to penalties, *R.* v. *Ld. Gordon,* 1781, 2 Doug. 590, 592); nor questions as to disparaging comments made by the Court on their conduct or testimony in other trials (*Seaman* v. *Netherclift,* 2 C.P.D. 53, *per* Bramwell and Amphlett, JJ.A.; *R.* v. *Bottomley,* 1893, Times, Feb. 7, *per* Hawkins, J.; though such questions are often put without objection); nor can a defendant be asked in cross-examination whether he relies on a supposedly discreditable defence, *e.g.* infancy, the Statute of Limitations, or the Gaming Act, for he is entitled to rely on anything pleaded by his counsel (*Lister* v. *McKenzie,* 1901, Times, Aug. 13); nor a plaintiff what are the particular terms of a contract that he

complains have been broken, for this also is for his counsel to say (*Strachan* v. *Universal Stk. Exge.*, 1895, Ap. 24, *per* Cave, J., *ex rel.*); nor can a witness be told what others have said on a subject and then be asked if he contradicts them (*North Australian Co.* v. *Goldsborough*, 1893, 2 Ch. 381, C.A.); nor is it allowable for counsel to mislead a witness by making assumptions contrary to fact, or to entrap him by misstatements (Ros. N.P. 179); and, where the issue was whether A. had passed off his goods as those of B., B. was not allowed to be asked on cross-examination whether he had advertised the goods in question as patented without having any patent (*Lever* v. *Goodwin*, 1887, W.N. 107, C.A.). So, where A. sued B. for damages for injury by B.'s motor-car, it was held most irregular and improper for B. to be asked on cross-examination whether he was insured (*Wright* v. *Hearson*, W.N. 1916, 216). And, where the sole object of a female plaintiff's cross-examination was to injure her for having employed a particular solicitor, it was disallowed (*Re Mundell*, 48 L.T. 776). In Ireland it seems that questions under this head are only admissible if they *directly* impeach credit; thus, in a libel action where the defence alleged that the libel was published, not by the defendant, but by a third person, called at the trial as a witness for the plaintiff, this person was not allowed to be cross-examined as to his use of other words against the plaintiff, entirely different from those in the libel (*Massey* v. *M.*, 31 Ir. L.T. Jo. 184, *per* O'Brien, J.); so, in another libel case, the same judge disallowed a question put in cross-examination to a medical witness called by the plaintiff, as to whether the witness had not been summoned at Petty Sessions for an alleged assault and threatening language (*Daly* v. *Cork Herald*, *id.*); and questions as to the professional ideas entertained by one doctor about another, as well as those imputing that the witness's diagnosis has been challenged in other cases, have also been disallowed (*R.* v. *Hennessy*, 31 Ir. L.T. Jo. 165); nor was a constable allowed to be cross-examined as to what passed between himself and his superintendent in reference to a criminal charge (*R.* v. *Herlihy*, 32 *id.* 38).

Compulsion to answer. A witness is compellable to answer every question put to him in cross-examination which is relevant to the issue, unless protected by *public policy* (*ante*, 194-9), or *privilege* (*ante*, 200-217, 454-5); or unless the case is one in which *oral evidence is excluded by documentary* (*ante*, 476-7; *post*, chaps xliv.-vi.). He is also, in general, compellable to answer questions relevant merely as affecting credit; but the judge has a discretion to excuse an answer when the truth of the matter suggested would not, in his opinion, affect the credibility of the witness as to the subject-matter of his testimony [*supra*; Steph. art. 129, and note xlvi.; Tay. s. 1460; 36 Sol. Jo. 158].

Contradiction on Relevant Matters. After a proper foundation has been laid in cross-examination (*Browne* v. *Dunne*, *ante*, 476), a party may contradict his opponent's witnesses by independent evidence on all matters *relevant to the issue*, and in particular as to their **Previous Contradictory Statements.** Every witness upon cross-examination in any civil or criminal proceeding may be asked whether he has made a former statement (or, in cases in which opinion evidence is admissible, expressed a former opinion: Tay. s. 1445) relative to the subject-matter of the case and inconsistent with his present testimony, and if he "does not distinctly admit that he has made such state-

ment, proof may be given that he did in fact make it; but before such proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement" [28 & 29 Vict. c. 18, s. 4 (extending C.L. Pr. Act, 1854, s. 23, which was repealed by the St. L. Rev. Act, 1892)]. If the inconsistent statement is *in writing*, it need not (as was formerly the case, see Rules of the Judges, 1836, Tay. ss. 1449-50 *n*; Best, early editions, ss. 473-8; Gulson, ss. 379-85; Ros. Cr. Ev., 12th ed., 57; *post*, 504, 508), be shown to the witness, nor proved in the first instance, nor can the witness demand this before answering (*North Australian &c., Co.*, v. *Goldsborough Co.*, 1893, 2 Ch. 381, 385-6, *Sladden* v. *Sergeant*, 1 F. & F. 322); but where the intention is to *contradict* him by the writing his attention must first be called to the parts that are to be used for that purpose; provided always that it shall be competent for the judge, at any time during the trial, to require the production of the writing for his inspection, and he may thereupon make such use of it for the purpose of the trial as he shall think fit (28 & 29 Vict. c. 18, s. 5, extending C.L. Pr. Act, 1854, s. 24, which was repealed by St. L. Rev. Act, 1892; as to the old rule by which the cross-examining party had to produce the document as his own evidence and have it read, before founding any question to the witness upon it, a practice which was fatal to effective cross-examination, see *post*, 504, 508). This provsio applies equally before and after the witness is asked, and the judge may have it read before he answers (*R.* v. *Hughes*, cited Ros. Cr. Ev., 13th ed. 118). In civil cases, however, an unstamped document is not admissible for this purpose (*Interleaf Publishing Co.* v. *Phillips*, C. & E. 315; *Baker* v. *Dale*, 1 F. & F. 271; *ante* 476). The contradictory statement is, however, no evidence of its own truth (*Wright* v. *Beckett*, 1 M. & Rob. 414, *per* Ld. Denman; *Ewer* v. *Ambrose*, 3 B. & C. 746; *R.* v. *Dibble*, 72 J. P. Rep.. 498; *North Australian &c., Co.* v. *Goldsborough, sup.; cp. R.* v. *Williams*, 8 Cr. App. R. 133, where it was held that when a witness at the trial varied the date of an event from that given in her deposition, the jury may be directed that it was clear the event happened on one of the two dates and though they must not take the deposition as true, they could, on the whole of the evidence at the trial, decide between the two dates). Where, also, contradictory statements are proved, witnesses may be called to disprove them (*R.* v. *Whelan*, 14 Cox, 595), though not generally to prove previous consistent ones (*post*, 488). Where a witness had made a statement to the defendant's solicitor inconsistent with an affidavit filed by him on behalf of the plaintiff, an affidavit in reply by the solicitor setting out such statement was rejected on the ground that the evidence was only admissible on cross-examination to discredit the witness (*Hemming* v. *Maddick*, 7 Ch. App. 395). If the witness *admits* the contradictory statement, the document may still be proved, either at the instance of the parties or the jury, at any time before verdict is given (*R.* v. *Garner*, 54 J.P. 424, C.C. R.; Ros. N.P. 18th ed. 180; see, however, *North Australian &c., Co.* v. *Goldsborough Co., post*, 504, 508). And where the *writing is lost, destroyed, or filed in another Court*, secondary evidence will be admissible and may be interposed out of turn; so, also, proof may be given that it is in the hands of the opponent, who has had notice to produce it but has refused [Tay. ss. 1447-1448; Ros. N.P. 180]. *A party's own witness* may, by leave of the

judge, be similarly contradicted when in the opinion of the judge the witness proves *adverse* (*ante,* 471-3). Although, however, a witness, whether a party or not, may be cross-examined as to previous inconsistent statements made by *himself,* he may not be told what *third persons* have said or sworn and asked if he contradicts them (*North Australian &c., Co.* v. *Goldsborough Co., ante,* 479).

No Contradiction on Irrelevant Matters: Two Exceptions. A party may not, in general, impeach the credit of his opponent's witnesses by calling witnesses to contradict him on *irrelevant* matters, and his answers thereon will be conclusive. Thus, where an Irish witness, who gave his evidence through an interpreter, denied on cross-examination that he had spoken English to two persons in court, it was held that his answer could not be contradicted by calling those persons (*R.* v. *Burke,* 8 Cox, 44). And, on a petition to revoke a patent by reason of an act of prior user, a witness who proved such act having stated on cross-examination that there were also others, was not allowed to be contradicted, such other acts being irrelevant (*Re Haggenmacher's Patents,* 1898, 2 Ch. 280). So, though a female witness, who had denied on cross-examination that she was the kept-mistress of the party calling her, was allowed to be contradicted, yet it would have been otherwise had the question been whether she was a common prostitute, since the former fact went to show bias, while the latter was merely collateral (*Thomas* v. *David,* 7 C. & P. 350). Similarly, the denials of a prosecutrix in a case of rape as to her connection with men *other* than the prisoner cannot be contradicted (*ante,* 190; though *aliter* in affiliation cases when such connection may affect paternity, *ante,* 139); nor those of a defendant in an action for indecent assault as to improprieties with other females (*Tolman* v. *Johnstone,* 2 F. & F. 66). And a witness's denial on cross-examination, that he had ever expressed his opinion that the party calling him had no case, cannot be contradicted (*Elton* v. *Larkins,* 5 C. & P. 385, 390; *Lane* v. *Bryant, ante,* 72). Nor can a witness be contradicted by inadmissible documents; thus, where a female witness had made statements in chief as to her life abroad, and the opposite counsel cross-examined her from a document which he did not put in and which was inadmissible but which he suggested to the jury was a foreign police report detrimental to the witness's character, this course was held highly improper. What he should have done was to say to the witness, "Look at this paper: do you still adhere to your answer?" (*R.* v. *Seham Yousry,* 11 Cr. App. R. 13, 18; as to the admissibility of police reports, see *R.* v. *Labouchere, ante,* 133, 262). Where contradictory matter affecting credit, merely, has come to light since the trial, leave to cross-examine the witness thereon may be given on appeal, even though, had it been known, witnesses could not have been called *at the trial* to prove it (*R.* v. *Hamilton,* 13 Cr. App. R. 32; *qu.* whether such witnesses could be called *on appeal*).

In the case of *bias* or *previous conviction,* however, a witness may be contradicted, though these facts are irrelevant to the issue:

(1) *Bias or Partiality.* Facts showing that the witness is biased or partial in relation to the parties or the cause may be elicited on cross-examination; or, if denied, independently proved (*A.-G.* v. *Hitchcock,* 1 Ex.R. 91; Ros. N.P. 185, Steph. art. 130; Ros. Cr. Ev. 90; and see Tay ss. 1440-1444);

e.g. that a female witness is the kept mistress of the party calling her (*Thomas* v. *David, sup.*), or that the witness had suborned false witnesses against the opposite party (*Queen's Case,* 2 Brod. & Bing. pp. 311-15; *A.-G.* v. *Hitchcock, sup.*), or has had quarrels with, or expressed hostility towards, him (*R.* v. *Shaw,* 16 Cox, 503.) So, the fact that the witness has accepted a bribe to testify may, if denied, be proved (*A.-G.* v. *Hitchcock, sup.*), though a previous admission by the witness that he had been *offered* a bribe cannot (*id.*).

(2) *Previous Conviction.* A witness (other than a defendant in a criminal case, as to whom see *ante,* 454) may be cross-examined as to whether he has been convicted of any felony or misdemeanour; and if he either denies or does not admit the fact, or refuses to answer, the cross-examining party may prove such conviction [28 & 29 Vict. c. 18, s. 6 (extending C.L.P. Act, 1854, s. 25, repealed by St. L. Rev. Act, 1892)], together with the circumstances under which it took place (see *R.* v. *Baker,* 1895, 1 Q.B. 797, 800), although the fact of such conviction may itself be wholly irrelevant to the issue (*Ward* v. *Sinfield,* 49 L.J.C.P. 696). As to proof of the conviction for *this* purpose, and by certificate, merely, see *ante* 367; and generally, *post,* 557-9.

Reputation for Untruthfulness. Independent evidence may also be given that an adversary's witness (but not a party's own, *ante,* 472) bears such a general reputation for untruthfulness (or, perhaps, for moral turpitude generally: Tay. s. 1471) that he is unworthy of credit upon his oath. In theory, it seems, such evidence should relate to general reputation only, and not express the mere opinion of the impeaching witness; but in practice the question may be shortened thus :"From your knowledge of the witness, would you believe him on his oath?" (*R.* v. *Brown,* L.R. 1 C.C. 70; *Stebbings* v. *L. & N W. Ry.,* 63 J.P. 138). The impeaching witness cannot, in direct examination, give particular instances of the other's falsehood or dishonesty, since no man is supposed to come prepared to defend all the acts of his life. But, upon cross-examination he may be asked as to his means of knowledge of the other witness, his feelings of hostility towards him, or whether, in spite of bad character in other respects, the impeached witness has not preserved his reputation for truth; and the answers to these questions cannot be contradicted (Tay. s. 1471; Steph. art. 133). The impeaching witness should come from the locality of the other, and not be a stranger sent expressly to learn the latter's reputation (*Mawson* v. *Heartsink,* 4 Esp. 103).

Re-establishing Credit. Where a witness's *general reputation for veracity* has been attacked, his character may be sustained either, as we have seen, by cross-examining the impeaching witnesses as to their means of knowledge, grounds of opinion, hostile feelings towards the other, and the like; or by independent *general* evidence that the impeached witness is worthy of credit (Tay. s. 1473; Steph. art. 133). It seems doubtful how far independent evidence of the latter description is admissible where merely *particular discrediting facts* have been elicited in cross-examination or proved against a witness. Such evidence has, indeed, been received in reply to proof both of subornation (*Annesley* v. *Anglesea,* 17 How. St. Tr. 1348; see also *Durham* v. *Beaumont,* 1 Camp. 207); and of previous conviction of crime (*R.* v. *Clarke,* 2 Stark. 241); but in a later case, where the character of a witness had been impeached on cross-examination, general evidence of this kind, tendered in rebuttal, was rejected (*Doe* v. *Harris,* 7 C. & P. 330, *per* Coleridge, J.; the

American decisions are conflicting: Whart. s. 569). In any case, mere contradiction among witnesses will not let in such evidence (*Durham* v. *Beaumont, sup.*), nor, as will be seen, will proof of previous inconsistent statements let in, in general, contrary proof of previous consistent ones (*post* 488), although the inconsistent statements themselves may be disproved (*R.* v. *Whelan,* 14 Cox, 595). [Tay. ss. 1473-1476; Whart. ss. 569-571.]

Recrimination. An impeaching witness may, in his turn, be attacked either in cross-examination or by independent general evidence that he is unworthy of credit, but no further recrimination than this seems allowable. [Tay. s. 1473; *R.* v. *Whelan, sup.; ante,* 41].

RE-EXAMINATION. The right to re-examine exists only when there has been cross-examination, and must be confined to the explanation of matters arising thereon [*Queen's Case,* 2 B. & B. p. 297; *R.* v. *St. George,* 9 C. & P. 483; Tay. ss. 1494-1495; Ros. N.P. 186; Ros. Cr. Ev. 125-126]. Thus, if the witness has admitted making a former inconsistent statement, he may in re-examination explain his motives for so doing (*R.* v. *Woods,* 1 Craw. & D. 439; *Queen's Case,* 2 B. & P. p. 294). So, where on a criminal trial a witness in chief swore to a certain fact, and in cross-examination admitted he had not mentioned it in his sworn information, he was allowed on re-examination to state that he had included it in an earlier information (*R.* v. *Coll, post,* 494). And upon a charge of rape on a child, the prisoner's counsel having elicited on cross-examination of the child that the act had not caused her any pain, the prosecution was allowed to ask, in explanation, whether the prisoner had done the same to her on former occasions (*R.* v. *Chambers,* 3 Cox, 92). Even if inadmissible matters are introduced in cross-examination, the right to re-examine thereon remains (*Blewett* v. *Tregonning,* 3 A. & E. 554; but *cp.* *R.* v. *Cargill,* cited *ante,* 41). Matters not properly explanatory, or new facts, cannot, however, be introduced in this way. Thus, where a certain conversation had been admitted in cross-examination, distinct matters occurring in the same conversation were not allowed to be proved in re-examination (*Prince* v. *Samo, ante,* 236; *cp. Shaw* v. *Roberts,* 2 Stark. 455); and an accomplice, having admitted on cross-examination by the prisoner's counsel that he had committed two other robberies on the night in question, was not allowed to be asked on re-examination in whose company he was, in order to criminate the prisoner, the question not arising out of the cross-examination (*R.* v. *Fletcher,* 1 Lew. C.C. 111). New facts may, however, by leave of the judge, who usually puts the question himself, be elicited in re-examination; and the opponent may then cross-examine thereon. [*cp.* Evidence in Reply and Rebuttal, *ante,* 40-1].

EXAMINATION BY JUDGE AND JURY. RE-CALLING WITNESS. A judge may put all such questions to a witness as the interests of justice require (*R.* v. *Hopper,* 1915, 2 K.B. 431; *R.* v. *Remnant,* Rus & Ry. 136; *R.* v. *Watson,* 6 C. & P. 653; *R.* v. *Jameson,* 1896, Times, July 24; Best, s. 86); and these questions may be based, not only on matters arising in the case, but on his own local or scientific knowledge (*R.* v. *Antrim,* 1895, 2 I.R. 603; *cp. Shortt* v. *Robinson,* 63 J.P. 295). So, the jury may ask admissible, though not inadmissible, questions (*R.* v. *Lillyman,* 1896, 2 Q. B. 167, 177).

It has also been held that the judge may, for the discovery of truth, both in civil and criminal cases, call and examine any witness himself, especially where the jury desire it; and though such witnesses may not, as of right, be cross-examined by the parties, yet where material evidence is given against either, leave should be given to that party to cross-examine (*Coulson* v. *Disborough,* 1894, 2 Q.B. 316, C.A.; *R.* v. *Cliburn,* 62 J.P. 232; *The Cardiff,* 78 L.J.P. 110; *R.* v. *Davis,* 149 C.C.C. Sess. Pap. 167, 175, *per* Grantham, J.; *R.* v. *Simmons,* and *R.* v. *Bull, ante,* 473). More recently, however, it was held that such witnesses could, in a civil case, only be called with the consent of all parties, and *Coulson* v. *Disborough, sup.,* was disapproved (*Re Enoch,* 1910, 1 K.B. 327 C.A.). In addition to the above, a judge himself may, in criminal cases, call witnesses, after a conviction, in aggravation or mitigation of punishment (*R.* v. *Bright,* 1916, 2 K.B. 441); and such evidence is material and punishable if false (*R.* v. *Wheeler,* 1917, 1 K.B. 283, cited *ante,* 453).

So, the judge may at any stage of the trial, either at his own instance or that of a party, recall a witness (including the prisoner; *R.* v. *Seigley,* 6 Cr. App. R. 106), for further examination or cross-examination; though, after a party's case is closed, this will only be allowed under special circumstances (Tay. s. 1477; Ros. Cr. Ev. 120; *ante,* 41). Where, after the summing-up, a witness is allowed to be re-called and interrogated, the opponent has a right to cross-examine and give evidence in rebuttal (*R.* v. *Howarth,* 13 Cr. App. R. 99).

NUMBER OF WITNESSES. CORROBORATION. As a general rule, Courts may act on the testimony of a single witness, even though uncorroborated; or upon duly proved documentary evidence without such testimony at all (*Wright* v. *Tatham,* 5 C. & F. 592-3; Best, s. 596). And where such testimony is unimpeached they should act on it (*Morrow* v. *M.,* 1914, 2 I.R. 183), and need not leave its credit to the jury (*Davis* v. *Hardy,* 2 B. & C. 225). But whenever there are circumstances of suspicion, or the testimony of a witness is challenged by cross-examination or otherwise, corroboration thereof is allowed; and in the several cases mentioned below corroboration is required either by law or well established rule of practice. On the other hand, the Courts have inherent power to check an undue multiplicity of witnesses (Best, ss. 47-8; Wigmore, s. 1906), as well as to prevent their oppression in various respects (*ante,* 447-8, 478).

History. Under the Roman and Canon Law, the effect of evidence was governed strictly by the numerical system. Testimony was counted not weighed, one oath being in no case sufficient; and since circumstantial evidence was regarded as inferior to direct, three presumptions were only deemed equivalent to two oaths (Wills, Circ. Ev. 6th ed. 34). Biblical authority is to the same effect. So, in Anglo-Saxon and Norman times, proof was, according to the importance of the case, made six-handed, twelve-handed, &c.; he who had the greater number of witnesses prevailing. Attempts were not lacking to import this system into the common law; but though various statutes were passed requiring two or more witnesses in particular cases the attempts failed, and from about the middle of the sixteenth century onward the present rule began to be more or less effectively recognised (1551, *Ringer* v. *Fogossa,* Plowd. 1,

8, 12; 1605, *Articuli Cleri*, 2 How. St. Tr. 131 143-4; 1662, *R.* v. *Tong*, 6 *id.* 225; 1800, *R.* v. *Rusby*, 2 Peake N.P.C. p. 193). [Wigmore, s. 2032; Thayer, Pr. Tr. Ev. 179; *id.* Cas. Ev., 2nd ed., 1067-8; Best, ss. 66, 69].

Exceptions. On the general rule that a single witness, unconfirmed, is sufficient, the following exceptions have been engrafted either by statute or by rule of practice at common law, there being this distinction that when corroboration is required by statute and is not forthcoming, the case must be withdrawn from the jury, whereas when it is merely required by the common law, the case must be left to the jury (*R.* v. *Baskerville*, 1916, 2 K.B. 658; *R.* v. *Blatherwick*, 6 Cr. App. R. 281). (1) **Treason.** In trials for high treason, or misprision of treason (other than compassing the Sovereign's death), two witnesses are essential, either both to the same overt act, or one to one, and another to another overt act of the same treason, unless the accused shall willingly without violence, confess the same [Treason Act, 1695, ss. 2, 4, extended to Ireland by 1 and 2 Geo. IV. c. 24; Tay. ss. 952-958; Best, ss. 619-20; Steph. art. 122]. (2) **Perjury.** A person shall not be liable to be convicted of any offence against this Act, or of any offence declared by any other Act to be perjury or subornation of perjury, or to be punishable as perjury, solely upon the evidence of one witness as to the falsity of any statement alleged to be false [Perjury Act, 1911, s. 13; the common law rule was to the same effect, calling for the oaths of two opposing witnesses, or of one corroborated by some material and independent circumstance (Tay. ss. 959-963; Best, ss. 603-10), except where the perjury was a mere contradiction of his own prior testimony (*R.* v. *Knill*, 5 B. & Ald. 929 *n*)]. (3) **Personation at Elections** must be proved by the testimony of two credible witnesses (6 & 7 Vict. c. 18, s. 88; 35 and 36 Vict. c. 33. ss. 24, 37). So, in cases of (4) **Breach of Promise,** the testimony of the plaintiff must be corroborated by "some other material evidence in support of such promise" (32 & 33 Vict. c. 68, s. 2; *post* 489-90); and (5) in **Bastardy** that of the mother must be corroborated "in some material particular by other testimony to the satisfaction of the justices" (8 & 9 Vict. c. 10, s. 6; 35 & 36 Vict. c. 65, s. 4; Tay. s. 964; *post* 490). And a similar rule applies to (6) **Orders of removal** (39 & 40 Vict. c. 61, s. 34; *R.* v. *Abergavenny Union*, 6 Q.B.D. 31); to (7) offences under the **Criminal Law Amendment Act,** 1885, ss. 2-4; and (8) to offences referred to in the **Children Act,** 1908, s. 30, where the proof of such offences rests on the unsworn testimony of children, a provision which is now, by the Cr. Justice Administration Act, 1914, s. 28 (2), extended generally to all offences on the trial of which such testimony is tendered. The judge should therefore direct the jury not to convict unless there is corroboration by other material evidence implicating the accused, and in default of such direction, or of other ample and clear evidence, the conviction will be quashed (*R.* v. *Davies*, 85 L.J.K.B. 208). (9) It is also a rule of *practice*, as distinguished from one of law, that Courts will not act upon the uncorroborated testimony of **Claimants to the property of deceased persons,** unless convinced that such testimony is true [*Rawlinson* v. *Scholes*, 79 L.T. 350, following *Re Hodgson, Beckett* v. *Ramsdale*, 31 Ch.D. 177, 183, and disapproving the more stringent statement of the rule in *Finch* v. *F.*, 23 *id.* 267; see also *Re Garnett*, 31 *id.* 1; *Re Harnett*, 17 L.R.Ir. 543; *Mahalm* v. *M'Cullagh*, 27 *id.* 431, affd. 29 *id.* 496; *contra*, 27 Law Mag. (1901) 51.] Moreover (10) under the **Motor Car**

Act, 1903, s. 9, a defendant may not be convicted merely on the *opinion of one witness* as to the rate of speed. But testimony of a constable as to the time marked by his watch relates to fact and not opinion, and one such witness is sufficient (*Plancq.* v. *Marks, ante,* 162-3, 171). (11) **Accomplices.** Although the uncorroborated evidence of an accomplice is strictly admissible, it is a rule of practice, though not of law, that the judge should warn the jury that it is dangerous to convict on such evidence alone, and in his discretion he may advise them not to do so, although he should point out that they have this right. The jury may disregard the caution and convict in spite of it; but (1) if no caution has been given; or (2) if, though a caution were given, the Court, on appeal, consider that on the facts, the verdict is unreasonable, or cannot be supported, the conviction will be quashed [*R.* v. *Baskerville,* 1916, 2 K.B. 658, reviewing all the cases, some of which are conflicting; *R.* v. *Tate,* 1908, 2 K.B. 680, qualifying *Re Meunier,* 1894, 2 Q.B. 415, 418; for the old law respecting *approvers,* see *R.* v. *Rudd,* Cowp. 331, 335.] As to the nature and extent of the corroboration required, it is now settled that, whether required by Statute or Common Law, (i) there must be corroboration both as to the *commission* of the crime (*i.e* of some one or more, but not of all, the material circumstances, otherwise the evidence of the accomplice would be superfluous), and the *connection of the accused* therewith (*R.* v. *Baskerville, sup.,* following *R.* v. *Stubbs,* 25 L.J.M.C. 16); (ii) that where there are several prisoners there must be corroboration as to all, and the jury should be advised to acquit those against whom there is none (*id.*); (iii) that the corroboration must be by some evidence other than that of another accomplice (*R.* v. *Baskerville, sup.; R.* v *Noakes,* 5 C. & P. 326; *R.* v. *Gay,* 2 Cr. App. R. 327). Testimony by the wife of an accomplice who has himself given evidence, is admissible, but requires a caution similar to that needed in the case of the accomplice; while if the accomplice has not himself given evidence, the testimony of his wife against her husband's co-defendants does not require any caution on the present ground, but is to be treated as that of an independent witness (*R.* v. *Payne,* 8 Cr. App. R. 171, and *R* v. *Willis,* 1916, 1 K.B. 933, both explaining *R.* v. *Neal,* 7 C. & P. 168, *contra*). An accomplice who is separately indicted, or who, if jointly indicted, has either pleaded guilty, been acquitted, or had his trial postponed, is a competent witness *against* his fellows; but one who is jointly indicted and jointly tried is, as we have seen, altogether incompetent for the prosecution (*ante,* 453, 457). In the latter case, therefore, it is usual, when the accomplice is to be called for the prosecution, to apply, before opening the case, to have him acquitted. A prisoner jointly indicted and jointly tried, used also to be incompetent *for* his co-prisoners (*R.* v. *Payne,* L.R. 1 C.C. 349; *R.* v. *Bradlaugh,* 15 Cox, 217; Ros. Cr. Ev., 12th ed., 514); but see now, *ante,* 453, 457. The rule requiring the corroboration of accomplices does not apply to two classes of accomplices: (*a*) *Informers—i.e.* persons who have joined in, or even provoked, the crime as police-spies (*R.* v. *Bickley,* 73 J.P. Rep. 239; or the police, who have assented thereto, *R.* v. *Heuser,* 6 Cr. App. R. 76); and (*b*) *Co-defendants, where the offence is of a technical rather than a moral* character, *e.g.* non-repair of a highway (Tay. s. 968), presence as spectators at a prize-fight (*R.* v. *Coney,* 8 Q.B.D. 534), or actions for penalties (*M'Clory* v. *Wright,* 10 Ir. C.L.R. 514; *Magee* v. *Mark,* 11 Ir. C.L.R. 449). Nor does

it apply where the witness is not an accomplice in the particular crime with which the prisoner is charged, *e.g.* in the case of thief and receiver (*R.* v. *Haslam,* 1 Lea, C.C. 418); suborner and perjurer (*R.* v. *Applegate,* 28 L.Jo. 759); or living on the earnings of prostitution, where the female witness is guilty of the offence of solicitation, though here, on general grounds (see *infra*), the judge would be justified in warning the jury against accepting, without corroboration, the evidence of a female leading such a life (*R.* v. *King,* 111 L.T. 80). As to charges of incest, where the female's consent makes her an accomplice, and the evidence admissible or sufficient for this purpose, see *R.* v. *Bloodworth,* 9 Cr. App. R. 80; *R.* v *Dimes,* 7 *id.* 43; *R.* v. *Stone,* 6 *id.* 89, and *R.* v. *Brown, id.* 24.

Other Cases. In *defended* divorce cases, the Court may act on the uncorroborated testimony of the parties if satisfied of its truth [*Curtis* v. *C.,* 21 T.L.R. 676; so, in Ireland, in a husband's action for *crim. con.,* the Court has acted on the unsupported testimony of the wife in proof of her own adultery though denied on oath by the defendant, *Morrow* v. *M.,* 1914, 2 I.R. 183; but in *Joseph* v. *J.,* 84 L.J.P. 104, the Div. Ct., in a desertion case, refused to act upon the uncorroborated testimony of the wife as to resumption of cohabitation, where this fact was denied by the husband]. And even in *undefended* cases, corroboration, though always advisable, is only essential where there are circumstances of suspicion (*ante,* 233; *Ginger* v. *G.,* L.R. 1 P. & D. 37; *Weinberg* v. *W.,* 27 T.L.R. 9; *Riches* v. *R.,* 35 *id.* 141; *Dixon* v. *D.,* 28 L. Jo. 322, not following *Harris* v. *H.,* 39 L.J. P. & D. 86, *contra*); and the same rule applies where the case is sought to be proved not by the direct testimony of the parties, but by their admissions or confessions out of Court (*ante,* 233-4). Where the parties are poor the corroborative evidence may be given by affidavit (*Gills* v. *G.,* 1898, Times, Nov. 8; *Pollastrini* v. *P.,* 1900, *id.* Jan. 17; *post,* 497). So, an *unwritten retainer,* denied on oath by the client, was held not to be proved by an uncorroborated oath of the solicitor (*Bird* v. *Harris,* 43 L.T. 434; *cp. Crossley* v *Crowther,* 9 Hare, 328; and *Beddy* v. *Smith,* 8 Ir. Eq. R. 667). Apart, also, from any specific rule of law, or practice, the judge should, in general, caution the jury of the danger of acting on the uncorroborated testimony of very *young children* (*R.* v. *Pitts,* 8 Cr. App. R. 126; *R.* v. *Dossi,* 13 *id.* 158), of the *prosecutrix* on sexual (*R.* v. *Graham,* 4 *id.* 218), or abortion (*R.* v. *Bickley,* 73 J.P. 239) charges, and of *disreputable witnesses* (*R.* v. *Brown,* 6 *id.* 24; *R.* v. *Ellsom,* 7 *id.* 4; *R.* v. *Greenway,* 10 *id.* 241; *R.* v. *King, sup*), and a conviction may be set aside if the jury have not been so warned (*R.* v. *Brown, sup.*).

Facts Admissible in Corroboration. Facts which tend to render more probable the truth of a witness's testimony on any material point, are admissible in corroboration thereof, although otherwise irrelevant to the issue, and although happening before the date of the fact to be corroborated (*Wilcox* v. *Gotfrey,* 26 L.T.N.S. 481; *Cole* v. *Manning,* 2 Q.B.D. 611). But facts which are equally consistent with the truth of such testimony, or the reverse, are inadmissible for this purpose (*Finch* v. *F.,* 23 Ch. D. 267, 272; *Wiedemann* v. *Walpole, inf.; Harries* v. *Thomas,* 86 L.J.K.B. 812; *R.* v. *Rogers,* 10 Cr. App. R. 276, 278; *R.* v. *Watson,* 8 *id.* 249; *R.* v. *Monks, ante,* 259). The question of the admissibility of such evidence is one of law for the judge, and not one of fact for the jury (*Bessela* v. *Stern,* 2 C.P.D. p. 267: *Wiedemann* v. *Walpole,* 1891, 2 Q.B. pp. 537, 539; *R.* v. *Christie,* 1914, A.C. 545;

R. v. *Bovy*, 12 Cr. App. R. 15; *R.* v. *Feigenbaum*, 1919, 1 K.B. 431; the *semble* to the contrary in *R.* v. *Gray*, 68 J.P. Rep, 327 C.C.R., *per* Ld. Alverstone, L.C.J., apparently acquiesced in by four other judges, and the doubt in *Hensen* v. *Dixon*, 96 L.T. 32, seem unsupportable).

Similar Facts. Facts similar to the main fact, although inadmissible under chaps vi., xi.-xii., *ante*, may be received for the present purpose [*R.* v. *Kennaway*, 1917, 1 K.B. 25; *R.* v. *Chitson*, 1909, 2 K.B. 945; *Perkins* v. *Jeffery*, 1915, 2 K.B. 702; *R.* v. *Pearce*, Pea. 75; *R.* v. *Barnard*, 19 How. St. Tr. 825-6; *R.* v. *Egerton*, R. & R. 375; though see *Thompson* v. *R.*, 1918, A.C. 221, 233, *per* Lord Sumner.]

Non-denial of Charge. Non-denial by a defendant of an incriminating statement made in his presence is evidence against him, not only as an admission by conduct (*ante*, 255-7), but also to corroborate the testimony of an accomplice (*R.* v. *Feigenbaum*, 1919, 1 K.B. 431).

Self-corroboration. Witness's Previous Conduct and Statements. It is often said that a witness cannot corroborate himself (*R.* v. *Christie*, 1914, A.C. 545, 557; *Owen* v. *Moberly*, 64 J.P. 88; *Hodds* v. *Palfrey*, 56 Sol. Jo. 172); and, where corroboration is legally required, some material evidence, independent of the witness's own testimony, is undoubtedly necessary. But where a person's conduct or statements, whether he is called as a witness or not, are evidence *per se, e.g.*, as part of the *res gesta*, or as relevant under chaps. viii.-x., *ante*, they may, of course, be used either to confirm or contradict his subsequent testimony in the box, and in this sense a witness may corroborate himself (see *Milne* v. *Leisler*, *ante*, 74; *R.* v. *Fowkes*, *ante*, 80; *O'Gorman* v. *O'G.*, *post*, 491). And a witness's conduct, even when not otherwise relevant, is also sometimes admissible in corroboration of his own testimony, *e.g.*, the fact that an expert witness has acted on his opinion (*Stephenson* v. *Tyne Commrs.*, *ante*, 397). With regard, however, to *statements* made out of Court, but not admissible *per se*, special considerations apply. Thus, formerly, the fact that a witness had made a previous statement similar to his testimony in Court could always be proved to confirm his testimony [*Lutterell* v. *Reynell*, 1670, 1 Mod. 282, 283; *Freind's Case*, 1696, 13 How. St. Tr. 31-2]. But afterwards the rule was changed, and such evidence is now generally inadmissible either on direct examination of the witness himself, to confirm his testimony, or on re-examination to re-establish his credit when impeached by proof of a previous contradictory statement, or when proved from the mouths of other witnesses [*R.* v. *Parker* (1783), 3 Doug. 242; *Coole* v. *Braham*, 18 L.J. Ex. 105, 106; *R.* v. *Coyle*, 7 Cox, 74; *R.* v. *Coll*, 24 L.R. Ir. 522; *R.* v *Christie*, 1914, A.C. 545, 557, 567-8; *Jones* v. *S. E. Ry.*, 87 L.J.K.B. 775; *Flanaghan* v *Fahy*, 1918, 2 I.R. 361, 381-2, C.A., where this statement of the rule was approved]

Exceptions. Such statements are, however, receivable in the cases mentioned below, not to prove the *truth* of the facts asserted, but merely to show that the witness is consistent with himself:—(1) where the witness is charged with having *recently fabricated* the story, *e.g.* from some motive of interest or friendship, it may be shown both by the witness himself and the person to whom it was addressed, that he had made a similar statement before such motive existed (*R* v. *Coll*, *R.* v. *Coyle*, *sup.*; *R.* v. *Benjamin*, 8 Cr. App. R. 146; *Flanaghan* v. *Fahy*, *sup.*). (2) On charges of *rape* and similar offences against females, the fact that the prosecutrix made a complaint shortly after the outrage, together with the particulars of the complaint, are

admissible to confirm her testimony and disprove consent (see fully, *ante*, 113-15). The case of complaints is, as we have seen, peculiar. When the old rule of allowing proof of similar statements in all cases was changed, the ancient practice in cases of rape survived as an exception to the altered rule [ante, 114].

EXAMPLES.

Admissible. [GENERAL EVIDENCE.] *Inadmissible.*

Breach of Promise. A. sues B. for breach of promise of marriage. Testimony by C.: (1) that B. said to C. he would marry A. and give her anything, but C. must not expose him; and (2) that C. over heard A. say to B., "You have always promised to marry me, and now you don't keep your word," to which B. made no answer, but promised to give her money to go away;—held admissible, as corroborating A.'s testimony to the promise (*Bessela* v. *Stern*, 2 C.P.D. 265).—So, the fact that B. in the presence of C., a witness, said to A., who was attending B. in an illness, "Who has a better right to take care of me than my wife?" (*Hickey* v. *Campion*, 20 W.R. 752). And so, as to a letter written by B. to A., "if I were well, would you marry me?" (*Hensen* v. *Dixon*, 96 L.T. 32).

Divorce. A. petitions for divorce from B., his wife, to whom he had been married less than two years, on the ground of her adultery with C. It was admitted that B. had lived with C. prior to her marriage. Both B. and C. deny the adultery on oath. *Held*, that a letter from C. to B., written after the alleged adultery, but before any accusation thereof was made, in which C. wrote. "Just think, it is 2 years since I held you in my arms,"—was admissible in corroboration of their sworn denial [*O'Gorman* v. *O'G.*, 56 Sol. Jo. 634. The head-note to this case, which was reported by Mr. Tregarthen, author of 'The Law of Hearsay Evidence' (1915) stated that the letter was received to prove the *truth* of its assertion. This is not so; statements contradicting or corroborating witnesses are original evidence and not hearsay, and are no proof of their truth. (See *Milne* v. *Leisler*, *ante*, 74; and *cp. ante*, 74, 218, 480, 488), nor did the Court decide that they were. Apart from this, the letter would appear to have been admissible *per se*, as part of conduct and so as presumptive evidence of the innocent character of the relationship (*ante*, 77-8)].

Bastardy. The question being whether A. was the father of B.'s illegitimate child, as sworn by B.;— acts of familiarity, proved by B.'s parents, between A. and B. prior to the time when the child could have been begotten, are admissible in corroboration (*Cole* v. *Manning*, 2 Q.B.D. 611). So, evidence that A. and B. had been seen

Breach of Promise. A., the former mistress of B., sues him for breach of promise. The fact that both A. and the clergyman of A.'s parish wrote letters to B., alleging that B. had promised to marry A., to which B. made no reply, held inadmissible either to prove, or to corroborate A.'s testimony as to, the promise (*Wiedemann* v. *Walpole*, 1891, 2 Q.B. 534; *aliter*, if such letters had formed part of a series, or if the allegation had been made orally in B.'s presence, *ante*, 259). So, letters by B. to A. expressing affection and admiration for her, and using terms of endearment, but containing no reference to marriage, are not admissible either as proof or corroboration, being equally consistent with B. having no intention to marry A. (*Kempshall* v. *Holland*, and *May* v. *Kelly*, cited *ante*, 119). So, the fact that A. was in possession of B.'s signet ring, which she alleged B. had given her, but which B. stated she had found and would not return, is inadmissible, not being more consistent with a promise of marriage than with the continuance of their former relationship, and not being a usual gift under the circumstances (*Wiedemann* v. *Walpole*, *sup.*) The fact that B. had "kept company" with A.; told her she "would make a good wife for some man"; and did not deny to a third party that he had given her reason to believe he was going to marry her,—Held, no corroboration of the promise (*Cleeland* v. *McCune*, 42 Ir.L.T.R. 201). So, the fact that B. did not go into the box to deny the promise is not admissible [*Wiedemann* v. *Walpole*, *sup.*, *per* Kay, L.J., who considered that the observations *contra* of Bramwell, J., in *Wilcox* v. *Gotfrey*, 26 L.T. N.S. 328 (reversed on other grounds, *id.* 481), were misreported; *cp. Blake* v. *B.*, 1898, Times, Oct. 26]. *Failure to give evidence* is also no corroboration in criminal cases [(Cr. Ev. Act, 1898, s. 1; *ante*, 44; *Harries* v. *Thomas*, 86 L.J.K.B. 812; *R.* v. *Blatherwick*, 6 Cr. App. R. 281, 283; *R.* v. *Anker*, 33 L.Jo. 184); *contra* in Ireland in corroboration of an accomplice under the Bribery Act (*Whaley* v. *Masserene*, 8 Ir. Jur. N.S. 281, 287)].

A. sues B. for breach of promise, and testifies that B. had verbally promised to marry her. In corroboration she swears that B. also wrote her letters to the same effect which he took away from her when

Admissible.

together on evenings in the lanes, and that after the birth A. asked B. if she was going to swear the child (*Harvey* v. *Anning*, 87 L.T. 687; *cp. Hill* v. *Denmark*, 59 J.P. 345). So, A.'s kissing B., though not merely walking out with her at night, is some corroboration (*Sligo* v. *Curran*, 33 Ir. L.T.R. 181, *per Gibson, J.*, who remarked that the corroboration required in such cases, which differed from that in breaches of promise, was evidence sufficient to establish moral probability of illicit intercourse). So, A.'s paying B. maintenance money (*R.* v. *Berry*, 28 L.J. M.C. 86; *Hodges* v. *Bennett*, 5 H. & N. 625); or even lending her money several times without taking any memo, or making any entry (*Lawrence* v. *Ingmire*, 20 L.T. 391), is corroboration. And also, where a witness said to A., "B. says it is yours, and you must keep it"; to which A. replied, "I will not; I would rather go to America" (*R.* v. *Pearcy*, 17 Q.B. 902). [*Cp.* 63 J.P. 674.] So, the fact that A. had previously been charged with the unlawful carnal knowledge of B. and when before the magistrate had stated that B. was a fast girl which caused her then condition, and that on his trial he had not repeated that suggestion;—Held admissible as conduct by A. which was corroborative of B.'s testimony (*Mash* v. *Darley*, 1914, 3 K.B. 1226 C.A.) [See an article on corroboration in Bastardy, by Judge Atkinson, 50 Law Mag. 178 (1915)].

Contents of Wills. As to evidence admissible to corroborate testimony of the Contents of a Will, see *Sugden* v. *St. Leonards*, *ante*, 331.

Carnal Knowledge. A. is charged with attempting carnally to know B., a girl of eight. B. gives unsworn testimony that A. assaulted her in his bed-room, and barred the door with the towel-horse. B.'s mother having also testified that, on her charging A. with indecency towards B. and with the towel-horse incident, A. had denied the charge and stated that he used the towel-horse to prevent the door blowing open;—Held, A.'s reply was admissible to corroborate B.'s testimony (*R.* v. *Gray*, 68 J.P. Rep. 327, C.C.R.). For proof of similar facts in such cases, see *R.* v. *Shellaker* and *R.* v. *Chitson*, *inf.* 493-4.

Inadmissible.

she was ill. The letters not being produced by B. on notice, A. swears to their contents as secondary evidence. Held, no corroboration, there being no proof thereof, other than A.'s own testimony (*Owen* v. *Moberly*, 64 J.P. 88; *Hodds* v. *Palfrey*, 56 Sol. Jo. 172).

Bastardy. The question being whether A. was the father of B.'s child,—B. swears that, while looking after A.'s children in the absence of A.'s wife, she had at A.'s request changed her bedroom with the children to a better one, next to A.'s, without them, from which she went to A.'s room every night. On cross-examination she admits A.'s wife knew of the change, but denies that the latter had offered her the better room. A. on oath, denies both the intimacy and that the change was made at his request; and there was a conflict as to whether any of the children slept in the new room. Held, that the change of rooms, especially as B., on her own story, went to A.'s room and not he to her's, was no material corroboration of B.'s testimony: (*Reffel* v. *Morton*, 70 J.P. Rep. 347; *cp. Thomas* v. *Jones*, 36 T.L.R. 872, C.A.).

Mere *opportunity* for misconduct is not corroboration; it must be such as shows a *probability* of that result. Secret walks by night, or secret meetings by day, between equals, are not corroborative of misconduct, though they might be between unequals. So, the parties being alone in a barn, in pursuance of their employment as farm hands, is not corroboration (*Burbury* v. *Jackson*, 1917, 1 K.B. 16).

Policy. Object of deposit. The question being whether A. held a policy of insurance on B.'s life as security for a past debt or for future advances;—the fact that B. paid the premiums on the policy till his death, is inadmissible as corroboration, being consistent with either view (*Mahalm* v. *M'Cullagh*, 27 L.R.I. 431).

Carnal Knowledge, &c. In *R.* v. *Gray*, *opposite*, it having been proved that B. had a venereal disease, the fact that A. had refused to allow himself to be medically examined, held not admissible in corroboration of B.'s evidence.

A., being charged by the police with an unnatural offence, remained silent,—this was held no corroboration [*Re* v. *Tate*, 1908, 2 K.B. 680. So, if A. had said. "I say nothing"; though *aliter* if he said, "I have nothing to say" (*R.* v. *Martin*, 5 Cr. App. R. 4.). See fully as to statements in a party's presence, *ante* 255-61].

Agency. In an action by A., a pilot, against B., a boat owner, for services rendered in raising a sunken boat on the alleged instructions of B.;—evidence that the sinking of the boat occurred through the negligence of A., held inadmissible to

Admissible. *Inadmissible.*

corroborate B.'s denial of such instructions, unless at the time of such alleged instructions B. was aware of A.'s negligence (*Speeding* v. *Young*, 33 L.J.C.P. 286, *per* Willes, J. If B. had been aware of the negligence, it would have rendered his denial more probable).

Similar Facts to Corroborate the Main Fact, or a Party's Identity.

Agency. The question being whether A. had a general authority to accept bills for B.;—the fact that B. had admitted his liability on a previous bill accepted in his name by A. is admissible in confirmation, though not in proof, of such authority (*Llewellyn* v. *Winckworth*, 13 M. & W. 598; *Morris* v. *Bethell*, L.R. 5 C.P. 47; *ante*, 97).

Course of Business. So, proof of particular instances is admissible to confirm testimony as to a general course of business (*Bourne* v. *Gatliff*, 11 C. & F. 45; *ante*, 106).

Divorce. A. petitions for divorce from B., her husband, on grounds of adultery and cruelty. A certified copy of a separation order previously made between A. and B. by a magistrate, on the ground of B.'s persistent cruelty to A., (though not the depositions on which it was founded),—held admissible in corroboration of A.'s testimony and in the exceptional circumstances, sufficient (*Judd* v. *J.*, 1907, P. 241).

Libel. A. sues B. for libel. To prove that the libel was written by B., the printer having sworn that he had received the document from and returned it to B., and notice to produce having been given, other distinct libels written by B. on the same subject held admissible to confirm the printer's testimony and show B. to be the author of the libel charged (*R.* v. *Pearce*, Pea. R. 75, *per* Ld. Kenyon).

Threats. A. is charged with sending a threatening letter to B. Proof that a second letter (let its contents be what they might) was afterwards sent by A. to B.,—held admissible, as supporting the evidence as to the first letter, and showing that its writer or sender was A. (*R.* v. *Barnard*, 19 How. St. Tr. at 825-6).

Abortion. A. is charged with the manslaughter of B.'s wife. B. (an accomplice) swears he called on A. and arranged for the operation, telling her C. gave him her address. Evidence by C. that she gave A.'s name to B., saying A. had done a similar act for her;—Held, admissible to show that that part of B.'s testimony was true (*R.* v. *Lovegrove*, 15 Cr. App. R. 50).

Robbery. A. is charged with robbing B. of a coat, by threatening to accuse him

Procuring. A. is charged under the Cr. L. Amendment Act, 1885, s. 2, with attempting to procure B. to become a common prostitute. There was no corroboration of B.'s

Admissible.

of a crime. B. having sworn to these facts and stated that B. told him he would pawn the coat and return B. the ticket, further evidence by B. that next day A. returned and attempted to obtain other property from him by a similar threat;—Held admissible to confirm the truth of B.'s testimony as to the first offence and its nature [*R.* v. *Egerton*, Russ. & Ry. 375; affd. by 12 Judges. In *R.* v. *Ellis*, 6 B. and C. p. 148, Holroyd, J., said the judges had considered the evidence admissible "to show that A. was guilty of the former transaction." As to whether the *subsequent* attempt was receivable as substantive evidence of the crime, and not merely as corroborative of B.'s testimony, *cp. previous* attempts,, *ante*, 141; similar facts, *ante*, 163-4; and cases cited *inf.* 493-4. In *R.* v. *Egerton*, *sup.*, there was other corroboration both of the first offence (the pawnticket being found on A.) and of the second attempt].

Forgery. A. is charged with forging the will of X. Two witnesses, B. and C. (accomplices) swore that B. who acted as executor, did so because A. refused, telling them that he (A.) had put through a similar will 18 years earlier which might be traced to him. Held, that A., who denied this, could be cross-examined as to the earlier will, which was produced and bore handwriting similar to A.'s and was not protected by the Cr. Ev. Act 1898, s. 1 (f). [*R.* v. *Kennaway*, 1917. 1 K.B. 25, The Court remarked that merely to elicit that A. had committed a similar forgery 18 years before would have been inadmissible, but when connected as being the reason given by A. for declining to act as exor., it tended to corroborate the truth of the accomplices' testimony. "For if A. did forge the earlier will, the probability is that he told them so—and gave that as the reason of his refusal to be exor. No doubt, proof of his commission of the earlier crime would not conclusively show that he *told* them he had committed it, but it would support their statement that he did." This ruling is criticised in 43 L.Q. Rev. 53, 60, but it seems correct].

Indecent Exposure. A. is charged with indecent exposure with intent to insult B. on July 16, 1914. After testifying to the fact, B. swore that A. had done the same thing two months earlier. A., in the box, was asked as to, but denied, both acts. To rebut this denial B. was recalled and gave detailed proof of the May incident. Held, that the evidence of both B. and A. was admissible and relevant to show that B. was not mistaken in her identification; and that the July act was wilful and not accidental, and done with intent to insult (*Perkins* v. *Jeffery*, 1915. 2 K.B. 702).

Inadmissible.

testimony as to this charge but she also swore that A. had ravished her and the medical evidence confirmed that fact. Held, this was no corroboration of the former charge (*R.* v. *Goldstein*, 11 Cr. App. R. 27).

False Pretences. A. is charged with obtaining money from B. (a branch firm), by falsely pretending he was authorised by B.'s head office to examine B.'s stock and obtain cash for expenses. Defence, *alibi*. Evidence that, a week later, A. obtained money from C. at a neighbouring town by a precisely similar representation and using the same name;—Held admissible as corroborating B.'s evidence as to A.'s identity [*R.* v. *Burlinson*, 11 Cr. App. R. 39. The handwriting in both cases being very similar and there being some admissions by A. both as to C.'s case and the justice of the verdict, the Court dismissed the appeal without deciding as to the validity of the evidence as to C.].

Indecent Exposure. In *Perkins* v. *Jeffery*, *opposite*, further evidence was tendered to show that on various (undated) occasions, A. had also exposed himself to *other females* about the same place and hour. Held, that such evidence was not admissible until the defence of accident, mistake, or absence of intent to insult, was definitely put forward (which was so here); and that the date of the other offences was sufficiently proximate to show a systematic course of conduct.

Admissible.

Inadmissible.

Indecent Assault (Identity). A. is charged with indecently assaulting boys on March 16th. The boys having proved the act, stated further that A. had made an appointment to repeat it, at the same place on March 19th. On the latter date A. was arrested while talking to the boys. *On him* were found powder puffs, and later, *at his lodgings*, indecent photos of naked boys. A.'s defence was mistaken identity and *alibi*: Held both these articles were admissible (1) By the trial judge, the Ld. Chancellor and Ld. Parmoor as showing the same abnormal propensities in both men and so as corroborating the boys' testimony; (2) By the C.A. as implements of the crime and so as evidence of identity, like burglary or coining tools on those charges; (3) By Ld. Atkinson, as showing A.'s intent on the 19th and so as identifying him with the 16th; (4) By Lds. Sumner, Parmoor and Parker as evidence of identity, because the first act *plus* the appointment to repeat it, showed the abnormal propensity of both men. *Aliter* if there had been no appointment to repeat, as then only an isolated act, and not a propensity, would have been shown, and the photos, which only showed the latter, but without any specific link of identity, would have been inadmissible (*Thompson* v. *R.*, 1918, A.C. 221; cited *ante*, 143).

Carnal Knowledge. A. is charged with carnal knowledge of B., a girl under 16, in Nov., 1912. Evidence by B. that A. had had similar relations with her in the previous April (*i.e.* beyond the 6 months to which prosecutions for such acts are limited, see *ante* 173);—Held admissible not only to corroborate B.'s testimony (as was held at the trial), but also as substantive evidence of the Nov. act (see *R.* v. *Ball*, *ante*, 166). [*R.* v. *Shellaker*, 1914, 1 K.B. 414. Evidence was also admitted in corroboration of B. that A. had bribed C. who had similar relations with B., to leave the neighbourhood and take the blame of B.'s pregnancy on himself (see 110 L.T. 351)].

A. is charged with carnal knowledge of B., a girl under sixteen. B. swore that, on the day following the act, A. told her he had had similar relations with C., another girl under sixteen, and hoped B. would be as loving as C. had been. A. being called in his own defence, denied on cross-examination both the alleged statement to B. and the imputation as to C. Letters in endearing terms written by him to C. were, however, put to and admitted by him, and were then put in evidence. Held, that the questions and letters were admissible, not to show A.'s *character*, or as evidence of *habit* or *system*, but as corroborating B.'s testimony by showing that she had not invented the incident as

Admissible. *Inadmissible.*

to C., and thus as evidence that A. was "guilty of the offence charged," under the Cr. Ev. Act, 1898, s. 1 (f) (i) [*R.* v. *Chitson*, 1909, 2 K.B. 945, C.C.A. In other reports, A.'s statement is represented as having been made to B. *at the time* of the offence; *cp. R.* v. *Gray*, *ante*, 490].

Previous Similar Statements by Witness.

Murder. (*Identity*). A is charged with the murder of B. On the trial, C., a witness for the prosecution, having stated that he knew A. and recognised him as amongst those who had struck B., admitted on cross-examination that he had afterwards made an information before a magistrate in which he had not mentioned A. as being present at the attack. In re-examination, C. was allowed to be asked, in order to rebut the suggestion that he had recently fabricated his evidence, whether he had not, in an earlier information before the same magistrate, sworn that he saw A. throw stones at B., and mentioned A. by name [*R.* v. *Coll*, 24 L.R. I. 522, C.C.R. In this case, the earlier information itself would have been admissible, and the proper evidence of C.'s statement before the magistrate, but no objection on this ground having been taken at the trial or reserved for the C.C.R., the above question was by the majority of the Court held allowable].

A. is charged with keeping a gaming-house. B., a police witness at the trial, stated he had kept watch on A.'s house from an adjacent chimney. In his deposition before the magistrate, B. had not mentioned the chimney, and A.'s counsel suggested it was an afterthought. B. was allowed to put in his note-book showing he had mentioned the chimney to his inspector [*R.* v. *Benjamin*, 8 Cr. App. R. 146. It was suggested that the note-book was forged as a foot-hold on the chimney was impracticable, but evidence on this point was rejected].

A. sues to establish the will of B., deceased, which C. contests on the ground of forgery. C. calls D., who proves that A. offered him a bribe to support the will. D. is cross-examined to show (1) He was addicted to drink and violence; and (2) Was hostile to A.—Held that (2), but not (1), let in the question on re-examination whether D. had not, prior to his hostility to A., told E. of A.'s bribe; and also the evidence of E. to this effect [*Flanagan* v. *Fahy*, 1918, 2 I.R. 361. In *R.* v. *Coyle*, 7 Cox 74, a witness was allowed on his examination *in chief* to state that he had given the same account on his cross-examination at a previous trial, his veracity being impugned not on cross-examination but by calling witnesses to contradict him].

Indecent Assault, &c. (*Identity*). A. is charged with indecently assaulting B., a boy. At the trial, B. had identified A., but was *not* asked if he had done so previously. B.'s mother and a constable were then called by the prosecution to say that, shortly after the assault, B., in their and A.'s presence, went up to A. and said, "That is the man, Mam," and in answer to the constable's query, "What man?" went on to describe the assault, to which statement A. replied, "I am innocent."—Held, that B.'s statements, whether proved by himself, or by others, were no corroboration of his own unsworn testimony in the box, not being "other material evidence in support thereof, implicating the accused" as required by the Children Act, 1908, s. 30 [*R.* v. *Christie*, 1914 A.C. 545, 557, 567-8. If B. *had been* asked in the box whether he had identified A. previously and had replied in the affirmative, that fact might have been proved by the constable and mother, to exclude the idea that his testimony on the point was an afterthought or mistake (*per* Ld. Haldane, at p. 551). For other points decided in this case, see *ante*, 81, 259].

A. is charged with perjury in falsely swearing that he identified B. on a certain occasion. The prosecution having put in the deposition of C. (deceased) which contained *inter alia* some evidence favourable to A. as to B.'s identity, D., another witness for the prosecution, was not allowed to be asked on cross-examination, for the purpose of confirming the favourable part of C.'s declaration, whether C. had not also in D.'s presence identified B. [*R.* v. *Parker*, 1783; 3 Doug. 242; Ros. Cr. Ev. 13th ed., 90].

Workmen's Compensation. A. sues B., her employer, for injuries by an accident she alleges occurred at B.'s premises. At the hearing she is cross-examined as to statements made by her to third persons that the accident happened at her own home. A. was not allowed, in rebuttal, to call C., a friend, and D., her doctor, to prove that two days after the accident she had made similar complaints to them of her injury and where it occurred (*Jones* v. *S. E. Ry.*, 87 L.J.K.B. 775, C.A., cited *ante*, 84).

CHAPTER XLI.

EVIDENCE TAKEN BEFORE, OR AFTER, TRIAL. AFFIDAVITS, INTERROGATORIES, DEPOSITIONS, COMMISSIONS.

THE admissibility of depositions taken in *former* trials was considered, *ante,* 436-40. The present chapter deals with evidence taken with respect to, but before or after, the *same* trial.

CIVIL CASES. In civil proceedings, evidence may be taken out of court for subsequent use in court, in the following cases and ways:

(1) **Affidavit Evidence by Agreement.** *Evidence in Equity, &c.* Originally, witnesses in Chancery (other than parties, *ante,* 450-1) appear to have been examined orally in open court. Afterwards, the examination was conducted privately; but the interrogatories were strictly preappointed, no new questions or cross-examination being allowed. By the seventeenth century, however, this practice had fallen into disuse, and thereafter, following the civil law, the Court of Chancery decided cases upon depositions in answer to written interrogatories, with occasional cross-examination. From time to time, indeed, various statutory qualifications of the latter procedure were introduced, until finally the practice in *all divisions of the High Court* was assimilated by the Judicature Acts [10 Seld. Soc. xxviii.; Kerby, Hist. Eq. 121-3; Wigmore, Ev. ss. 4, 2190; Langdell, Eq. Pl. ss. 1-56; Best, s, 118].

Under the last-named Acts, the parties to a case may now agree to try it upon affidavit (O. 37, r. 1; O. 38, rr. 25-30). Such an agreement, which is equivalent to a consent to try before a judge alone (*Brooke* v. *Wigg,* 8 Ch.D. 510), must be in writing, signed by the solicitors of all the parties (or of their guardians, &c., if the parties are under disability, see *Knatchbull* v. *Fowle,* 1 Ch. D, 604; *Fryer* v. *Wiseman,* 45 L.J. Ch. 199); or by the parties themselves if they have no solicitors (Tay. s. 1394); and unless specifying that the evidence is to be by affidavit *alone,* it may be supplemented by *vivâ voce* testimony (*Glossop* v. *Heston Board,* 47 L.J. Ch. 536; *A.-G.* v. *Pagham Co.,* 1876, W.N. 94). If a party is unable to procure affidavits, he may apply to be relieved of his agreement, and have the evidence taken wholly or partly *vivâ voce* (*Warner* v. *Mosses,* 16 Ch.D. 100; *Winfield* v. *Shoolbred,* 1880, N.W. p. 192); or the unwilling witness may be ordered to attend for examination in court, but not, so long as the agreement stands, before an examiner (*id.*) Moreover, the Court itself, where the affidavits are unsatisfactory or the interests of justice require it, may exclude the affidavits and order the witnesses to be examined orally (*Lovell* v. *Wallis,* 49 L.T. 593; *Lawson* v. *Quare,* 32 Sol. Jo. 24; *Re Whiteley,* 1891, 1 Ch. p. 559). As to affidavits by blind or illiterate persons, see O. 38, r. 13; *Re Longstaffe,* 52 L.T. 681; *R.* v. *Hailey,* 1 C. & P. 258; and *R.* v. *Petricks,* 138 C.C.C. Sess. Pap. 890.

Unless otherwise agreed or ordered, the plaintiff must file, and deliver to the defendant, a list of his affidavits within fourteen days from the date of consent; and the defendant his within fourteen days of such delivery (O. 38, rr. 25, 26); the plaintiff must then file his affidavits in reply within seven days from the last-mentioned days, or such other time as aforesaid, and such affidavits must be confined to matters strictly in reply (O. 38, r. 27; *ante*, 40); if at the hearing they turn out not to fulfil the latter condition, the Court will disregard them, or give the defendant leave to answer (*Gilbert* v. *Comedy Co.*, 16 Ch.D. 594, explaining *Peacock* v. *Harper*, 7 Ch.D. 648; see *Adair* v. *Young*, 1879, W.N. p. 8; *Roe* v. *Davies*, 2 Ch.D. 729, and *ante*, 40. By O. 38, r. 28, either party may within fourteen days after the time limited for reply, or otherwise appointed, serve upon his opponent notice requiring the production of an affidavit witness for cross-examination at the trial, and in default of such production the affidavit cannot be read unless by special leave (*Meyrick* v. *James*, 46 L.J.Ch. 579; as to the death, &c., of the deponent, see *ante*, 475); or unless the notice omits to comply with the rule, or to state when, where, and before whom the examination is to take place (*De Mora* v. *Concha*, 32 Ch.D. 133; affirmed *sub nom. Concha* v. *C.*, 11 App. Cas. 541).

Alterations, Omissions, Mistakes, &c. No affidavit having in the jurat or body thereof any alteration, interlineation or erasure shall, without the leave of a Court or a judge, be used in any proceeding unless such alteration, &c., has been initialled by the officer taking it (O. 38, r. 12; *Re Cloake*, 61 L.J.Ch. 69; *Best* v. *Woods*, 39 Ir. L.T.R. 44; though see *Re Coleraine &c.*, 45 Ir. L.T. Rep. 244). But the Court or a judge may receive any affidavit notwithstanding any defect by misdescription of parties or otherwise in the title or jurat (*e.g.* omission of the words "before me," *Eddowes* v. *Argentine Co.*, 38 W.R. 629); or any irregularity in the form thereof (*e.g.* the name of the wrong judge, *Harlock* v. *Ashberry*, 28 Sol. Jo. 26), and may direct a memorandum to be made on the document that it has been so received (O. 38, r. 14). In extreme cases, notwithstanding O. 38, rr. 2, 7, affidavits without title and in the third person have been allowed (*Blamey* v. *B.*, 1902, W.N. 138). And errors in a jurat have been corrected by re-swearing in court (*Re Harris*, 10 Ch. App. p. 266). An affidavit in support of a bill of sale has been received where the description of the Commissioner was omitted though *aliter* as to that of the attesting witness (*post*, 564).

(2) **Affidavit Evidence in Admiralty Cases.** In default actions *in rem*, and in references in Admiralty actions, evidence may be given by affidavit (O. 37, r. 2; for certain other cases, see Ros. Adm. Pr. 354-5.). The affidavits must not be printed without an order (O. 38, r. 30); and as to cross-examination thereon, see *The Parisian*, 13 P.D. 16.

(3) **In Bankruptcy, &c.** In Bankruptcy, evidence is usually by affidavit, in default of seven days' notice requiring it to be oral. As to depositions out of the jurisdiction, see Bky. Act, 1914, s. 25; and by deceased persons, *post*, 502. In Revenue cases disputed facts should be tried orally (*A.-G.* v. *Met. Ry.*, 5 Ex. D. 218).

(4) **Affidavit Evidence by Order of the Court.** Under O. 37, r. 1, the Court or a judge may at any time, for sufficient reason, order (*a*) that *any particular fact or facts may be proved by affidavit.* In pursuance of this rule, upon an inquiry as to damages for breach of a charter-party, evidence of

witnesses in New South Wales was ordered to be given by affidavit (*Macdonald* v. *Antelme,* 1884, W.N. 72). And in an action for revocation of probate, the affidavit of an attesting witness who could not be found, made eight years before on obtaining probate, was received in support of the will (*Gornall* v. *Mason,* 12 P.D. 142; *Hayes* v. *Willis,* 75 L.J.P. 86); so, in *Drewitt* v. *D.,* 58 L.T. 684, an affidavit made previously in a motion in the cause was allowed to be read by the same judge, the deponent being engaged as a witness in another trial. And in *Divorce* cases, evidence has been allowed to be given by affidavit, where the parties were poor and the witnesses resided at a distance (*Burslem* v. *B.,* 67 L.T. 719; *Gills* v. *G.,* 1898, Times, Nov. 8; *Pollastrini* v. *P.,* 1900, *id.* Jan. 17, *ante,* 487; and see Browne on Divorce, 7th ed. 235-6); so, with evidence as to foreign law (*Re Whitelegg,* 1899, P. 267). The affidavit of a deceased deponent has also, by order made at the trial, been received in proof of adultery (*Williams* v. *W.,* 1916, P. 130); and proof of adultery abroad allowed by affidavit, instead of commission, in an exceptional case (*Gayer* v. *G.,* 1917, P. 64, C.A.; *Boulton* v. *B.,* 62 Sol. Jo. 606); see also *Goodman* v. *G.,* 1920, P. 67. On the other hand, proof of a will in solemn form by affidavit has been disallowed, although the property was small, and the parties cited did not appear (*Cooke* v. *Tomlinson,* 24 W. R. 851, *per* Hannen, J.). Or (*b*) that *the affidavit of any witness may be read at the hearing* or trial, on such conditions as the Court or a judge may think reasonable (*Gornall* v. *Mason,* and *Drewitt* v. *D., sup.;* as to reading affidavits in former causes, see O. 37, r. 3; *ante,* 436). Or (*c*) that any *witness whose attendance in court ought, for some sufficient cause, to be dispensed with,* be examined by interrogatories or otherwise before a commissioner or examiner, *e.g.* the examination of a witness dangerously ill, the evidence being only receivable at the trial if the witness is incapable of being examined thereat (*Burton* v. *North Staff Ry.,* 35 W.R. 536).

Provided, that where it appears to the Court or a judge that the other party *bonâ fide desires the production of a witness for cross-examination, and that such witness can be produced,* an order shall not (in any of the three cases mentioned above, *Blackburn Union* v. *Brooks,* 7 Ch.D. 68) be made authorizing the evidence of such witnesses to be given by affidavit (O. 37, r. 1; *Nadin* v. *Basset,* 25 Ch.D. 21). If the other party does not *bonâ fide* desire the production of the witness (*Blackburn Union* v. *Brooks, sup.*); or the witness cannot be produced (*Elias* v. *Griffith,* 46 L.J.Ch. 806; *Gornall* v. *Mason,* and *Burton* v. *North Staff. Ry., sup.;* and see *ante,* 475), the proviso does not apply.

On a motion for judgment, the Court has no power to order the evidence to be taken by affidavit (*Ellis* v. *Robbins,* 50 L.J.Ch. 512); nor will an attempt to try an action on such evidence, by means of a summons to dismiss, be allowed (*Pluckrose* v. *Edwards,* 32 Sol. Jo. 709).

(5) **Depositions before Examiners, or on Commission.** By O. 37, r. 5, the Court or a judge may, in any cause or matter where it may be *necessary for the purposes of justice,* make any order for the examination upon oath before the Court or judge or any officer of the Court or any other person (or for the cross-examination of an affidavit witness, *De Mora* v. *Concha,* 32 Ch.D. 133), and may empower any party to such cause or matter to give

such disposition in evidence therein on such terms, if any, as the Court or a judge may direct. An order to examine witnesses *de bene esse* will in general only be made where they are going, or have gone, abroad; or where, from age, illness, infirmity, or some other cause, they are unlikely to be able to attend at the trial (*Warner* v. *Mosses,* 16 Ch.D. 100; *Bidder* v. *Bridges,* 26 Ch.D. 1; *Re Wagstaff,* 96 L.T. 605; Tay. s. 509) or at the appeal (*Treasury Sol.* v. *White,* 55 L.J. 79). As to procedure with respect to the examination of such witnesses in England and abroad, see Ann. Pr., Notes to O. 37, r. 5; and Hume-Williams, Evidence on Commission; an order appointing some person abroad as special examiner is now, however, more usual than the cumbersome procedure of a commission. When the examination is concluded, the original deposition, authenticated by the signature of the examiner, must be transmitted to the Central Office and there filed (O. 37, r. 16). If the examiner has omitted to sign, the Court may still direct them to be filed on terms (*Stephens* v. *Wanklin,* 19 Beav. 585). and where he had died before signing, they were allowed to be received in evidence unsigned (*Felthouse* v. *Bailey,* 14 W.R. 827).

O. 37, r. 18, is as follows; "Except where by this Order otherwise provided, or directed by the Court or a judge, no deposition shall be given in evidence at the hearing or trial of the cause or matter *without the consent* of the party against whom the same may be offered, *unless* the Court or judge is satisfied that the deponent is *dead,* or *beyond the jurisdiction* of the Court, or *unable from sickness or other infirmity* (which does not require an incurable malady, but will be satisfied by any serious illness, *Beaufort* v. *Crawshay,* L.R. 1 C.P. 699, *ante,* 438, and may perhaps, be proved by affidavit, Tay. s. 517) *to attend* the hearing or trial; in any of which cases the depositions certified under the hand of the person taking the examination shall be admissible *saving all just exceptions* without proof of the signature to such certificate." Though the opening words of this rule confer very extensive powers upon the Court, it is probable that in practice the admissibility of the depositions will be confined to those cases in which the personal attendance of the witness is from some of the causes mentioned unattainable (*Bagot* v. *B.,* 1 L.R.I. 1; *Nadin* v. *Bassett,* 25 Ch.D. 21; *Burton* v. *North Staff. Ry.* 35 W.R. 536; Tay. s. 516).

Unwilling Deponent. Where a witness refuses to attend an examination, or to be sworn, or to answer, the proper course is not to move to commit him for contempt, but first (unless he is an officer of the Court, when this is not necessary, *Re Gen. Financial Bank,* 1888, W.N. 47) to serve him with a *subpœna,* and if he fails to comply, then to move for an order directing him to attend, or to be sworn, or to answer, as the case may be (O. 37, rr. 8, 13; *Stuart* v. *Balkis Co.,* 32 W.R. 676; *Exp. Fernandez,* 10 C.B. N.S. 3; *ante,* 446-7). If, however, an affidavit witness has voluntarily attended an appointment for cross-examination, the necessity for a *subpœna* or order is waived and he may be committed for not answering questions (*Cutler* v. *Wright,* 1890, W.N. 28). A witness who refuses to make an affidavit may, as we have seen, be ordered to attend for examination in court, though not before an examiner (*ante,* 495).

Objections to Depositions. "Any questions which may be objected to shall be taken down by the examiner in the depositions, and he shall state

his opinion thereon to the counsel, solicitors, or parties, and shall refer to such statement in the depositions, but he shall not have power to decide upon the materiality or relevancy of any question" (O. 37, r. 12). "If any witness shall object to any question which may be put to him before an examiner, the question so put, and the objection of the witness thereto, shall be taken down by the examiner, and transmitted by him to the Central Office to be there filed, and the validity of the objection shall be decided by the Court or a judge" (O. 37, r. 14). But though an examiner has no power to decide an objection, or compel an answer, he may allow a witness to be treated as hostile (*Ohlsen* v. *Terrero,* 10 Ch. App. 127; *contra, Buckley* v. *Cooke,* 1 K. & J. 29; *Wright* v. *Wilkin,* 4 Jur. N.S. 804; Tay. s. 1417), or to be examined apart (*Re Western of Canada Oil Co.,* 6 Ch.D. 109). Objections to evidence on commission should be taken before the examiner; for if received by him without objection, the evidence cannot afterwards be rejected (*Robinson* v. *Davies,* 5 Q.B.D. 26, where secondary evidence of documents had been improperly received; *Richards* v. *Hough,* 51 L.J.Q.B. 361, where the witness had been improperly allowed to affirm; *Patterson* v. *P.,* 1899, Times, Ap. 29, where leading questions had been permitted). Unsworn depositions were received without objection in *Wright* v. *W.,* 1904, Times, Dec. 8. If, after objection, admissible evidence has been rejected, or inadmissible evidence received, the judge may suppress the depositions either wholly or in part [*Robinson* v. *Davies, sup.;* Ros. N.P. 186; Tay. ss. 512, 538; *Lumley* v. *Gye,* 3 E. & B. 114; *Hutchinson* v. *Bernard,* 2 M. & Rob. 1; *Small* v. *Nairne,* 13 Q.B. 840; *ante,* 439. See further Hume-Williams & Macklin, Ev. on Commission, 192-201].

(6) **Hearsay and Secondary Evidence by Order of the Court.** By O. 30, r. 7, "On the hearing of a summons (for directions) the Court or a judge may order that evidence of any particular fact, to be specified in the order, shall be given by statement on oath of information and belief, or by production of documents or entries in books, or by copies of documents or entries or otherwise as the Court may direct." This rule now applies both to the Chancery and King's Bench Divisions (Ann Pr. Notes); but only to evidence at the hearing of such summons and not at the trial (*Rainbow* v. *Kittoe,* 1916, 144 L.T. Jo. 412, *per* Eve, J.; *cp. post,* 500). As to orders made at, or before, the trial under other provisions, see *ante,* 497-8. In *Hicks* v. *Lond. Genl. Om. Co.,* Times, Mar. 8, 1916, Scrutton, J., at the trial allowed the unsworn statement of an officer at the front to be received, subject to the comment that it had not been cross-examined upon.

(7) **Interrogatories.** Under O. 31, r. 1, the plaintiff or defendant, in any cause or matter not of a penal nature, may by leave (and in actions for fraud or breach or trust without leave) deliver interrogatories in writing for the examination of the *opposite party, i.e.* one between whom and the applicant an issue is joined (*Molloy* v. *Kilby,* 15 Ch.D. 162; *Eden* v. *Weardale,* 35 Ch.D. 287; *Codd* v. *Delap,* 1906, W.N. 55; Ann. Pr., Notes to O. 31, r. 1), as to any matter in question between them, but not as to matters which would be admissible only in cross-examination (*Kennedy* v. *Dodson,* 1895, 1 Ch. 334). And by O. 31, r. 24, any party may at the trial use in evidence any one or more of the answers, or any part of the answer of the opposite party, without putting in the others, or the whole of such

answer, *provided* always that the judge may look at the whole of the answers, and if he shall be of the opinion that any others of them are so connected with those put in that the latter ought not to be used without them, he may direct them to be put in (*ante,* 218). So, the answer of the officer of a company on their behalf is an admission against them (*Welsbach Co.* v. *New Sunlight Co.,* 1900, 2 Ch. 1.). [See generally, Ann. Pr., Notes to O. 31, rr. 1-11.]

(8) **Evidence on Motion, Further Consideration, Appeal, and in Chambers.** "Upon any motion, petition, or summons, evidence may be given by affidavit; but the Court or a judge may, on the application of either party, order the attendance for cross-examination of the person making such affidavit" (O. 38, r. 1). "The party intending to use any affidavit in support of any application made by him in chambers in the Chancery Division, shall give notice to the other parties concerned of his intention in that behalf" (O. 38, r. 20); and affidavits, although previously used in chambers, are inadmissible on the trial, or on further consideration, in favour of the party filing them, unless such notice has been given (*Re Chennell,* 8 Ch.D. 492; *Brier* v. *Evison,* 26 Ch.D. 238); though they may be used against him as admissions (*Campbell* v. *Rothwell,* 38 L.T. 33; *ante,* 234, 257, 261-2). Although by O. 37, r. 22, the practice with reference to the examination, &c., of witnesses at a trial extends to evidence taken in a cause or matter at any stage, yet upon *interlocutory motions* the affidavits may contain statements as to the deponent's *information and belief,* provided the sources thereof are given, otherwise the affidavits will be inadmissible (O. 38, r. 3; *Re Young Manufacturing Co.,* 1900, 2 Ch. 753; *Lumley* v. *Osborne,* 1901, 1 Q.B. 532; *ante,* 227, 401), as well as *secondary evidence* of the contents of documents without accounting for the absence of the originals (*Spencer* v. *Bailey,* 93 L.T.Jo. 223). Moreover, the allowance of cross-examination is discretionary with the judge, and not, as upon the trial, absolute (*La Trinidad* v. *Browne,* 36 W.R. 138; *Woodworth* v. *Sugden,* 32 Sol. Jo. 743; *Re Jones,* 95 L.T.Jo. 36), and may be ordered after the affidavit has been used (*Strauss* v. *Goldschmidt,* 8 T.L.R. 239, and even where the deponent is a foreigner out of the jurisdiction, *id.; sed qu.* whether at a trial on affidavits this would be allowed, *Concha* v. *C.,* 11 App. Cas. 541, 549). Where, however, an affidavit has been used without cross-examination on a motion, no cross-examination will be allowed on the trial except on the footing of fresh evidence (*Singer* v. *Audsley,* L.R. 13 Eq. 401); but an affidavit may be used in court although the cross-examination thereon is pending elsewhere (*Lewis* v. *James,* 32 Ch.D. pp. 331-2). In taking accounts, notice of the points to which cross-examination is to be directed must be given to the charging or accounting party as the case may be (*Bates* v. *Eley,* 21 Ch.D. 473), a notice that all the items are disputed not being sufficient (*Arthur* v. *Dudgeon,* L.R. 15 Eq. 102; *Glover* v. *Ellison,* 20 W.R. 408), and he can refuse to answer (though not to be sworn, if such notice has not been given (*Meyrick* v. *James,* 46 L.J.Ch. 579).

Evidence after Trial. By O. 37, r. 25, "All evidence taken *at the hearing* or trial of any cause or matter may be used in any subsequent proceedings in the same cause or matter"; and O. 38, r. 21, adds, somewhat tautologically, that "all affidavits which have been previously made and read in court upon

any proceedings in a cause or matter may be used before the judge in chambers." An undertaking not to use an affidavit at the hearing does not, however, preclude its use on a subsequent inquiry in chambers (*Jenner* v. *Morris,* 10 W.R. 640). "Evidence taken *subsequently to the hearing* or trial of any cause or matter shall be taken as nearly as may be in the same manner as evidence taken at or with a view to a trial" (O. 37, r. 21; and see *Re Lea,* 124 L.T.Jo. 335).

Fresh Evidence on Appeal. Further Consideration, &c. The C.A. may admit further evidence as to matters occurring *before* the judgment appealed from without special leave if the application is interlocutory, but with special leave and on special grounds only, on appeal from judgment after a hearing on the merits; and in both cases without special leave as to matters occurring *after* the judgment appealed from (Ann. Pr., Notes to O. 58, r. 4). So, upon further consideration, fresh evidence may be read by leave of the Court under O. 37, r. 1 (*May* v. *Newton,* 34 Ch.D. 347).

Evidence to influence costs, even as to matters arising after judgment, may be given by affidavit (*Re Revill,* 55 L.T. 542), though not *viva voce* (*Bristol, Mayor of,* v. *G. W. Ry.,* 1916, W.N. 47). In the Ch. Div. on a motion to discharge an order made in chambers, no other evidence except that used in chambers will be admitted (*Re Rouse,* 59 L.T. 887; *Re Marsden,* 40 Ch.D. 475, 479). But in the Q.B.D. a Divisional Court will, as a matter of convenience, allow further affidavits to be read (*Robinson* v. *Bradshaw,* 32 W.R. 95). In revenue cases where facts are in dispute, evidence should in general be taken orally (*A.-G.* v. *Metrop. Ry.* 5 Ex.D. 218); but on appeal from a referee under the Finance Act, 1910, oral evidence will only be allowed under special circumstances (R. 7, 1914; *Inland Rev. Commrs.* v. *Driver Holloway,* 87 L.J.K.B. 406, C.A.). In Peerage Cases, evidence given before previous committees may be taken as read and re-printed together with the fresh evidence and proceedings before the existing Committee (*Beaumont Peerage,* 6 C. & F. 868).

New Trials. In new trials, the case must be re-proved *de novo,* and the evidence and verdict given, and judges' finding, at the first trial, are inadmissible (*Roe* v. *Naylor,* 87 L.J.K.B. 958, 960-3, C.A.; *O'Connor* v. *Malone,* 6 C. & F. 572; *ante,* 433, 464).

Statutory Declarations. Under the Statutory Declarations Act, 1835 (5 & 6 Will. IV. c. 62), a solemn declaration, in lieu of an oath, may be made on certain extra-judicial occasions. But by s. 7, the provisions of this Act are not to apply to Courts of Justice; and a statutory declaration, made in Fiji before a notary public, has been rejected in support of a petition, and an affidavit required instead (*Re Vaughan,* 26 Sol. Jo. 76; though see *contra, Re Hardwick,* 123 L.T.Jo. 322). On questions between Vendor and Purchaser, however, such declarations are the usual mode of verifying facts and supplying defects in evidence (Dart, V. & P., 6th ed. 166-167); and in patent cases they are also receivable before the Comptroller, unless otherwise directed [Patents Act, 1907 (7 Ed. VII. c. 29), s. 77 (1)]. So, under the Summary Jurisdiction Act, 1879, s. 41, they may be used to prove the service of notices or the handwriting and seal of justices, &c.; and a declaration on oath made before a notary in France according to French law, by which an affidavit could not be made, has been received in support of a grant

of administration (*Re Lambert,* L.R. 1 P. & D. 138; *cp. Re Caspari, ante,* 462). In Acts passed before or after 1889, the term Statutory Declaration means, unless the contrary appears, one passed under the Act of 1835 (Interpretation Act, 1889, s. 21).

(9) **Depositions in Bankruptcy and Winding Up.** In case of the death of the debtor, or his wife, or of a witness whose evidence has been received by any Court in any proceedings in bankruptcy, the deposition of the person so deceased purporting to be sealed with the seal of the Court, or a copy thereof purporting to be so sealed, shall be admitted as evidence of the matters therein deposed to (Bky. Act, 1914, s. 141; *cp. ante,* 253; and the Irish Act, 20 & 21 Vict. c. 60, s. 365, contains similar provisions.)

By rule 70 of the Companies (Winding-up) Rules, 1909, the verified notes of examinations under s. 215 of the Companies (Consolidation) Act, 1908, are, subject to the direction of the Court and to all just exceptions as to their admissibility against particular persons, receivable against any of the persons against whom the application is made, who under s. 175 of the Act and the order for public examination, was, or had the opportunity of being, present and taking part in such examination, provided fifteen days' notice and a copy of the notes or part to be used, is given to all but the actual deponent (*Re London and General Bank,* 63 L.J.Ch. 853; *ante,* 253).

(10) **Depositions under the Merchant Shipping Act, 1894, &c.** As to these depositions, which are admissible both in civil and criminal proceedings, see ss. 690-1, 695; Marsden on Collisions, 6th ed. 289;; *Pyper* v. *Manchester Liners,* 5 L. Jo. Cy. Ct. Rep. 26 (Ap. 15, 1916); *post,* 512-3; and for decisions under the old M. S. Act, 1854, s. 270, which is in practically identical terms, see *R.* v. *Stewart,* 13 Cox, 296; *R.* v. *Anderson,* 11 *id,* 154; and *R.* v. *Conning, id.* 134. As to depositions before the Receiver of Wreck, see *ante,* 252.

(11) **Depositions in Actions to Perpetuate Testimony.** As to these see O. 37, rr. 35-8; *Evans* v. *Merthyr Tydvil U.C.* 1899, 1 Ch. 241; *Beresford* v. *A.-G.,* 144, L.T.Jo. 57, 92, C.A.

CRIMINAL CASES. In criminal proceedings, oral evidence taken before the trial is admissible thereon in the cases mentioned below. [For the history of this subject, see Wigmore, 17 Harv. L. Rev. 448-58; 1 Steph. Hist. Cr. Law, 219-29, 237-8; Thayer, Cas. Ev., 2nd ed. 317 *n*].

Depositions before Magistrates. *Witnesses for the Prosecution.* By the Indictable Offences (Jervis') Act, 1848, 11 & 12 Vict. c. 42, s. 17, it is enacted that in all cases where any person shall be charged before any justice of the peace with any indictable offence—"such justice or justices, before he or they shall commit such accused person to prison for trial, or before he or they shall admit him to bail, shall, in the presence of such accused person, who shall be at liberty to put questions to any witness produced against him, take the statement on oath or affirmation of those who shall know the facts and circumstances of the case, and shall put the same into writing, and such depositions shall be read over to and signed respectively by the witnesses who shall have been so examined, and shall be signed also by the justice or justices taking the same; and the justice or justices before whom any such witness shall appear to be examined as aforesaid shall,

before such witness is examined, administer to such witness the usual oath or affirmation, which such justice or justices shall have full power and authority to do; and if upon the trial of the person so accused as first aforesaid it shall be proved, by the oath or affirmation of any credible witness, that any person whose deposition shall have been taken as aforesaid, is dead, or so ill as not to be able to travel, and if, also, it be proved that such deposition was taken in the presence of the person so accused, and that he or his counsel or attorney had a full opportunity of cross-examining the witness, then, if such deposition purport to be signed by the justice by or before whom the same purports to have been taken, it shall be lawful to read such deposition as evidence in prosecution, without further proof thereof, unless it shall be proved that such deposition was not in fact signed by the justice purporting to sign the same." *Witnesses for the Defence.* By the Criminal Law Amendment (Russell Gurney's) Act, 1867, 30 & 31 Vict. c. 35, s. 3, every person who is charged before a justice with an indictable offence shall be asked whether he desires to call any witnesses; and if he does so, the justice in his presence shall take the statement on oath or affirmation, both examination and cross-examination of such witnesses, and reduce the same to writing; and, "such depositions of such witnesses shall be read over to and signed respectively by the witnesses who shall be so examined, and shall be signed also by the justice or justices taking the same, and transmitted in due course of law with the depositions; . . . and afterwards, upon the trial of such accused person, all the laws now in force relating to the depositions of witnesses for the prosecution shall extend and be applicable to the deposition of witnesses hereby directed to be taken." (As to depositions taken under this Act of persons dangerously ill, see *post,* 510-11). Witnesses under this Act may be heard *in camerâ* (45 Sol. Jo. 590; 68 J.P. 111.) Under the former Act, the presiding magistrate must take the depositions of sick persons even out of Court; if this is impracticable they may be taken by another justice under s. 6 of the latter Act (*post,* 510-11). [*R.* v. *Bros,* 45 L.Jo. 704; *R.* v. *Katz,* 64 J.P. 807; *R.* v. *Norbury,* Stone's J.M. 1920, 14; *R.* v. *Holloway,* 65 J.P. 712; but *cp. R.* v. *Lees,* 71 J.P.Jo. 342].

Exhibits written by a deponent and annexed to the deposition may be proved by the magistrate's clerk without calling the deponent (*R.* v. *Liebling,* 2 Cr. App. R. 314.)

Proof of Statutory Conditions. It seems doubtful whether the various requirements of 11 & 12 Vict. c. 42, s. 17, must be affirmatively proved by the party tendering the evidence, or whether, if the signature purports to be that of the justice, and proof is given merely of the death or illness of the deponent, and the presence of, and opportunity of cross-examination by, the accused, the onus is not thrown upon the opposite party to disprove them. The latter view, which seems to accord more with the final words of s. 17, is, it is submitted, the correct one [Steph. art. 140; *R.* v. *Peacock,* 12 Cox, 21, where proof of the prisoner's presence raised a rebuttable presumption of such opportunity; and *cp. R.* v. *Holloway* and *R.* v. *Nicholls, post,* 506, 512; *contra,* Tay. s. 482; and Ros. Cr. Ev., 13th ed. 61; Powell, Ev. 9th ed. 328, where it is said all the requirements must be proved, though regularity will be presumed if the depositions are correct in form]. Where it was objected that depositions under s. 6 of Russell Gurney's Act (*post,* 510), (i) were merely

produced by the clerk of the justices and not filed with the officer of the court; and (ii) that the name of the deponent's husband, though he was present, was not added; it was held as to (i) that the statute was only directory, and as to (ii) that only those taking part in the proceedings need be named (*R.* v. *May,* 1891, Times, Dec. 7).

Primary Evidence. Depositions have been held Primary and not Secondary evidence of oral testimony (*ante,* 436-7).

Parol Evidence in Substitution, Contradiction, or Addition. As to admissibility of parol evidence in substitution, contradiction, &c., of the depositions, see *post,* 569-70, 576.

Cross-Examination. The old rules laid down by the judges as to cross-examination upon depositions, noticed Tay. 10th ed. ss. 1449-50 and Ros. Cr. Ev. 12th ed. 57, by which the cross-examining counsel was obliged to produce the document as his own evidence and have it read, before founding any question to the witness upon it, are now superseded by 28 & 29 Vict. c. 18, ss. 4, 5 (*id.;* Steph. note xlvii.), under which the writing need not be shown to the witness, or proved, in the first instance; although where the intention is to contradict him his attention must first be called to the parts that are to be used for that purpose (*R.* v. *Riley,* 1866, 4 F. & F. 964; *R.* v. *Wright, id.* 967); provided that the judge may at any time during the trial, require the production of the document for his inspection and he may therefore make such use of it for the purposes of the trial as he shall think fit (see fully, *ante,* 480, *post,* 504, 508). In *R.* v. *Garner,* 54 J.P. 424, C.C.R., where the deponent had admitted that her present testimony differed from her previous deposition, but neither side had put in the deposition, the judge was held entitled to read it to the jury in his summing up; but *cp. N. Australian Co.* v. *Goldsborough,* 1893, 2 Ch. 381, where Ld. Esher considered the witness's *admission* of the contradictory statement would exclude its proof (*sed qu.*) In *R.* v. *Hughes,* Derby Winter Assizes, 1868, Byles, J. held that the proviso applied both before and after the deponent's answer and that his own practice was to have the deposition read before any attempt was made to contradict the witness by it (Ros. Cr. Ev. 11th, ed. 133).

The statutory requirements will now be considered in detail:

(1) *Caption of Depositions: Same Charge.* A deposition without a caption or title has been held inadmissible (*R.* v. *Newton,* 1 F. & F. 641; *R.* v. *Galvin,* 10 Cox, 198, Ir. C.C.R.; *R.* v. *Rees,* 1888, Times, Dec. 20, S. Wales Circ.; *R.* v. *Simpson,* 62 J.P. 825, though see as to this case, *R.* v. *Katz,* 64 J.P. 807; *contra, R.* v. *Langbridge,* 3 Cox, 465, C.C.R.). And, being an integral part of the deposition, the caption must be added at the time and not subsequently (*R.* v. *Prestridge,* 72 L.T.Jo. 93; *R.* v. *Lees, sup.*); and a caption which does not state where the deposition was taken has been rejected (*R.* v. *Curtis,* 21 T.L.R. 87.) But it need not state more than that it is the deposition of the witness, and the particular charge preferred before the magistrate (Ros. Cr. Ev. 61; *R.* v. *Langbridge, sup.*); indeed, a deposition on a general charge of felony with no dates or details, and nothing but the contents, to show that it related to the charge in question, has been admited (*R.* v. *Ivimy,* 107 C.C.C. Sess. Pap. p. 582). One caption, however, at the head of the whole body of the depositions is sufficient, without a separate caption

for each deposition (*id.*, *R.* v. *Young*, 3 C. & K. 106, especially if "Caption same as in No. 1" be added (*R.* v. *Scanlon*, 44 Ir. T.L.R. 228). But fresh captions must be given for each day's depositions (*Meering* v. *Grahame-White*, 122 L.T. 44, C.A.).

The charge need not be stated with technical precision (*R.* v. *Langbridge* and *R.* v. *Ivimy*, *sup.*); but should be the same as that upon which the evidence is afterwards tendered (*R.* v. *Tepper*, Stone's J.M., 1920, p. 12, where a deposition, on the face of which it did not appear that the prisoner was charged with the specific offence for which he was afterwards indicted, was rejected). However, if full opportunity of cross-examination was available, a technical difference in the charges has been held not of itself to exclude the evidence. Thus, a deposition taken on a charge of wounding with intent to do grievous bodily harm (*R.* v. *Beeston*, 24 L.J.M.C. 5), or of stabbing (*R.* v. *Dilmore*, 6 Cox, 52), or of robbery with violence (*R.* v. *Lee*, 4 F. & F. 63), or of attempted murder (*R.* v. *Edmunds*, 25 T.L.R. 658), may be read upon a subsequent trial for the murder of the deponent; and one upon a charge of false pretences has been received upon a subsequent trial for uttering a forged note, when the two arose out of the same transaction, and the same evidence supported both [*R.* v. *Williams*, 12 Cox, 101; *ante*, 437; *infra*, (5)].

(2) *Presence of Magistrate.* The deposition must be taken in the presence of a magistrate; if taken in his absence, it will be inadmissible, although afterwards read over and sworn in his presence (*R.* v. *Day*, 6 Cox, 55; *R.* v. *Watts*, 9 Cox, 395; see, however, *R.* v. *Bates*, 2 F. & F. 317). As to whether the magistrate must take the depositions and commit, see *infra* (8).

Where a prisoner had been charged before, and afterwards committed, by a London magistrate, and the deposition of a sick witness had, in the interval, been taken before, and signed by, a country magistrate, the deposition was received [*R.* v. *Vidil*, 9 Cox, 4 *per* Blackburn, J.; *contra*, *R.* v. *Rees*, *inf.* (8); and Tay. s. 412, *n* 3].

(3) *Presence of Accused.* The entire depositions must be taken in the presence of the accused; and the omission of this requisite cannot be cured by reading over and re-swearing them in his presence, for such a method obviously allows a very imperfect opportunity for cross-examination [*R.* v. *Christopher*, 2 C. & K. 994; *R.* v. *Day*, and *R.* v. *Watts*, *sup.*; and *per* Hawkins, J., Stone's J.M., 1920, p. 11; but see *R.* v. *Bates*, *sup.*; and where the accused was absent with the assent of her solicitor, who cross-examined the witnesses, this was held sufficient, *per* Coleridge, C.J., 89 L.T.Jo. 240].

(4) *Oath or Affirmation.* The deposition must be taken on oath or affirmation: thus, the unsworn testimony of a child taken under the Criminal Law Amendment Act, 1885, s. 4, cannot be read upon proof of the death or illness of the child (*R.* v. *Pruntey*, 16 Cox, 344; but see now *post*, 511).

(5) *Opportunity of Cross-examination.* If a deposition is proved to have been taken in the presence of the accused, the law will presume that he had full opportunity of cross-examination (*R.* v. *Peacock*, 12 Cox, 21; *R.* v. *Childs*, 148 C.C.C. Sess. Pap. p. 85; *ante*, 503); but this presumption may be rebutted by proof—*e.g.* that the accused was insane (*id.*); or (perhaps) did not understand the language (see *R.* v. *Jones*, 49 J.P. 728); or that the notice was so short that he had no time to instruct a solicitor or consider questions (*R.* v. *Harris*, 82 J. P. Rep. 196); or the deponent was so ill as to

be unfit for further cross-examination, unless the cross-examiner was putting questions vexatiously or frivolously with the object of inducing the magistrate to stop the examination (*R.* v. *Mitchell,* 17 Cox, 503; *R.* v. *Hyde,* 3 Cox, 90). And if, after cross-examination, new matter is elicited, on which the accused has no opportunity of cross-examination, the new matter will be inadmissible (*R.* v. *Prestridge,* 72 L.T.Jo. 93). Where, however, both deponent and prisoner only imperfectly understood English, but the prisoner refused the aid of an interpreter, and the magistrate's clerk had advised that he would only injure his case by further questions, the depositions were received (*R.* v. *Jones, sup.*). The magistrate should, when the prisoner is undefended, invite him to cross-examine the witnesses at the end of each examination, and not merely at the end of all the examinations; and should allow him sufficient time to consider his questions (*R.* v. *Day,* 6 Cox, 55; *cp. R.* v. *Wats,* 9 Cox, 395; and *R.* v. *Christopher,* 2 C. & K. 994. But where the former charge is technically different from the subsequent one, the depositions may still be read if the accused had full opportunity of cross-examination upon all points material to both [*sup,* (1)].

(6) *Whole Statement.* Although in the statutory form the statement of the witness is directed to be taken down "as nearly as possible in the words he uses," and no longer merely "so much thereof as is material," as in the former Act, yet a deposition has been received which included only such portions of the examination as the magistrate considered material, and omitted altogether the cross-examination (*R.* v. *Hendy,* 4 Cox, 243; and see *R.* v. *Bates,* 2 F. & F. 317; *cp.* 576).

(7) *Read over to and Signed by Witness.* The deposition, when completed, is directed to be read over to and signed by the witness. It has been thought that the omission of this formality might exclude the evidence (Steph. art. 140; Tay. ss. 482, 485); but in *R.* v. *Holloway,* 65 J.P. 712, the mere assent of a dying deponent was held sufficient, although the deposition was not taken under 30 & 31 Vict. c. 35, s. 6, cited, *post,* 510-11; and *cp. R.* v. *Nicholls, ante,* 503, and *post,* 512. Previous Acts did not contain this provision, see *R.* v. *Flemming,* 2 Lea. 854.

(8) *Signature of Magistrate.* The deposition is receivable if it merely "purport to be signed by the justice by or before whom it purports to be taken," unless proof can be given that it was not in fact so signed. It is sufficient if such signature is appended to the end of the whole body of the depositions, provided that the different sheets were fastened together at the time of the signature (*R.* v. *Parker,* 11 Cox, 478; *R.* v. *Carroll, id.* 322). But if the separate sheets were not pinned or otherwise fastened together at or before the time when the last was signed, the unsigned sheets will be rejected (*R.* v. *Lee,* 4 F. & F. 53; *R.* v. *France,* 2 Moo. & R. 207; *R.* v. *Mann,* 49 J.P. 743). It has been held not necessary that the magistrate by whom the depositions are taken and signed should be the one before whom the prisoner is charged or committed [*R.* v. *Vidil,* 9 Cox, 4, *per* Blackburn, J.; *contra, R.* v. *Rees,* 1888, Times, Dec. 20, S. Wales Cir., *per* Charles, J., and Tay. s. 412; see *sup,* (2)].

(9) *The Witness must be dead, ill, kept out of the way, or insane.* The admissibility of the depositions is not limited to the two cases mentioned in the statute—"dead, or so ill as not to be able to travel"; if the witness

is fraudulently or forcibly kept out of the way by the prisoner himself (*R.* v. *Scaife,* 17 Q.B. 238; *R.* v. *Ivimy,* 107 C.C.C. Sess. Pap. 581, where evidence of this was heard in the absence of the jury, *cp. ante,* 42); or probably if he is insane (*R.* v. *Marshall,* Car. & M. 147; *R.* v. *Scaife, sup.;* Tay. ss. 476, 480; Steph. art. 140; *ante,* 438) the depositions will be received; although mere absence abroad (*R.* v. *Austin,* 7 Cox, 55), or being *en route* for a foreign country as a soldier (*R.* v. *Cohen,* 34 L.Jo. 623) is insufficient, The *degree of illness* is for the judge to determine (*R.* v. *Noakes,* 1917, 1 K.B. 581; *R.* v. *Wellings,* 3 Q.B.D. 426); and it has been held not essential to prove it by the medical attendant (*R.* v. *Noakes, sup., contra R.* v. *Cohen, sup.; R.* v. *Butcher,* 64 J.P. 808). Not only ability to travel, but ability to give evidence, must be considered (*R.* v. *Cockburn,* 7 Cox, 265; *R.* v. *Wilson,* 8 Cox, 453; *R.* v. *Wilson,* 12 Cox, 622). The ailment need not be permanent, but where it is temporary the judge may in his discretion postpone the trial for the recovery of the witness (*R.* v. *Tait,* 2 F. & F. 553; *R.* v. *Wilson,* 12 Cox 622). The following degrees of illness have been held *sufficient* to admit the deposition: travelling would have endangered life (*R.* v. *Day,* 6 Cox, 55); the deponent had arrived, but returned home, as his doctor testified that it would have been dangerous for him to remain (*R.* v. *Wicker,* 18 Jur. 252); the deponent could have been brought into court without danger to life, but was disabled by paralysis from giving evidence (*R.* v. *Cockburn, sup.*); the deponent could travel but not complete the object of his journey, as he had a tendency to softening of the brain; and was so ill and nervous that examination and cross-examination would confuse and nullify his evidence, and in his condition be dangerous to life (*R.* v. *Wilson,* 8 Cox, 453; *R.* v. *Stewart,* 1 Cr. App. R. 57, where there was merely nervous prostration). The following have been held *insufficient:* the deponent had been seized with a bowel complaint on the morning of the trial, and was too ill to travel (*R.* v. *Harris,* 4 Cox, 440; *R.* v. *Bull,* 12 Cox, 31); the deponent was very old, and so nervous that the doctor considered coming into court and being examined would be dangerous to her (*R.* v. *Farrell,* 12 Cox, 605; *R.* v. *Thompson,* 13 Cox, 181); the deponent was in bed two days before the trial, appeared ill, and when he tried to get up could not stand; a non-medical witness believed it to be rheumatics, but no doctor was called (*R.* v. *Williams,* 4 F. & F. 515); a non-medical witness saw the deponent in bed the night before with cold and inflammation; he was attended by a doctor, and witness heard he was very bad (*R.* v. *Ulmer,* 4 Cox, 442); the witness, a policeman, saw the deponent in bed and "was told he had fever" (*R.* v. *Welton,* 9 Cox, 297; *R.* v. *Cohen,* 34 L. Jo. 623). The following conditions connected with *pregnancy* have been held *sufficient:* deponent's husband stated he did not know how long she had been pregnant, that she could attend to her duties, but a fortnight before had suffered from undergoing a journey (*R.* v. *Croucher,* 3 F. & F. 285); the deponent was daily expecting her confinement (*R.* v. *Stephenson,* 31 L.J.M.C. 147; *R.* v. *Wellings,* 3 Q.B.D. 426; *R.* v. *Heesom,* 14 Cox, 40; *R.* v. *Goodfellow, id.* 326); or was unable to travel owing to recent confinement (*R.* v. *Marsella,* 17 T.L.R. 164); or had just been confined of a dead child (*R.* v. *Wilton,* 1 F. & F. 309). The following have been held *insufficient:* the deponent expected to be confined in a month (*R.* v. *Omant,* 6 Cox, 466); or was apparently very close to it, and consequently

unable to travel (*R.* v. *Butcher,* 64 J.P. 808); the deponent had just been confined (*R.* v. *Wilton, sup.; R.* v. *Walker,* 1 F. & F. 534; *R.* v. *Cotton,* 12 Cox, 400; *contra, R.* v. *Harney,* 4 Cox, 441; *R.* v. *Marsella, sup.;* in *R.* v. *Wilson,* 12 Cox, 622, "just confined" was considered sufficient to admit the depositions before the grand jury, but the trial was postponed, as the evidence of the witness was most material).

Depositions when admissible on other grounds. Depositions, although inadmissible under the statute, may be receivable—(1) To corroborate (*R.* v. *Coll,* cited *ante,* 494), or contradict (*ante,* 479-81), the deponent when after wards called as a witness at the trial. In *R.* v. *Garner,* 54 J.P. 424, C.C.R., where the deponent had admitted that her testimony differed from her previous deposition, but neither side had put in the deposition, the judge was held entitled to read it to the jury in his summing up; but *cp. N. Australian Co.* v. *Goldsborough,* 1893, 2 Ch. 381, where Ld. Esher considered the witness's *admission* of the contradictory statement would exclude its proof. The old rules laid down by the judges as to cross-examination upon depositions, noticed Tay. s. 1449, and Ros. Cr. Ev., 12th ed., 57, are superseded by 28 & 29 Vict. c. 18, ss. 4, 5 (*id.;* Steph. note xlvii.; *ante,* 480, 504). (2) As dying declarations (*R.* v. *Woodcock,* 1 East, P.C. 356; *R.* v. *Quigley,* 18 L.T. 211; *ante,* 321). (3) As original evidence, *e.g.* of motive (*R.* v. *Buckley, ante,* 139). (4) To refresh the memory of the official who took them down (Tay. s. 824; *R.* v. *Mann, ante,* 471). (5) They have also been considered admissible under the common law rule (*ante,* 436) as testimony given in a former proceeding between the same parties and on the same issue (3 Russ. Cr., 6th ed., 557 *n*); and perhaps (6) as statements made in the presence of the prisoner, and not denied by him (*R.* v. *Mann, sup., sed qu.;* and in *R.* v. *Mitchell,* 17 Cox, 503, and *R.* v. *Lees,* 71 J.P. Jo. 342, *R.* v. *Mann* was not followed; see *ante,* 260).

Examination of the Prisoner. The statutory provisions regulating the taking of the prisoner's statement *not on oath* are as follow: "After the examination of all the witnesses on the part of the prosecution as aforesaid (*ante,* 502-3) shall have been completed, the justice of the peace or one of the justices by or before whom such examination shall have been so completed as aforesaid, shall, without requiring the attendance of the witnesses, read or cause to be read to the accused the depositions taken against him, and shall say to him these words, or words to the like effect: 'Having heard the evidence, do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing, and may be given in evidence against you upon your trial'; and whatever the prisoner shall then say in answer thereto shall be taken down in writing and read over to him, and shall be signed by the said justice or justices, and be kept with the depositions of the witnesses, and shall be transmitted with them as hereinafter mentioned; and afterwards upon the trial of the said accused person the same may, if necessary, be given in evidence against him, without further proof thereof (the words, "if such deposition purports to be signed by the justice" were probably omitted by accident, 3 Rus. Cr., 6th ed., 541), unless it shall be proved that the justice or justices purporting to sign the same did not in fact sign the same: *Provided* always, that the said justice or justices before such accused person shall

make any statement shall state to him, and give him clearly to understand, that he has nothing to hope from any promise of favour, and nothing to fear from any threat which may have been holden out to him to induce him to make any admission or confession of his guilt, but that whatever he shall then say may be given in evidence against him upon his trial, notwithstanding such promise or threat: *Provided* nevertheless, that nothing herein enacted or contained shall prevent the prosecutor in any case from giving in evidence any admission or confession or other statement of the person accused or charged, made at any time, which by law would be admissible as evidence against such person" [Indictable Offences Act, 1848 (11 & 12 Vict. c. 42), s. 18, specially preserved by the Cr. Ev. Act, 1898, s. 1 (*h*); for the Irish Act, see 14 & 15 Vict. c. 93, s. 14, clause 2]. Such statements, whether telling for or against the accused, are put in as part of the case for the prosecution, not strictly as evidence, but merely as statements made by the accused (*R.* v. *Gardner,* 1899, 1 Q.B. 150, 155; 42 Sol. Jo. 681); matter favourable to him being thus got in without imperilling his right of reply (Stone's J.M., 1920, p. 15; *ante,* 44).

Notwithstanding the minute directions given in the above clause and in the form contained in Schedule N of the Act, it seems that if the statement be headed according to the schedule, it is evidence against the accused on its mere production and without proof of the mode in which it was taken, unless, indeed, it can be shown that the signature of the justice is forged (Tay. ss. 890-892; *R.* v. *Sansome,* 4 Cox, 203). Thus, a statement has been admitted which was not signed either by the justice or the accused (*R.* v. *Bond,* 4 Cox, 231); and it seems that the first caution alone, and perhaps not even that, need be given; although it will certainly be prudent in case any promise or threat may have been previously held out to the accused to give both the statutory cautions (*R.* v. *Sansome,* and *R.* v. *Bond, sup.*). If the statement is not headed in the prescribed form, or if it contain erasures or interlineations, it will probably be necessary to call the justice or clerk to explain the conditions under which it was taken (Tay. s. 892).

As any declaration voluntarily made by the accused is at common law admissible against him, the only advantage conferred by the statute is to simplify the proof of the statement and to render it of more weight. And where the examination is from some informality inadmissible under the statute, or where it has not been reduced to writing, the statement, if voluntarily made or acknowledged by the prisoner, may still be proved as a confession at common law (Tay. s. 894; Ros. Cr. Ev. 51-54; *R.* v. *Thomas,* 13 Cox, 77-8; *R.* v. *Erdheim,* 1896, 2 Q.B. 260, the case of a bankrupt's answers on public examination; *ante,* 215, *post,* 569). Moreover, the taking of the statutory examination will not exclude proof of any admission made by the accused before or after the examination (see the last proviso to s. 18, *sup.*); or of anything incidentally said by him during it, and before being cautioned (*R.* v. *Wilkinson,* 8 C. & P. 662; *R.* v. *Christopher,* 2 C. & K. 994; *R.* v. *Harris,* 1 Moody, C.C. 338; *R.* v. *Bond, sup.; R.* v. *Stripp,* 7 Cox, 97); or of statements made by him before the justice on a former investigation, but not incorporated in the examination returned (*id.*). The accused may now, of course, irrespective of the above, give evidence *on oath* before the magistrate, either in summary or indictable cases (Cr. Ev. Act, 1898, s. 1); and such depositions are admissible against him at the trial (*ante,* 44, 454). Thus

where the accused was tried for felony under the Cr. L. Amend. Act, 1885, s. 4, and also for misdemeanour under s. 5, his deposition before the magistrate when examined on the latter charge only was received against him on his trial for the former (*R.* v. *Chapman,* 29 T.L.R. 117, *per* Channell, J.).

Depositions to perpetuate Testimony. By the Criminal Law Amendment (Russell Gurney's) Act, 1867, 30 & 31 Vict. c. 35, s. 6, "Whenever it shall be made to appear to the satisfaction of any justice of the peace that *any person dangerously ill,* and in the opinion of some registered medical practitioner *not likely to recover from such illness,* is able and willing to give material information relating to any *indictable* offence, or relating to any person accused of any such offence, and it shall not be practicable for any justice or justices of the peace to take an examination or deposition in accordance with the provisions of the Indictable Offences Act, 1848, (11 & 12 Vict. c. 42, s. 17; *ante,* 502-3) of the person so being ill, it shall be lawful for the said justice to take in writing the statement on oath or affirmation of such person so being ill, and such justice shall thereupon subscribe the same, and shall add thereto by way of caption a statement of his reason for taking the same, and of the day and place when and where the same was taken, or of the names of the persons (if any) present at the taking thereof (see *ante,* 503), and, if the same shall relate to any indictable offence for which any accused person is already committed or bailed to appear for trial, shall transmit the same with the said addition to the proper officer of the Court for trial at which such accused person shall have been so committed or bailed; and in all other cases he shall transmit the same to the clerk of the peace of the county, division, city, or borough in which he shall have taken the same, who is hereby required to preserve the same, and file it of record; and if afterwards, upon the trial of any offender or offence to which the same may relate, the person who made the same statement shall be proved to be *dead,* or if it shall be proved that there is *no reasonable probability that such person will ever be able to travel or give evidence,* it shall be lawful to read such statement in evidence, either *for* or *against* the accused, without further proof thereof, if the same purports to be signed by the justice by or before whom it purports to be taken, and provided it be proved to the satisfaction of the Court that reasonable *notice* of the intention to take such statement has been served upon the person (whether prosecutor or accused) against whom it is proposed to be read in evidence, and that such person, or his counsel or attorney, had or might have had, if he had chosen to be present, a full opportunity of cross-examining the deceased person who made the same." A prisoner in actual custody, serving or served with, such notice, may by order of the committing or visiting justice be brought up in custody to hear the deposition taken (s. 7). The notice of intention to take such statement must be in *writing;* a mere oral notice, even if the prisoner has actually been present in pursuance of it, will not suffice to admit the deposition (*R.* v. *Shurmer,* 17 Q.B.D. 323; *R.* v. *Lees,* 71 J.P. Jo. 342; *R.* v. *Harris,* 82 J.P. Rep. 196); and it must be given a reasonable time beforehand (*R.* v. *Simpson,* 62 J.P. 825 *R.* v. *Harris, sup.,* where half an hour was held insufficient); though, if notice be impracticable, as from the prisoner having absconded, the statement though it may be evidence as a dying declaration will be inadmissible as a deposition (*R.* v. *Quigley,* 18 L.T. 211). Moreover, the Act does not apply where the

witness is not "dangerously ill," but merely a confirmed invalid unable to be moved (49 Sol. Jo. 443). And where the deposition of a dying deponent was taken under the Indictable Offences Act, 1848, s. 17, at a hospital and not a police court, it was admitted, though not taken in compliance with the present Act (*R.* v. *Katz, ante,* 503).

Depositions of Children, &c. By ss. 28, 29 of the Children Act, 1908, in offences under Part II. of that Act, or any offence mentioned in the First Schedule of the Act, the depositions of any child or young person may be taken where a justice is satisfied by the evidence of a registered medical practitioner that their attendance in court would involve serious danger to life or health; and such depositions, as well as those of children taken under the Indictable Offences Act, 1848, s. 17 (*ante,* 502-3), or the Petty Sessions (Ireland) Act, 1851, are admissible for or against the accused without further proof, if purporting to be signed by the justice before whom they purport to have been taken, and if it be proved that reasonable notice (in writing, *cp. R.* v. *Shurmer, sup.*) of the intention to take the deposition was served on the accused, and that he or his counsel or his solicitor had, or might have had if they had chosen to be present, an opportunity of cross-examination. And by s. 30 of the Children Act, 1908, the *unsworn* testimony of a child of tender years (see *ante,* 462), if otherwise taken and reduced into writing in accordance with the Indictable Offences Act, 1848, s. 17, or Part II. of the Children Act, 1908, shall be deemed to be a deposition within the meaning of s. 17 of the Act of 1848, and Part II. of the Act of 1908.

In Ireland, by 50 Geo. III. s. 102, s. 5, if any person after giving information or examination on oath against any person for any offence shall, before the trial, be murdered or violently put to death, or so maimed or forcibly carried away and secreted as not to be able to give evidence on the trial, his information or examination shall be admitted as evidence thereon, provided that the information, &c., of a witness secreted shall not be evidence unless the jury find, on a collateral issue, that he was secreted by the accused or some person acting as his agent or in his favour. These provisions are extended to examinations before the grand jury by 56 Geo. III. c. 87, s. 3.

Depositions before Coroners. By the Coroners Act, 1887 (50 & 51 Vict. c. 71), s. 4 (2), "It shall be the duty of the coroner in a case of murder or manslaughter to put into writing the statement on oath of those who know the facts and circumstances of the case, or so much of such statement as is material, and any such deposition shall be signed by the witness and also by the coroner." By s. 5 (3), "The coroner shall deliver the inquisition, deposition, and recognizances, with a certificate under his hand that the same have been taken before him, to the proper officer of the Court in which the trial is to be, before or at the opening of the Court." This statute, like those which preceded it, makes no provision as to the admissibility of the depositions; and there has been some doubt on the point. Under the previous similar Act, Mr. Taylor states (8th ed. s. 492), that they were "rendered admissible as secondary proof by virtue of the statute"; while in Steph. Dig., art. 142 *n,* it is remarked that "as the statute says nothing about the conditions on which they may be received, their admissibility depends on the common law principles regulating testimony taken in former trials" (*ante,* 436); the latter view was adopted by Grantham, J., in *R.* v. *Cowle,* 71 J.P. Rep. 152. In criminal

cases, they have been rejected when taken in the absence of the accused (*R.* v. *Rigg*, 4 F. & F. 1085; *State* v. *Campbell*, 1 Rich. 124; and this view is supported by Tay. s. 494 *n*; Ros. Cr. Ev. 67; 3 Russ. Cr., 6th ed., 572; and 2 Phil. & Arn. Ev., 10th ed., 109-10). Even where the accused is present, however, it must be remembered that there is no charge made, nor any strict right to cross-examine, nor are the rules of evidence accurately observed. In *Sills* v. *Brown*, 9 C. & P. 601, an action for damages for a collision, the deposition of a witness taken before the coroner on an inquiry into the death of the plaintiff's son by the collision, was admitted on behalf of the defendant, the witness being abroad (*ante*, 440; *sed qu.*; and this case has been doubted by Greenleaf, s. 537 *n*; Tay. s. 464 *n*, and Phil. & Arn. *sup.*).

It has recently been held that coroners' depositions are to be treated upon the same footing as those taken before magistrates (*R.* v. *Butcher*, 64 J.P. 808, *per* Darling, J. But this was denied by Grantham, J., who held them admissible if proof were given that (1) they were signed both by the deponent and the coroner; (2) the accused had full opportunity of cross-examination; and (3) the deponent be dead (*R.* v. *Cowle*, *sup.*; *R.* v. *Black*, 74 J.P. Rep. 71; *R.* v. *Marriott*, 75 *id.*, 22 Cox, 211, *per* Avory, J.).

The depositions may be proved by calling the coroner who subscribed them, or proving his signature, and showing, by the clerk or other person present, that the statutory forms have been observed (*id.*; Tay. s. 493). A deposition which was not proved to have been sworn or signed by the witness has been rejected (*R.* v. *Roberts*, 98 C.C.C. Sess. Pap. 691, *per* Hawkins, J.). Depositions have, however, been admitted which were neither signed by, nor read over to, the witness, where it was not customary to observe these formalities (*R.* v. *Nicholls*, 128 C.C.C. Sess. Pap. 489; *cp. R.* v. *Holloway*, *ante*, 503, 506).

Depositions of Witnesses going Abroad. Depositions are sometimes taken by consent in prosecutions for misdemeanour when the witness is about to leave the country, such depositions being admissible only where the witness is abroad at the time of the trial (Ross. Cr. Ev., 13th ed., 68).

Depositions taken in India, the Dominions, Abroad, and under the Merchant Shipping, Extradition or Fugitive Offenders Acts. By 13 Geo. III. c. 63, s. 40, in cases of indictments and informations in the King's Bench Division for offences committed in India, that Court may award a mandamus to the judges of the Supreme Courts in *India* (as to which see now 24 & 25 Vict. c. 104, ss. 10, 11; *Wilson* v. *W.*, 9 P.D. 8; *Sinclair's Divorce Bill*, 1897, A.C. 469), requiring them to hold a Court for the examination of witnesses and the reception of other proofs concerning the matters in question; and such examination shall be reduced to writing, and returned to the King's Bench Division in the manner directed by the Act, and shall be there deemed as good evidence as if the witness had been present. By 6 & 7 Vict. c. 98, s. 4, similar provisions are made with regard to slave-trade offences committed in *British colonies*. Depositions as to offences committed *Abroad* by persons employed in the public service are regulated by 42 Geo. III. c. 85; and those relating to criminal offences in merchant ships by the Merchant Shipping Act, 1894, s. 691 (*ante*, 502). As to depositions taken in French ports respecting offences under the Sea Fisheries Act, 1868, &c., see Tay. s. 1564 *n*; and as to those taken here or abroad for the purpose of criminal proceedings abroad and extradition, see the Extradition Acts, 1870, s. 14, and 1873, ss. 4, 5 (*cp.*

R. v. *Lemoine,* 43 L.Jo. 244); and the Fugitive Offenders Act, 1881, s. 29 (Tay. ss. 1560-2).

Evidence after Trial in Mitigation, or on Appeal. Evidence after trial in mitigation of punishment is "material," is punishable if false (*R.* v. *Wheeler,* 1917, 1 K.B. 283), and may be called either by the parties, or the Court (*R.* v. *Bright,* 1916, 2 K.B. 441; *ante,* 483-4). Under the Criminal Appeal Act, 1907, s. 9, the Court of Appeal may order the examination of any witness who would have been compellable at the trial, to be conducted in a manner provided by rules of court before any judge of the Court, or officer thereof, or any justice of the peace or other person appointed by the Court for the purpose, and allow the admission of any deposition so taken, as evidence before the Court. [See C.A. Rules, 1908, r. 40 (*g*)]. And evidence on appeal may relate not merely to matters occurring *before* the trial, but even *after* it, *e.g.* a confession made by the prisoner after conviction in a letter written to a third person (*R.* v. *Robinson,* 86 L.J.K.B. 73, where, the letter having been destroyed, the contents were proved by the recipient). Generally, however, evidence on appeal should be given on affidavit (*R.* v. *Dunton,* 72 J.P. Jo. 556).

BOOK II.

ADMISSIBILITY OF EVIDENCE.

PART III. DOCUMENTS.

CHAPTER XLII.

AUTHORSHIP AND EXECUTION. ATTESTATION. ANCIENT DOCUMENTS. CONNECTED AND INCORPORATED DOCUMENTS. ALTERATIONS AND BLANKS. REGISTRATION, STAMPS, ETC.

The authorship, execution, attestation, and other requirements affecting the validity of documents may be proved in the manner hereinafter stated.

Definitions and Classification of Documents. A document has been judicially defined as "any writing or printing capable of being made evidence, no matter on what material it may be inscribed' (*R.* v. *Daye*, 1908, 2 K.B. 333). Sir J. Stephen's definition is,—"Any substance having any matter expressed or described upon it by marks capable of being read" (Dig. art. 1); Mr. Best's is "All material substances on which the thoughts of men are represented by writing, or any other conventional mark or symbol" (s. 215). The latter adds that, in some instances, the line of demarcation between documentary and real evidence seems faint, as in the case of models or drawing, which clearly belong to the latter head, but differ from the former in being *actual* not *symbolical* representations (*id.; cp.* Bentham, Rat. Jud. Ev. ii., 691-2); and for further cases in which material may affect admissibility, see *post*, 533. Mr. Gulson regards documents as *real* evidence, because they are the subject of direct perception by the Court (Philosophy of Proof, ss. 313-20). But this would equally apply to witnesses, whose evidence is also obtained by the Court by direct perception (*ante*, 4-5; *cp.* Chamberlayne Ev., Vol. I., ss. 23-5). In statutes the term "writing" includes printing, lithography, photography and other modes of representing or reproducing words in a visible form (Interp. Act, 1889, s. 20).—Documents may, for evidential purposes, be roughly classed as *Public, i.e.* both in respect of their usual method of proof being by copy (*post*, 533), and their contents being evidence of the facts stated against strangers, as well as parties and privies (*ante*, 335); *Judicial, i.e.* public as to method of proof, but admissible for the most part between parties and privies only; and *Private, i.e.* both as to their usual method of proof being by

production of the original document, and their admissibility being restricted as last mentioned.

AUTHORSHIP AND EXECUTION. The authenticity of *public* and *judicial* documents will be more fully considered in chap. xliii. when dealing with their contents, since in most of the statutes providing for their proof the two subjects are treated together. It will suffice here, therefore, to say that many of such documents being judicially noticed are admissible in evidence without any authentication whatever, while others need no further authentication than that of appearing in a Government Gazette, or "purporting" to be printed by the official printers, or "purporting" to be certified, stamped, sealed, or signed by certain officers or departments, the effect being to render such documents *primâ facie* admissible, so far as their genuineness and validity (as distinct from their *truth*) go, and to throw upon the opponent the onus of impeaching them in these respects if he can. The various conditions as to the execution of *private* documents will now be considered.

Date. Documents are presumed to have been executed on the day they bear date; but where there is no date, or a wrong one, the true date may be proved by parol (*post*, 585, 681.).

Handwriting and Signature. The handwriting and signature of *unattested* documents, or of documents which, though attested, are not required by law to be so (*post*, 519, 523), may be proved by calling (1) *the writer;* or (2) a witness who *saw the document signed;* or (3) a witness who has acquired a *knowledge of the writing* in any of the three ways mentioned, *ante*, 399, 403; or by (4) *comparison* of the document in dispute with any other proved to the satisfaction of the judge to be genuine (*ante*, 108, 125); or by (5) *experts*, with or without comparison (*ante*, 388; such testimony, of course, is not essential, *Re Clarence*, 54 So. Jo. 117; *R.* v. *Derrick*, 5 Cr. App. R. 162); or by (6) the *admissions* of the party against whom the document is tendered, whether such admissions are expressly made for the purposes of the trial (*ante*, 18), or are merely of an evidentiary nature (*ante*, 234). The above methods, being equally admissible and equally primary (*ante*, 400), may be resorted to indifferently; subject, of course, to observation should weaker proof be tendered where stronger might have been adduced.

Mode of Signature. As a general rule, even where signature is required by statute and for solemn documents, a manual signing is not essential, any form in which a person affixes his name, with intent that it shall be treated as his signature, being sufficient. Thus the stamped signature of a judge of the High Court impressed on an order by his clerk, is sufficient (*Blades* v. *Lawrence*, L.R. 9 Q.B. 374); and the same applies to the signature of justices to summonses, though it seems that orders of commitment and the like should bear their personal signature (43 L. Jo. 673). So, a *Will* may be signed by another guiding the testator's hand (*Wilson* v. *Beddard*, 12 Sim. 28); or by a stamp (*Jenkyns* v. *Gaisford*, 11 W.R. 854; *Bennett* v. *Brumfitt*, L.R. 3 C.P. 28), mark, whether the testator can write or not, for no such inquiry will be allowed (*Baker* v. *Dening*, 8 A. & E. 94); initials (*Re Blewitt*, 5 P.D. 116; *Re Savory*, 15 Jur. 1042), or initialled seal (*Re Emerson*, 9. L.R.I. 443; *Re Lemon*, 30 Ir. L.T.R. 127); but not by a plain seal (*id.*). nor by passing a dry pen over a previous signature (*Casement* v. *Fulton*, 4

Moo. P.C. 130; *Kevil* v. *Lynch,* I.R. 8 Eq. 244). And a will or deed executed in an assumed name is valid, if not intended to deceive (*Re Clarke,* 1 S. & T. 22; *Re Douce,* 2 *id.* 593; *post,* 625); but a party cannot avoid liability by signing a deed in another's name, nor bind the latter if he be not his lawful agent (*Fung Ping Shung* v. *Tong Shun,* 1918, A.C. 403). So, signature under the *Statute of Frauds* may be by surname only (*Lobb* v. *Stanley,* 5 Q.B. 574), mark, stamp, initials (Benjamin on Sale, 233), pencil (*id.; Geary* v. *Physic, inf.;* but *cp. post,* 529), printing, if otherwise adopted by the party (*Schneider* v. *Norris,* 2 M. & S. 286; *Torret* v. *Cripps,* 27 W.R. 706; *Hucklesby* v. *Hook,* 82 L.T. 117), or in the third person, *e.g.* where A. *wrote "sold to A."* (*Johnson* v. *Dodgson,* 2 M. & W. 659; *Bleakley* v. *Smith,* 11 Sim. 150; and see *Durrell* v. *Evans,* 1 H. & C. 174, where A. was bound by his agent's entry, "A. bought of B."). But the signature in such cases must be intended to govern and authenticate every material part of the instrument (*Hubert* v. *Turner,* 4 Scott, N.R. 486; *Caton* v. *Caton,* L.R. 2 H.L. 127). Moreover, as the statute only applies to parol contracts, an *unsigned* deed may be valid thereunder (Tay. s. 1001; Ros. N.P. 139; *contra,* as to a sealed but unsigned will of lands before 1838, Ros. N.P. 147). So, the signature of a contract under the Railway and Canal Act, 1854, s. 7 (*Buckton* v. *L. & N.W. Ry.,* 34 T.L.R. 119), a notice of objection to a voter under 6 & 7 Vict. c. 18, s. 17 (*Bennett* v. *Brumfitt, sup.*), or of notices, &c., under the Public Health Act, 1875, s. 150 (*Brydges* v. *Dix,* 1891, Times, Jan. 22), may be by print or stamp. And an endorsement in pencil of a promissory note has been held valid (*Geary* v. *Physic,* 5 B. & C. 234). On the other hand, a solicitor's signature to a County Court bill of particulars must be manual (*R.* v. *Cowper,* 24 Q.B.D. 533); and a signature by mark is invalid under the Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 56 (*Morton* v. *French,* 45 Sc.L.R. 126). Signature of an agreement has even been presumed from its reduction into writing (*Rist* v. *Hobson,* 1 Sim. & S. 543); but handwriting *per se* is not necessarily evidence of authorship, *e.g.* where the letter is written, or copied, for another (*Watt* v. *W., ante,* 157).

Signature by one Party only. Repeated Signatures. As to signature by one party to an instrument only, see *Manchester Brewery* v. *Coombs,* 82 L.T. 347; *May* v. *Belleville,* 54 W. R. 12; *Clements* v. *Carey,* 40 Ir. L.T.R. 20; and as to one signing on the faith of others signing, *post,* 599. Where a party executes a document in several different capacities, it is not necessary that he should sign more than once, and extrinsic evidence is admissible to show his intention (*Young* v. *Schular, sup.; Ball* v. *Dunsterville,* 4 T.R. 313; *Drew* v. *Norbury,* 3 Jo. & Lat. 267, 284; Tay. s. 1109a). Where debentures were required to be signed by two directors and the secretary, and one of the directors acted as secretary, signing again in that capacity, the execution was held sufficient (*Re Wright,* 39 Ir. L.T.R. 204; *cp. Re Fireproof Doors,* 1916, 2 Ch. 142; *ante,* 91; *post,* 518, 520). And under the Settled Estates Act 1877, s. 48, execution of a lease by the lessor is presumptive evidence of the execution of the counterpart by the lessee.

Qualified Signature. Procuration, &c. A signature by procuration on a bill is notice of a limited authority, and the principal is not bound if this be exceeded (Bills of Ex. Act, 1882, s. 25; *Reid* v. *Rigby,* 1894, 2 Q.B. 40; *Jacobs* v. *Morris,* 1902, 1 Ch. 816 C.A.); and a bill or note signed "on behalf

of" a principal will not render the agent personally liable, though *aliter* as to a mere description of "agents" (*id.* s. 26; so also as to a guarantee, *Avery* v. *Charlsworth*, 31 T.L.R. 52). As to restricting the operation of deeds, bills, &c., by words appended to the signature, see *Exchange Bank* v. *Blethen*, 10 App. Cas. 293; *post*, 592; and *cp. Re Atkinson*, *ante*, 334.

Extrinsic Evidence of Intention, Capacity, Purpose. The intention with which a document was executed will affect its operation and may generally be shown by parol, *e.g.* a party who joins in it for a specific purpose cannot be treated as joining for a different one (*Re Horsfall*, 1911, 2 Ch. 63); so, a deed may be shown to have been signed as a will, or a will not as such, but for some collateral purpose; or a document to have been executed conditionally as an *escrow*, or as a duplicate, and not a distinct instrument (*ante*, 326-7; *post*, 583, 599); but here two persons by mistake signed each other's wills, the execution of both was held invalid though the contents were similar (*Re Meyer*, 1908 P. 353). So, also the capacity in which a party signed, *e.g.*, as principal or agent (*Young* v. *Schuler*, 1 Q.B.D. 651; *post*, 581-2; and *cp. Lawrie* v. *Lees*, 7 App. Cas. 19), or as party, or agent, though signed as witness (*Carr* v. *Lynch*, 1900, 1 Ch. 613; *Wallace* v. *Roe*, 1903, 1 I.R. 32); or the purpose, *e.g.* for indorsement or negotiation (*Gompertz* v. *Cook*, 20 T.L.R. 106). As to the intent of *attestation*, see *post*, 520.

Deeds. Sealing and Delivery. A deed has been defined as "a writing on paper, vellum, or parchment, sealed and delivered, whereby an interest, right or property passes, or an obligation binding on some person is created, or which is in affirmance of some act whereby an interest, right, or property passes" (Norton on Deeds, 3). Where a contract is by deed, the deed is the contract; where it is not by deed, the writing even though required by law, is merely evidence, or a record, of the contract (*Wake* v. *Harrop*, 6 H. & H. 768, Anson, Contracts, 18th ed., 68-9, 313). *Signature*, though usual, is not necessary to the validity of a deed, unless a power requiring it, and forms no part of the execution (Norton, 5). Nor is an unsigned indenture of lease for more than 3 years void under the Statute of Frauds (*id.*; Tay. s. 1001). But where the signature of a deed has been proved and the attestation clause is in the usual form, sealing and delivery may be presumed (Tay. s. 149; Ros. N.P. 137; even though "delivery" is not mentioned in the clause, *Hall* v. *Bainbridge*, 12 Q.B. 699). So, if signature and sealing are proved, delivery will be presumed (*id.*). And where a party had acted under a deed which was merely sealed but not signed nor attested, its due execution was presumed against himself (*Cherry* v. *Heming*, 4 Ex. 631).

Sealing. To constitute *sealing*, neither wax, nor wafer, nor a piece of paper, nor even perhaps an impression, is necessary (*Hall* v. *Bainbridge*, *sup.*; *Re Sandilands*, L.R. 6 C.P. 411), provided from the testimony or circumstances adduced, that sealing may in fact be inferred (*Natl. Prov. Bank* v. *Jackson*, 33 Ch.D. 1, C.A.). But, a transfer which merely bore a printed circle containing the words "place for seal" was held insufficient, although duly attested as "signed, sealed, and delivered" (*Re Balkis Co.*, 58 L.T. 300, C.A.); and where a voluntary bond, which referred to contemplated testamentary dispositions which were to supersede it, had a similar attestation clause, but bore no trace of a seal, and was found in the possession of a deceased *obligor*, it was rejected (*Re Smith, Oswell* v. *Shepherd*, 67 L.T. 64

C.A.). An unsealed conviction by justices may, however, be sealed after filing it (*R.* v. *Tabrum,* 23 T.L.R. 474); and an unsealed summons is merely defective in form, and cannot be objected to under the Summary Jurisdiction Act, 1848, s. 1 (*R.* v. *Garrett-Pegge,* 1911, 1 K.B. 880).

Corporation Seal. Where the seal is that of a corporation and is not judicially noticed (*ante,* 22-4), it may be proved by any one who knows it, without calling a witness who saw it affixed (*Moises* v. *Thornton,* 8 T.R. 303, 307; doubted Tay. s. 1852, who cites *Doe* v. *Chambers, post,* 520, *contra,* which, however, merely held that the secretary who affixed the seal was not an attesting witness, though *had* he been it might have been necessary to call him; and as to cases where attestation is essential, see *post,* 519, 524) [Steph. art. 67, *n* 3; Ros. N.P. 132]. It will also be presumed to have been affixed by the proper person, though this may be rebutted by proof of absence of authority (*Clarke* v. *Imperial Gas Co*, 4 B. & Ad. 315). As against the corporation, even seals invalidly affixed may be good (*ante,* 91); and a company may also, by its own negligence, be estopped from disputing the absence (*Hoare* v. *Lewisham,* 17 T.L.R. 774), or invalidity (*Vagliano* v. *Bank of England,* 1891, A.C. 107; *post,* 685, 686) of a seal. The seal need not be the corporate seal, any private one, duly adopted, will suffice (*R.* v. *St. Paul,* 7 Q.B.D. 232); and a previously affixed seal may be adopted for the purposes of a particular document (*R.* v. *Monahan,* 38 Ir. L.T.R. 218). An English company may also, under seal, empower any person as its attorney to execute deeds on its behalf abroad [Companies (Consolidation) Act, 1908, s. 78]. Although, however, a corporation may in some cases take advantage of the absence of a sealed contract, this does not necessarily apply to third parties (*Bournemouth Coms.* v. *Watts,* 14 Q.B.D. 87). As to sealed confirmation of unsealed contracts, see *Brooks* v. *Torquay Council,* 1902, 1 K.B. 601. See further as to proof of corporation documents and seals, *post,* 553, 555.

Delivery is essential to a deed (*Foundling Hosp.* v. *Crane,* 1911, 2 K.B. 367; for the history of this point, see 2 Poll. & Mait. Hist. Eng. Law, 83-6, 190; Wigmore Ev. s. 2405), and the deed takes effect therefrom. No particular form, however, is necessary. Thus, a party throwing the document on the table with intent that the other should take it up (Com. Dig: Fait. A. 3); or treating or acquiescing in it as his own (*Ball* v. *Dunsterville,* 4 T.R. 313; *Re Seymour,* 1913, 1 Ch. 475, C.A.); or adopting the signature of one who has signed for him (*Tupper* v. *Foulkes,* 9 C.B. N.S. 797), is sufficient. And fixing the common seal of a corporation is tantamount to delivery, unless an opposite intent can be gathered (*Mowatt* v. *Castle Steel Co.,* 34 Ch.D. 58; *Staple of England* v. *Bank of England,* 21 Q.B.D. 160; *Roberts* v. *Security Co.,* 1897, 1 Q.B. 111, C.A.; Norton on Deeds, 9-11). After material alteration, however, or the filling in of blanks (*Cole* v. *Parkin,* 12 East, 471; *Powell* v. *London Prov'l Bank,* 1893, 2 Ch. 555, C.A.), or an unauthorized execution by an agent (*Re Seymour, sup.*), the deed will be void at law unless validated by *Re-delivery* [As to Alterations &c., see further, *post,* 528-30], though if given for good consideration it may be valid in equity (*Re Queensland Co.,* 1894, 3 Ch. 181); and the date of a proxy may be inserted any time before user (*Ernest* v. *Loma Mines,* 75 L.T. 317; *Sudgrove* v. *Bryden,* 122 L.T.Jo. 296). [See generally as to the Forms and Execution

of Deeds, Norton on Deeds, 1-25; and 30 Sol. J.. 636, 651, 667.]. As to *escrows*. see *ante,* 15, 517, and *post,* 583, 599.

As to the execution of instruments under *powers of attorney,* see Conveyancing Acts, 1881, ss. 44, 48, and 1882, ss. 8, 9; *Young* v. *Schuler,* 11 Q.B.D. 651, cited *ante,* 75; Ros. N.P. 138. At Common Law such execution must have been in the name of the party, not of the attorney; but under s. 46 of the first mentioned Act, the latter may now execute either in the principal's, or his own, name (Williams, Vendor and Purchaser, 2nd ed. 119 *n*). As to execution under *Order of the Court,* see Jud. Act, 1884, s. 14; *Howarth* v. *H.,* 11 P.D. 63, 95; *Re Cathcart,* 1893, 1 Ch. 466; Ros. N.P. 138; and Ann. Pr., Note to above section. And as to execution before a purchaser's solicitor, 105 L.T.Jo. 267.

Documents Requiring Attestation. Documents required by law to be attested must (subject to the exceptions mentioned below) be proved by calling the attesting witness [*Whyman* v. *Garth,* 8 Ex. 803; *Bowman* v. *Hodgson,* L.R. 1 P. & D. 363; *Coles* v. *C., id.* 70; Tay. ss. 1843-5; Best, ss. 220-1; Ros. N.P. 16th ed. 131-4; Steph. art. 66.]. *Principle.* The reason is not (as is sometimes supposed) that proof by the attesting witness is the *best evidence,* but that he is the witness appointed or agreed upon by the parties to speak to the circumstances of its execution, an agreement which may be *waived* for the purposes of dispensing with proof at the trial, *ante,* 18, but cannot be *broken* [*Whyman* v. *Garth, sup.; Geralopulo* v. *Wieler,* 10 C.B. 690, 696; *Cussons* v. *Skinner,* 11 M. & W. 161, 168].

History. This is the most ancient and inflexible of all the rules of evidence, running back to the times of the Franks, amongst whom the witnesses to a deed might be required to defend it by battle. Down to the middle of the sixteenth century, however, the attesting witnesses were summoned with the jury and conferred privately with them, not giving their testimony in open court. The present rule appears to have no connection with the "best evidence" principle which, as we have seen, was a much later introduction (*ante,* 46). Indeed, at first, a witness to an instrument was not necessarily one who had seen it executed, but one who was willing to give it credit by his name; and it was no uncommon thing for such witnesses, when questioned, to know nothing about the execution (Thayer, Pr. Tr. Ev. 97-99, 501-503; Steph. note xxviii.). Prior to the Common Law Procedure Act, 1854, all attested documents, and not merely as now only those required by law to be attested, were in general obliged to be proved by calling the attesting witness (*post,* 523).

Several Witnesses. Primary and Secondary Evidence. Where there are several attesting witnesses only one need be called, except in the case of wills of realty (*post,* 564; Tay. s. 1854; Ros. N.P. 146); and, where the execution has already been proved in a former trial between the same parties, by an attesting witness, since deceased, his deposition dispenses with calling the survivor (*Wright* v. *Tatham, ante,* 437, 440; *cp. Gornall* v. *Mason, ante,* 497]. The above methods are often loosely called "primary," and the absence of all the witnesses must be accounted for before "secondary evidence" of execution, *i.e.* by proof of their handwriting, will be admitted; proof of the handwriting of any one, however, will then be sufficient (*Adam* v. *Kerr,* 1 B. & P. 360; *Nelson* v. *Whittall,* 1 B. & Ald. 19). When, but only

when, this species of proof is unobtainable, the execution may be proved by other means, *e.g.* admission, the testimony of the writer, proof of his handwriting, or presumptive evidence (*post,* 523; and see *ante,* 111, 128).

Competency and Credit of attesting Witnesses. Generally any competent witness may attest; thus, marksmen (*Re Eynon,* L.R. 3 P. & D. 92), infants if of years of discretion, and now husbands and wives for each other (44 Sol. Jo. 422; Weir, Bills of Sale, 310), may be attesting witnesses. Indeed, even incompetency in the witness will not invalidate a will (Wills Act, s. 14); but while executors and beneficiaries are competent, neither they nor their husbands or wives can take any benefit under the will (Wills Act, 1837, ss. 15, 17). This forfeiture, however, though held to apply to a beneficiary under a parol secret trust (*Re Fleetwood,* 15 Ch.D. 594; *contra, O'Brien* v. *Condon,* 1905, 1 I.R. 51), does not apply to a superfluous witness who did not sign *animo attestandi* (*Re Sharman,* L.R. 1 P. & D. 661; *Re Smith,* 15 P.D. 2; *Byrne* v. *Nolan,* 118 L.T. Jo. 80; *Re Murphy,* I.R. 8 Eq. 300, *Re Limond,* 1915, 2 Ch. 240); nor to a creditor (s. 16); nor to a trustee merely taking the legal estate (*Cresswell* v. *Cresswell,* 6 Eq. 69); nor to a witness who attests a will giving him a legacy, but not the codicil republishing it, or who attests the codicil but not the will (*Re Trotter,* 1899, 1 Ch. 764; *Re Marcus,* 57 L.T. 399). On the other hand, a party to a *deed* is not competent to attest it (*Seal* v. *Claridge,* 7 Q.B.D. 516); nor can a proxy though not a party to, or beneficially interested in, the instrument, attest his own appointment (*Re Parrott, Exp. Cullen,* 1891, 2 Q.B. 151, where the history of this rule is traced); nor can any one but a solicitor attest a warrant of attorney, or cognovit (Tay. ss. 1111-1118); and an unauthorised attestation is invalid (*M'Craw* v. *Gentry,* cited *post,* 521). A grantee's agent, however, is incompetent (*Peace* v. *Brookes,* 1895, 2 Q.B. 451). The signatures of the directors and secretary of a company witnessing the affixing of the common seal form part of the execution, and such persons are not considered as attesting witnesses (*Doe* v. *Chambers,* 4 A. & E. 410; *Deffell* v. *White,* L.R. 2 C.P. 144; *Shears* v. *Jacob,* 1 *id.* 513; *Dunn* v. *Dunn,* L.R. 1 P. & D. 277). As to contradiction of an attesting witness who denies the execution, see *post,* 522. As to how far a party may cross-examine or discredit an attesting witness called by himself, see *ante,* 472, and as to discrediting a deceased witness, by proof of his previous statements denying the execution, *ante,* 277.

Animus attestandi. The witness must *intend* to attest (*Re Smith,* 15 P.D. 2; *Re Eynon, sup.*); and extrinsic evidence on this point is receivable (*ante,* 326, 517). Unless otherwise provided, however, it is not necessary that the witness to a *deed* should have actually seen the party sign or seal; it is sufficient if the latter acknowledged an impression already made; or if he delivered the document already signed and sealed, or sealed alone, where signature is not necessary (Ros. N.P. 136). But it is otherwise in the case of a will (Tay. s. 1053; Theobald, Wills, 6th ed. 33-5.)

Document produced; but Witness dead, insane or absent. When, although the document is forthcoming, the witness is dead, insane, out of the jurisdiction, kept away in collusion with the other side, or cannot be found after dilligent search, and the document is not thirty years old, secondary evidence of execution must be given by proof of the *handwriting* of the witness; or, if this is not obtainable by presumptive or any other available evidence

[*Clarke* v. *C.*, 5 L.R.I. 47; *Baxendale* v. *De Valmer*, 57 L.T. 556; *Byles* v. *Cox*, 74 *id.* 222; *Re Peverett*, 87 *id.* 143; and see *Gornall* v. *Mason*, 12 P.D. 142, cited *ante*, 497; by consent, however, an affidavit of execution by a witness to a will may be dispensed with, *Re Hux*, 46 L.J.P. 39; and see *Re Ovens*, *post*, 522]. So, perhaps, if the witness is seriously ill (*Jones* v. *Brewer*, 4 Taunt. 46; *contra*, *Harrison* v. *Blades*, 3 Camp. 457 where the proper course was said to be either to apply to examine the witness out of court, or to postpone the trial; Tay. s. 1843; Ros. N.P. 134).

Document lost, destroyed or cancelled. Witness alive or dead. The rule requiring the production of the attesting witnesses, provided their *names are known*, holds although the document is lost or destroyed (*Keeling* v. *Ball*, Peake Add. Cas. 88; *Gillies* v. *Smither*, 2 Stark. R. 528); or cancelled (*Breton* v. *Cope*, 1 *Peake* N.P. 44, where, in order to receive a recital in a deed as an admission, it was held that the deed must be strictly proved, although it was cancelled; *cp. Re Lambert*, and *Doe* v. *Pembroke*, *ante*, 317); or the witness is blind (*Cronk* v. *Frith*, 9 C. & P. 197); or the person executing the document has admitted the execution (*Call* v. *Dunning*, *post*, 522; though *aliter* as to admissions made by a party for the purposes of the trial, see *infra*). Where both the *document is lost* and the attesting *witness is dead*, proof of his handwriting, by some one who remembers having seen the document, though advisable is not indispensable [*R.* v. *St. Giles*, 1 E. & B. 642, the case of a deed, where a witness who did not know the handwriting of the alleged attesting witness, stated that he remmbered the latter's name being opposite to the signatures of the parties, and also that a local lawyer of the same name, whose writing it probably was, was dead. The Court, in holding this sufficient, remarked that proof of handwriting could be required for no object except to establish the *identity* between the dead man and the attesting witness; if the evidence did not establish such identity, then it was a case of an attesting witness unknown, and fell within a different rule (*cp. Sly* v. *S.*, *ante*, 292]. If the document is *lost* and the names of the attesting witnesses are *unknown* (*Keeling* v. *Ball*, *sup.*; *cp. Re Phibbs*, 1917, P. 93), or if, though known, no proof of their handwriting can be given (*R.* v. *St. Giles*, *sup.*, *per* Erle, J.), the document may be proved as if unattested. Thus, the existence and execution of a lost indenture of apprenticeship has been presumed from proof that the master and apprentice had *acted in that capacity* (*R.* v. *Fordingbridge*, cited *ante*, 128).

Where attesting Witness forgets, denies, refuses to prove, or is hostile. Where the witness has no recollection of the execution, but from seeing his signature has no doubt that it took place, this is sufficient proof (Ros. N.P. 136; and see as to wills, *Wright* v. *Saunderson*, 9 P. D. 149; *Woodhouse* v. *Balfour*, 13 P.D. 2; *Paton* v. *Ormerod*, 1892, Times, Feb. 3, C.A.; *Whiting* v. *Turner*, 89 L.T. 71). And where a person who saw the execution, afterwards subscribed his name without the knowledge or request of the parties (*M'Craw* v. *Gentry*, 3 Camp. 232); or, where one of the latter had subscribed a fictitious name as witness (*Fasset* v. *Brown*, Peake, 23), the execution was allowed to be proved as if there were no witness, *i.e.* by evidence of the handwriting of the party executing, or otherwise. So, if the attesting witnesses to a will refuse to make an affidavit of execution, the Court may order their examination in court (*Re Sweet*, 1891, P. 400); or dispense with their

evidence and accept that of the executor alone (*Re Ovens,* 29 L.R.I. 451). And where an attesting witness denies the execution, other evidence thereof is admissible, and the document may be upheld in spite of such denial (*Coles* v. *C.,* I.R. 1 P. 70; *Bowman* v. *Hodgson, id.* 362; *Dayman* v. *D.,* 71 L.T. 699; *Pilkington* v. *Gray,* 1899, A.C. 401; *Goodisson* v. *G.,* 1913, 1 I.R. 218; *cp. Whiting* v. *Turner, sup.*), though where the denial is distinct and positive and there is nothing to throw doubt upon it, the attestation will be rejected (*Wyatt* v. *Berry,* 1893, P. 5; *cp. Woodhouse* v. *Balfour,* 13 P.D.2). A party, however, is not bound to call a *hostile* attesting witness, if there be another available (*Belbin* v. *Skeats,* 1 S. & T. 148; see *ante,* 469). As to denials by a deceased witness, see *ante,* 277.

Where attesting Witness need not be called. In the following cases proof of the execution of documents required by law to be attested is dispensed with, although the subscribing witness may be alive and in court:—(1) *Wills:* where the attestation form shows compliance with the statutory formalities, probate in common form may be granted on the oath of the executor alone (Williams Exors., 10th ed. 239); and probate even in solemn form has, where the action was undefended, been granted upon the testimony of a non-attesting witness who swore to its due execution [*Mackay* v. *Robinson* (1919), 63 Sol. Jo. 239; *sed qu.;* no cases were cited, and see *contra, Bowman* v. *Hodgson,* L.R. 1 P. & D. 362, *Coles* v. *C., id* 70, and *Belbin* v. *Skeats,* 1 S. & T. 148; *post,* 563]. (2) when the document is *ancient, i.e.* thirty years old (*post,* 523). (3) when the execution has been *admitted for the purposes of the trial* (*Whyman* v. *Garth,* 8 Ex. 803; Tay. s. 1049; *ante,* 476; as to such admissions, which will not in all cases dispense with formal proof, see *ante,* 18-19). (4) When the document is in the *possession of the adversary,* who refuses to produce it pursuant to notice (*Cooke* v. *Tanswell,* 8 Taunt. 450; *Poole* v. *Warren,* 8 A. & E. 588); or when, although producing it pursuant to notice, he *claims some subsisting interest* under it in the subject-matter of the cause (*Doe* v. *Cleveland,* 9 B. & C. 864, 869; *Rearden* v. *Minter,* 5 M. & G. 204; *Collins* v. *Bayntun,* 1 Q.B. 117; *Nagle* v. *Shea, inf.;* for by claiming an interest he admits its validity, *Pearce* v. *Hooper,* 3 Taunt. 60) [Tay. s. 1848; Ros. N.P. 143]; or when he has *executed a new agreement incorporating the old,* for in this case execution of the new one alone need be proved (*Fishmongers' Co.* v. *Dimsdale,* 6 C.B. 896; 12 C.B. 557); or when the adverse party is *estopped from disputing it by recital* (*Bringloe* v. *Goodson,* 5 Bing. N.C. 728; *Nagle* v. *Shea,* Ir.R. 9 C.L. 389; *Nash* v. *Turner,* 1 Esp. 218); but the estoppel is confined to the part recited, anything more must be proved in the usual way (*Gillett* v. *Abbott,* 7 A. & E. 783) [Tay, s. 1849; Ros. N.P. 76, 144; *contra, Doe* v. *Penfold,* 8 C. & P. 536]. Where, however, the admissions do not amount to an express or implied waiver of proof for the purposes of the trial, or to an estoppel, they will not dispense with calling the attesting witness. Thus, if the party in his pleading denies the execution, his admission thereof on oath in a former trial will not be receivable (*Call* v. *Dunning,* 4 East, 53; *Whyman* v. *Garth, sup.; contra, Bowles* v. *Langworthy,* 5 T.R. 366, is probably not law); nor can he be compelled, or even allowed, to be called by his opponent to admit the execution in the witness-box (*Whyman* v. *Garth, sup.; ante,* 476). (5) When the person against whom the document is tendered is a *public officer bound by law to*

procure the execution, and who has dealt with it as duly executed (*Plumer* v. *Briscoe,* 11 Q.B. 46, the case of a replevin bond assigned by the sheriff; *Bailey* v. *Bidwell,* 13 M. & W. 73; Tay. s. 1850). (6) Under the Merchant Shipping Act, 1894, s. 694, as to documents requiring attestation thereunder (*post,* 546). (7) It is doubtful whether the attesting witness need be called in the case of deeds which are *executed by corporations* (*ante,* 518), or *enrolled under statute* and tendered against persons other than those on whose acknowledgment they have been enrolled [Tay. ss. 1852-1853; Steph. art. 67 *n*; Ros. N.P. 132].

Documents not requiring Attestation. An attested document, to the validity of which attestation is not by law necessary, may be proved by admission or otherwise, as if there were no attesting witnesses [28 & 29 Vict. c. 18, ss. 1, 7, which applies to Ireland (*R.* v. *Mallow,* 12 Ir. C.L.R. 55; Tay. ss. 1839-41) and replaces the C.L. Proc. Act, 1854, 17 & 18 Vict. c. 125, s. 26, which was repealed by the St. Law Rev. Act, 1892]. This rule has been held to apply only where all the parties are before the Court; in proceedings *ex parte,* the attesting witness must still be called (*Re Reay,* 3 W.R. 312; *Re Rice,* 32 Ch.D. 35; *Worthington* v. *Moore,* 64 L.T. 338).

Identity of Party, Witness, and Document. Proof of the identity of the writer or marksman with the defendant or other person alleged to have signed may, of course, have to be given, *e.g.* by showing that the signature is that of the latter, or that he has spoken of the contents of the deed (*Doe* v. *Paul,* 3 C. & P. 613); or by proof of similarity of name, address and occupation, or even, especially if the name be uncommon, of name alone (*Hamber* v. *Roberts,* 7 C.B. 861; *Simpson* v. *Dismore,* 9 M. & W. 47; *aliter* if the name be very common, *Jones* v. *J., id.* 75, and *cp. R.* v. *Drake,* 1 Lew. C.C. 25, and *Whitelocke* v. *Musgrave,* 1 C. & M. 511). So, a foreign newspaper article, which purported to be signed by A. and stated facts pointing thereto, was admitted against A. though he denied its authorship (*Parmeggiani* v. *Sweeney,* 1905, Times, 28 Oct.). Where father and son bear the same name, the former is in the absence of evidence presumed to be indicated, (*Stebbing* v. *Spicer,* 8 C.B. 827; *post,* 627, 640). [Tay. ss. 1856-1861; Ros. N.P. 136-7.] As to the identity of a deceased attesting witness, see *R.* v. *St. Giles, supra;* and where the witness is a marksman, *Re Garner,* 1 L.R.Ir. 307, and *George* v. *Surrey,* M. & M. 516.

The identity of the document, whether attested or not, may also have to be shown, *e.g.* where the defendant, pursuant to notice, produced a document which the plaintiff denied to be the contract in question, parol evidence was received to determine the point (*Froude* v. *Hobbs.* 1 F. & F. 612; *cp. Arbon* v. *Fussell, ante,* 108, 125). And where the proceedings are not directly upon the agreement, but for the conversion, detention, loss or theft of the document, evidence of identification may be given without notice to produce (*post,* 545).

Ancient Documents. Private documents *thirty years old,* produced from *proper custody,* and otherwise free from suspicion, prove themselves, and no evidence of the handwriting, signature, sealing or delivery need, in general, be given [Stark. Ev., 4th ed. 521-524; Tay. ss. 87-88; Steph. art. 88]. The thirty years date from the execution of the document, and, even in the case of wills, not from the death of the testator (*Doe.* v. *Wolley, inf.; Man* v.

Ricketts, 7 Beav. 93, 101). In the case of documents of title, however, acts of possession thereunder should be shown, though the absence of such evidence goes merely to weight and not to admissibility (*ante,* 113). The period used to be forty years (Gilbert, Ev., 1st ed. 102); and the first case applying the reduced term seems to be *R.* v. *Farringdon,* 1788, 2 T.R. 166. Indeed, as between vendor and purchaser, recitals *twenty years old* are, in the absence of evidence to the contrary, sufficient, although not conclusive, proof of their contents (Vendor & Purchaser Act, 1874, s. 2; *Dunn* v. *Flood,* 25 Ch.D. 629, 636; and see Conveyancing Act, 1881, s. 3).

Principle. The rule, established for the sake of general convenience, is founded on the great difficulty and often impossibility of proving handwriting after a long lapse of time (*Wynne* v. *Tyrwhitt,* 4 B. & Ald. 376); and on the presumption that the attesting witnesses, if any, are dead—a presumption which is not allowed to be rebutted by proof that such witnesses are alive and actually in court (*Doe* v. *Wolley,* 8 B. & C. 22; *Doe* v. *Burdett,* 4 A. & E. 19; *Marsh* v. *Collnett,* 2 Esp. 655).

Scope of Rule. The rule applies not only to wills and deeds requiring attestation, but to accounts (*Foster* v. *Plumbers' Co.* 44 Sol. Jo. 211), letters, entries, receipts, and settlement certificates (Stark. Ev., 4th ed. 521-4; Tay. s. 88), as well as, it has been thought, to all other documents, public or private (*id.; Wynne* v. *Tyrwhitt, sup.*). But it seems doubtful whether it applies to documents sealed by a court or corporation, since such seals, being of a permanent character, are not rendered more difficult of proof by lapse of time (*R.* v. *Bathwick,* 2 B. & Ald. p. 648; Tay. s. 87; *ante,* 518). And, in the case of declarations made by deceased persons in the course of duty, or as to pedigree, the rule has not always been followed (*ante,* 276, 281). So, when an old deed purported to be an appointment under a special power, and to be executed by the attorney of the donee of the power, the Court presumed only the execution of the deed, but not, in the absence of the power or evidence thereof, the authority of the solicitor to execute it (*Re Airey,* 1897, 1 Ch. 164).

Proper Custody. The proper custody of a document means its deposit with a person and in a place where, if authentic, it might naturally and reasonably be expected to be found [Tay. ss. 659-664; Stark. Ev., 4th ed. 291-293, 524-529; Ros. N.P. 102-104; Steph. art. 88; 108 L.T.Jo. 580]. Such a custody is sufficient, although there might be another which would be more strictly and absolutely proper (*Meath* v. *Winchester,* 3 Bing. N.C. 183; *Croughton* v. *Blake,* 12 M. & W. 205).

Principle. The proof is required not as a ground of reading the document, but to afford the judge reasonable assurance of it as being what it purports to be (*Doe* v. *Phillips,* 8 Q.B. 158; *Bidder* v. *Bridges,* 34 W.R. 514). In County Courts, the rule as to proper custody is not confined to *ancient* documents, for any document which, if duly proved, would be admissible in evidence, may, if produced from proper custody, appearing to be genuine, and not objected to, be read without further proof (O. 18, R. 9).

Where the party who tenders the instrument is also the proper depository, no proof of custody is needed (Stark., 4th ed. 525-526; *Doe* v. *Phillips, sup.; Doe* v. *Keeling,* 11 Q.B. 884; *contra, Evans* v. *Rees,* 10 A. & E. 151, 154, is probably overruled on this point). Thus, it is sufficient for overseers to produce an old parish certificate without showing whence it came (*R.* v. *Ryton,*

5 T.R. 259); or for a corporation to produce ancient corporation documents (*R.* v. *Netherthong,* 2 M. & S. 337, 338; *Brett* v. *Beales,* M. & M. 416).

In other cases the propriety of the custody must generally be proved, whether the document be of a public or private nature (Stark. Ev. 291), or tendered as primary or secondary evidence (*Bidder* v. *Bridges, sup.*). The proper custody of parish registers of baptism and burial is at the incumbent's residence, or the church, and not unless explained, with the parish clerk (*Doe* v. *Fowler,* 14 Q.B. 700; see 76 J.P.Jo. 465); that of ecclesiastical terriers and vicars' books is in the church chest, or the registry of the bishop or archdeacon (*Armstrong* v. *Hewitt,* 4 Price, 216; *Bidder* v. *Bridges, sup.*), and not with a mere landowner in the parish (Tay. s. 661); that of charts of the coast is with the Admiralty, and not the British Museum (*Mercer* v. *Denne,* 1904, 2 Ch. p. 545; *A.-G.* v. *Horner,* 1913, 2 Ch. 140, C.A.; though in *Trafford* v. *Sc. Faith's R.D.C.,* 74 J. P. Rep. 297, County maps from the British Museum were admitted, *sed qu.*); that of family Bibles is with a member of the family (*Hubbard* v. *Lees,* L.R. 1 Ex. 225; *ante,* 311). So, the poorhouse of a union is not an improper repository for old poor-rate books (*Smith* v. *Andrews,* 1891, 2 Ch. 678, 680), or other documents of parishes within the union (*Slater* v. *Hodgson,* 9 Q.B. 727). And a case stated by a former bishop for the opinion of counsel, and preserved with his private papers and family documents, has been admitted, although the opinion related in some respects to the see, and might not improperly have been preserved in the public registry of the diocese (*Meath* v. *Winchester, supra*). So, expired leases are admissible which come from the custody either of the lessor or his agent or solicitor (*Plaxton* v. *Dare,* 10 B. & C. 17; *Doe* v. *Phillips,* and *Doe* v. *Keeling, sup.*), or from that of the lessee (*Hall* v. *Ball,* 3 M. & G. 242). And a chartulary of an abbey, produced by the owner of lands of the abbey, though he was not the principal proprietor nor owner of the farm in question, has been held admissible (*Bullen* v. *Michel,* 2 Price, 399). With regard to court rolls, the lord has the general right to their custody, subject to the right of the steward thereto, for the purposes of his office (*Re Jennings,* 1903, 1 Ch. 906). So, with overseers and assistant as to rate and parish books (*R.* v. *Powell,* 63 J.P. 84.) As to the custody of tithe maps, see *Lewis* v. *Poole,* 61 J.P. 776, and *Fox* v. *Pitt,* 1918, 2 K.B. 196.

On the other hand, a manuscript enumerating the possessions of a dissolved monastery, and produced from the Herald's Office (*Lygon* v. *Strutt,* 2 Anstr. 601); a manuscript book containing a grant to an abbey, produced from the Bodleian Library at Oxford (*Michell* v. *Rabbetts,* cited 3 Taunt. p. 91); and a grant to a priory, produced from the Cottonian MSS. in the British Museum (*Swinnerton* v. *Stafford* (*Marquis*), 3 Taunt. 91; *Bidder* v. *Bridges,* and *Mercer* v. *Denne, supra*), has been rejected, because the possession of the documents was not connected with an interest in the property.

CONNECTED DOCUMENTS. INCORPORATION. REFERENCE. When a transaction is contained in several documents, parol evidence is admissible to connect them and show what papers were intended to constitute the transaction (*Gould* v. *Lakes, ante,* 326, 329). This rule, however, is subject to the qualifications that (1) in contracts under the Statute of Frauds, such evidence is only receivable when the documents themselves contain some

internal reference to each other [*Long* v. *Millar,* 4 C.P.D. 450; *Chapronière* v. *Lambert,* 1917 2 Ch. 356; which need not be express, but may be a conclusion that the two papers are parts of one correspondence, Fry, Sp. Perf., 3rd ed. 254; and such reference is not required in contracts unaffected by the Act, *Edwards* v. *Aberayron Soc.,* 1 Q.B.D. 563, 588; *McGuffie* v. *Burleigh,* 78 L.T. 264]; and (2) in the case of wills that no unexecuted document can be incorporated by reference, unless it is clearly *identified* by its description in the will, and proved to have been *in existence* at the time of the execution of the latter (*Allen* v. *Maddock,* 11 Moo. P.C. 427; *Singleton* v. *Tomlinson,* 3 App. Cas. 404; *Re Louis,* 32 T.L.R. 313; *Re Deprez,* 1917, 1 Ch. 24). Parol evidence is admissible to show what documents exist to which the will can refer (*Paton* v. *Ormerod,* 1892, P. 247); but not where it might equally refer to an existing or to a future document (*University Coll.* v. *Taylor,* 1908, P. 40). There is a distinction, however, between incorporation for *construction* and for *probate,* admissible documents being sometimes omitted from the probate on grounds of convenience, *e.g.* their length, detention by third persons, or loss, though here copies are occasionally received (*Quihampton* v. *Going,* 24 W.R. 917); while, documents not entitled to incorporation in the probate may be valid as declarations of trust, probate being only granted subject thereto (*Re Marchant,* 1893, P. 254); or as specific bequests (*Bizzey* v. *Flight* 3 Ch.D. 269; *Whateley* v. *Spooner,* 3 K. & J. 542; *Smith* v. *Condor,* 9 Ch.D. 170). As to the incorporation or not, of foreign in English wills, see *Re Schenley,* 20 T.L.R. 127; or charter-parties in bills of lading, *ante,* 147; *post,* 575, 612; and of inapplicable or inconsistent clauses of an original policy in a reinsurance contract, *Home Co.* v. *Victoria Co.,* 1907 A.C. 59; *Australian &c. Soc.* v. *National &c. Assn.* 1914, A.C. 634.

In the following cases the internal references have been respectively considered sufficient or insufficient to incorporate the documents referred to and parol evidence accordingly to be admissible or not.

Reference Sufficient.

A. makes a written offer to buy goods of B. The letter contains all the terms of the contract except B.'s name, but the envelope containing the letter is addressed to B. Held, a sufficient connection to satisfy the Statute of Frauds and the Sale of Goods Act, 1893, s. 4, and to charge A. (*Pierce* v. *Gardner,* 1897, 1 Q.B. 688, C.A.; *Freeman* v. *F.,* 7 T.L.R. 431; *Last* v. *Hucklesby,* 58 Sol. Jo. 431, C.A.); and a letter in reply signed by B. saying simply, "I accept *your offer*" (*Long* v. *Millar,* 4 C.P.D. 450); or "I accept the terms contained in your letter of the 14th inst." (*Oliver* v. *Hunting, inf.*), is sufficient to charge B.

A. signs a formal agreement with B. "to purchase three plots of land at Hammersmith and pay a deposit of £31 thereon." B. does not sign the agreement, but on receipt of the deposit signs a separate paper: "Received £31 as a deposit on *purchase* of three plots of land at Hammersmith." Held, that the word "purchase" formed a sufficient internal refer-

Reference Insufficient.

A. sold B. 1062 spruce deals and sent him a detailed invoice of the sale. C., A.'s carrier, also sent B. an advice-note as follows: "Please receive 1062 spruce deals, from A., consignor," upon the back of which B. wrote: "Refused. Not according to representation.—B." Afterwards, B. wrote to A., "with reference to the spruce deals refused by me and now lying at C.'s, they are so inferior I cannot accept the same." Held, that as neither the advice-note, indorsement, nor letter contained the full terms of the contract nor any reference to the invoice which did, there was no sufficient contract under the statute to charge B., although the number and description of the deals and the name of A. as consignor in both the invoice and advice-note corresponded (*Taylor* v. *Smith,* 1893, 2 Q.B. 65, C.A.).

A.'s agents wrote to B giving particulars of "Caryll Hurst, West Grinstead," and stating that A.'s price for house and grounds was £2200, or £2900 to include four acres of adjoining land. B. there-

Reference Sufficient.

ence to connect the receipt with the agreement under the Statute of Frauds, so as to charge B. (*Long* v. *Millar, sup.*). So, where a letter, though repudiating the contract, referred to the particulars, but not to the conditions, of sale, yet as both were in the same document, they were held to be incorporated (*Dewar* v. *Mintoft*, 1912, 2 K.B. 373).

A. agrees to sell B. an estate for £2375, and signs a memo. containing all the terms of the contract except the *name* of the property. Afterwards, on B. sending him a cheque for the deposit, A. replies, "I beg to acknowledge receipt of cheque, £375, on account of purchase of Fletton Estate." Held, a sufficient internal reference to charge A. (*Oliver* v. *Hunting*, 44 Ch.D. 205, *per* Kekewich, J.).

A. orally agrees to sell B. her share in the Barrett's Grove property for £200; and on B. paying her £1 as deposit, gives him the following signed receipt: "Received of B. £1 of my share in the Barrett's Grove property, the sum of £200, September 22, 1882." Some time after, A. writes to B.; "If the *balance* of £199 on account of purchase of my share of the property is not paid by the 22nd inst., I shall consider the agreement of September 22, 1882, not binding." Held, that the word "balance" was a sufficient reference to enable the documents to be read together as against A. (*Studds* v. *Watson*, 28 Ch.D. 305).

A. writes to B. as follows: "Please let me have a letter agreeing to purchase the half-acre you have selected, for £350." B. replies, "I am willing to take half an acre of the land as agreed for £350." Held, the words "willing to take" clearly referring to some prior proposal, and the price in both letters being identical, they could be read together against B. (*Wylson* v. *Dunn*, 34 Ch.D. 569; and see *Oliver* v. *Hunting*, *supra*.

So, where A. signed a memo. of terms for the letting of a carriage to B. for a year, and B. in a later letter referred to "our arrangement for the hire of your carriage," this was held a sufficient reference to bind B. (*Cave* v. *Hastings*, 7 Q.B. D. 125.)

A. sues B. on a guarantee, alleged to be contained in the following letters addressed by B. to A.: (1) "September 15, Burton, Balderson. I hereby guarantee the safety of the above investments." (2) "September 16.—I acknowledge receipt this day of £710, to be invested as under: (*a*) £360, on mortgage of Toynton, the property of Burton: and (*b*) £350 on mortgage of Friskney, the property of Balderson." Held, that the names "Burton, Balderson," sufficiently connected the

Reference Insufficient.

upon called on the agents and signed the following: "I agree to purchase Caryll Hurst for £2450, July 11, 1898.—B."; which offer the agents accepted in writing. Held, B.'s letter did not incorporate that of A.'s agents; and as in the former the name of the vendor was omitted and the subject-matter was uncertain, since it was impossible to say whether the contract was for the house only, or the house and land, there was no memo. under the statute (*Walters* v. *Le Blanc*, 16 T.L.R. 366, C.A.).

A. buys B.'s horse at an auction, the conditions of sale being contained in an unsigned catalogue, but the auctioneer's clerk making the following signed entry in his ledger: "Sales by auction. March 28, 1872. Owner, B. Lot 49. Grey mare. purchaser, A. £33." Afterwards A. writes to the auctioneer: "March 28, 1872. I return the grey mare, lot 49, bought at your sale to-day, she not being as warranted." In an action against A. for the price, held (1) that, though A.'s letter might be taken to refer to the catalogue and conditions, yet that as the latter did not contain the *price*, the two documents were insufficient; (2) That as the ledger entry, though containing the price and corresponding as to date and lot with the catalogue, did not annex or refer to the latter, it was insufficient [*Pierce* v. *Corfe*, L.R. 9 Q.B. 210; *aliter*, if A.'s letter had referred to the ledger-entry, or if the latter had referred to the catologue; *cp. Dewar* v. *Mintoft*, *sup.*].

A. makes the following signed offer for B.'s land, to the latter's agent: "May 18, 1894. I offer £935 for the land at Broadridge owned by B." which offer B. verbally accepts. On May 19, B.'s agent writes to B.: "As you wished the matter settled, I to-day took a deposit from the man making the offer," and on May 21, writes to B.'s solicitor: "Land at Broadridge. At B.'s request, I send you name of purchaser of above. It is A." Held, (1) that though the last letter contained the other essentials of the contract, it was insufficient as omitting the price; (2) that it could not be read with the first letter since that was a mere offer, not otherwise shown to be accepted; nor (3) with the second, as there was no reference made thereto (*Potter* v. *Peters*, 64 L.J. Ch. 357; 72 L.T. 624, *per* Kekewich, J.).

A testator by a will executed in May, 1890, bequeathed an annuity to his wife to be paid by his trustees out of certain funds "which they will find noted by me for the purpose." After his death an open envelope was found marked "Instructions to my executors, June 1890," which contained a list of the securities set apart for

Reference Sufficient.

two documents under the Statute (*Sheers* v. *Thimbleby*, 76 L.T. 709, C.A.).

A testator, in a codicil to his will, referred to a certain bequest as being "contained in a list of gifts deposited with my brother." Held, the whole list was incorporated by this reference (*Re Daniell*, 8 P.D. 14; and see *Re Balme*, 1897, P. 261, where the bequest was of all books contained in a certain library catalogue).

Reference Insufficient.

the above object. In a codicil, later than June 1890, he confirmed his will. Held, as the list was not referred to as an existing document in the will, the codicil did not incorporate it therewith [*Durham* v. *Northern*, 1895, P. 66; see *Paton* v. *Ormerod*, 1892, P. 247; *Re Garnet*, 1894, P. 90; *Re Smart*, 1902, P. 238; *Re Deprez*, 1917. 1 Ch. 24. As to evidence that the particulars in such a list are incorrect, see *post*. chap. xlv. *Examples*, (5)].

ALTERATIONS, ERASURES, BLANKS. **Alterations, Erasures.** *Deeds and Contracts.* Any *material* alteration—*i.e.* one which affects the liability of either party as expressed in the instrument (*Aldous* v. *Cornwell*, L.R. 3 Q.B. 573; *Ellesmere Brewery* v. *Cooper*, 1896, 1 Q.B. 75; *ante*, 518)—made in a deed or written contract after its execution, and while in the control of the party enforcing it (even though made by a stranger without his knowledge or consent, *Davidson* v. *Cooper*, 13 M. & W. 343), renders the instrument void, unless such alteration was made with the privity of the parties charged (*Rudd* v. *Bowles*, 1912, 2 Ch. 60) [Norton, Deeds, 26-42; 1 Sm. L.C., 11th ed. 800-809; Tay. ss. 1819-1838; Ros. N.P. 654-656; Steph. art. 89; Williston, 18 Harv. L. Rev. 105, 165.] But a material alteration made by a stranger while the instrument was not in the custody or control of the party enforcing it (*Hutchins* v. *Scott*, 2 M. & W. 809; *Lowe* v. *Fox*, 12 App. Cas. 206, 217); or a material alteration by whomsoever made when the instrument is tendered not for the purpose of enforcing it, but of proving a collateral fact (*Hutchins* v. *Scott, sup.*; *Agricultural Cattle Insurance Co.* v. *Fitzgerald*, 16 Q.B. 432; *Ward* v. *Lumley*, 29 L.J.Ex. 322); or an immaterial alteration, provided it be not fraudulently made (*Re Howgate*, 1902, 1 Ch. 451; *Crediton* v. *Exeter*, 1905, 2 Ch. 455; Tay. s. 1830), will not avoid the instrument. Thus, where a tenant held under an oral yearly agreement, afterwards signing a written one for a term of 7 (which was altered to 14) years, the instrument also containing further stipulations as to mode of tillage, for breach of which the landlord sued him, it was held that the agreement being oral and only incorporating so much of the document as was applicable to a yearly holding, the written term as to years was immaterial and its alteration need not be explained by the producing party (*Falmouth* v. *Roberts*, 9 M. & W. 469; *post*, 570). It must be remembered, however, that under the Stamp Laws an alteration, even by the consent of both parties, may render the instrument invalid. A document, whether ancient or modern, which is merely in a mutilated or imperfect state, is not deemed to be altered in the above sense; and will be admissible, though its value as evidence may be affected (*Trimlestown* v. *Kemmis*, 9 C. & F. 749, 763; *Evans* v. *Rees*, 10 A. & E. 151; Tay. s. 1838).

Bills and Notes. By the Bills of Exchange Act, 1882, s. 64 (1) where a bill or acceptance is materially altered without the assent of all the parties liable thereon, it is avoided, except as against a party who has himself made, authorised or assented to the alteration, and subsequent indorsees. Provided that where a bill has been materially altered, but the alteration is not apparent (*Leeds Bank* v. *Walker*, 11 Q.B.D. 84) and the bill is in the

hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenor. (2) In particular, the following alterations are material —viz., any alteration of the date, the sum payable, the time of payment, the place of payment, and, where a bill has been accepted generally, the addition of a place of payment without the acceptor's assent. An alteration in the number of a bank-note has been held material, though the contract was unaffected thereby, and the plaintiff was a *bonâ fide* holder for value (*Suffell* v. *Bank of England,* 9 Q.B.D. 555; see *Leeds Bank* v. *Walker, sup.*).

Wills. Under the Wills Act, 1837, s. 21, no obliteration, interlineation or alteration made after execution, shall have any effect, except so far as the words or effect of the will before alteration shall not be apparent (*i.e.* on the face of the will as left by the testator, *Re Horsford,* L.R. 3 P. & D. 211; words underneath being "*apparent*" if experts, using glasses, &c., but not physical interference, can decipher them, *Ffinch* v. *Combe,* 1894, P. 191; *Re Brazier,* 1899, P. 36; see *ante,* 394), unless such alteration be executed in the manner required for a will; but the will with such alteration shall be deemed duly executed if the signature of the testator and subscription of the witnesses (the initials of both are sufficient, *Re Blewitt,* 5 P.D. 116; *Re Shearn,* 50 L.J.P. 15) be made in the margin, or in some other part opposite or near to such alteration, or at the foot or end of, or opposite to, a memorandum referring to it, and written at the end or other part of the will. As to evidence to decipher or supply obliterated words, see *ante,* 394, and *Re Wright,* 44 Ir.L.T.R. 137. [Tay. s. 1069; Ros. N.P. 1041; Theobald, Wills, 6th ed. 38-40.]

Proof of Date of Alterations. In the absence of evidence to the contrary, alterations, interlineations and erasures appearing on the face of *Deeds* (*Doe* v. *Catomore,* 16 Q.B. 745), and *official documents* (*Steevens' Hosp.* v. *Dyas,* 15 Ir. Ch. R. 405; *ante,* 372), will be presumed to have been made before execution. Alterations in *Wills* (but not the filling in of blanks, *Greville* v. *Tylee,* 7 Moo. P.C. 320; nor interlineations apparently written at the same time and merely completing the sense, *Re Cadge,* L.R. 1 P. & D. 543) are presumed to have been made after execution (*Simmons* v. *Rudall,* 1 Sim. N. S. 115, 136; *Doe* v. *Palmer,* 16 Q.B. 747), and even after the execution of any codicils thereto (*Re Sykes* L.R. 3 P. & D. 26; *Christmas* v. *Whinyates,* 32 L.J. P. & M. 73); probate in the case of unexplained alterations only being granted of the will in its original form (Tay. s. 164). But the attestation clause may be referred to to show the date of any alterations (*Doherty* v. *Dwyer,* 25 L.R.I. 297); and the declarations of the testator are admissible to rebut the above presumption (*ante,* 327). So, evidence that other alterations in the same will had been made *before* execution, is relevant to show that those in question had also been so made (*Re Foley, ante,* 167). Memorials of deeds are primary evidence of the date of alterations thereon, though usually only secondary evidence of their contents (*post,* 538, 541). Alterations made before execution in *pencil* are presumed to be deliberative merely, those in *ink* to be final (Theobald, Wills, 6th ed. 38-39).

No similar presumptions exist as to the date of alterations in *Bills and Notes* (*Johnson* v. *Marlborough,* 2 Stark. 313; *Bishop* v. *Chambre,* M. & M.

116; *Knight* v. *Clements,* 8 A. & E. 215; Tay. s. 1819; Ros. N. P. 247), or in *other documents,* save that alterations in these will be presumed to have been made at such time and under such circumstances as not to constitute an offence (Tay. s. 1819).

Blanks. *Deeds.* With regard to deeds, the rule is that matters not essential to their operation (*e.g.* the mere insertion of a Christian name) may be filled in after execution, by or with the consent of the grantor, and if his intention is thereby carried out (*Eagleton* v. *Gutteridge,* 11 M. & W. 465; Tay. s. 1835); but that with respect to essential matters (*e.g.* the name of a transferee of shares, or the number of the shares) the deed must after the blanks have been filled in, be redelivered either by the party himself, or by his agent authorised thereto by deed, otherwise it is void (*Hudson* v. *Revett,* 5 Bing. 368; *West* v. *Steward,* 14 M. & W. 47; *Société Générale* v. *Walker,* 11 App. Cas. 20; *Powell* v. *London & Provl. Bank,* 1893, 2 Ch. 555, C.A.; Tay. ss. 1836-7; Ros. N.P. 137). Where, however, a company contracted to issue debentures as security for a loan, the contract was enforced in equity and the lender held to rank *pari passu* with other holders, although the debentures issued in blank to him in respect of the loan were void at law (*Re Queensland Co., Davis* v. *Martin,* 1894, 3 Ch. 181; *Pegge* v. *Neath Co.* 14 T.L.R. 62; *Re Perth Tramways,* 1906, W.N. 113; but see *Nolloth* v. *Simplified Soc.,* 34 W.R. 73, and *Building Assn.* v. *Smee,* 34 L. Jo. 346). As to parol evidence to fill blanks in deeds and wills, see *post,* 613-4).

Other Instruments. In other cases it is different. Thus, writs and subpœnas may be sealed in blank and filled up afterwards by the applicant; but additional names should not be inserted as of course, after it has been issued and sealed, but a corrected *præcipe* lodged and the writ re-sealed (*Craig.* v. *Boyd,* 1901, 2 I.R. 645). So a stamped bill form, signed by the acceptor in blank, is valid, and may involve a liability to the full amount covered by the stamp (Bills of Exchange Act, 1882, s. 20, sub-s. 1; *Garrard* v. *Lewis,* 10 Q.B.D. 30). But where a smaller amount had originally been filled in and a larger fraudulently substituted, this rule was held, in the absence of culpable negligence on the part of the drawer, not to apply (*Schofield* v. *Londesborough,* 1896, A.C. 514). And blanks in a proxy may be filled in after execution (*Sadgrove* v. *Brydon,* 1907, 1 Ch. 318).

REGISTRATION, ENROLMENT, STAMPS. **Registration, Enrolment, &c.** Where deeds, memorials and other instruments are required by statute to be enrolled, registered, or acknowledged, the proof of these formalities will depend in great measure on the language of the particular Act. But (1) the *certificate* or *memorandum* of enrolment, registration, or acknowledgment, indorsed on the original instrument returned to the party, will in general be evidence both of the fact and date of these acts, without proof, of the signature or official character of the officer (*Doe* v. *Lloyd,* 1 M. & G. p. 684; *ante,* 349, 370), though not of its validity, *e.g.*, that a composition deed has been assented to by the requisite majority (*Bramble* v. *Moss,* L.R. 3 C.P. 458); and (2) an *office copy* of the enrolment, or of the document registered, is by several statutes made evidence both of the fact of the enrolment, and of the contents of the document enrolled or registered (*e.g.* the Charitable Trusts Act, 1855, s. 42; the Bills of Sale Act, 1878, *post,* 564-5); while in the

case of deeds affecting Crown Lands, (1) and (2), *sup.*, are evidence of due execution as well (Tay. s. 1648), [See further *post,* 538-9, 564-5]. As to Irish documents enrolled in England, see *Irish Soc.* v. *Derry,* 12 C. & F. 641. The object of registration being mainly to secure the protection of subsequent purchasers, non-registration will not, unless otherwise provided, invalidate the deed as between the parties, or *ab initio;* and though the transferring part may be void, the covenants and recitals may, as between the parties, still remain operative (*Jones* v. *Gibbon,* 9 Ves. p. 411; *McVity* v. *Tranouth,* 1908, A.C. 60; *National Bank of Australasia* v. *Falkingham,* 1902, A.C. 585; 42 L.Jo. 802).

[Tay. ss. 1119-1127, 1646-1654; Ros. N.P. 18th ed. 143-4; O. 61, rr. 8-14].

Stamps. Except in criminal proceedings (which include proceedings before magistrates to recover penalties, *Mellor* v. *Denham,* 5 Q.B.D. 467; *R.* v. *Tyler,* 1891, 2 Q.B. 588), no instrument requiring a stamp "*shall be given in evidence, or be available for any purpose whatever,*" unless (1) it is duly stamped in accordance with the law in force at the time when it was first executed; or (2) if the instrument is one which may be legally stamped after its execution, unless on payment (or the solicitors undertaking to pay, *Re Coolgardie Co.,* 1900, 1 Ch. 475; *Mason* v. *Motor Co.,* 1905, 1 Ch. 419) to the officer of the Court of the unpaid duty, together with the penalty payable on stamping the same, and of a further sum of one pound (Stamp Act, 1891, s. 14). Nor can a stamp objection be waived by consent of the parties (*Bowker* v. *Williamson,* 5 T.L.R. 382). A written proposal may be orally accepted (*Morrell* v. *Studd,* 1913, 2 Ch., p. 658), and does not require a stamp (*Carlill* v. *Carbolic Co.,* 1892, 2 Q.B. 484, 490; Alpe, 10th ed. 514; Highmore, 2nd ed. 81-9; but *cp. Lucas* v. *Beach,* 1 M. & G. 417). Notice of the omission or insufficiency of the stamp must now be taken by the judge, arbitrator, or referee (s. 14); and to determine the point the Court may go behind the consideration stated (*Maynard* v. *Cons. Kent Corp.,* 1903, 2 K.B. 121). Documents defective in this respect will be excluded, even for the collateral purpose of contradicting a witness (*Interleaf Publishing Co.* v. *Phillips,* 1 Cab. & Ell. 315, decided under the Act of 1870; and see *Ashling* v. *Boon,* 1891, 1 Ch. 568, where an unstamped promissory note was rejected as evidence of the receipt of the amount of the note). And to prove that a husband separated voluntarily from his wife and did not desert her, an unstamped agreement of separation was rejected (*Fengl* v. *F.,* 1914, P. 274). So, where A. sued B. for commission on a sale of land by B. to C., the agreement between B. and C. not being stamped and so inadmissible under a local Stamp Act "for any purpose whatever," but a subsequent conveyance of the same property, executed by B. contained a recital of the agreement, it was held that the recital though primary and not secondary evidence against B. of the *contents* of the agreement, did not dispense with the need of a stamp (*Dent* v. *Moore,* 1919, 26 C.L.R. 316; *cp. post,* 537-8). In spite, however, of the more stringent language of the present Act, unstamped, or insufficiently stamped, documents are necessarily 'available' for the 'purpose' of proving their own unstamped condition (s. 14; *cp. Kirkwood* v. *Carroll,* 1903, 1 K.B. 531, C.A.); and they have also been admitted to refresh the memory of a witness (*Birchall* v. *Bullough,* 1898, 1 Q.B. 325); so an unstamped document has been looked at, not as an agreement, but merely as showing the terms thereof (*Mason* v. *Motor Co.,* 1905,

1 Ch. 419, 425; but *cp. Fengl* v. *F., sup.*). As to the party upon whom the burden of producing a document duly stamped, rests, see *post,* 568-9.

Where a document requiring a stamp is lost, or not produced upon notice, it will, in the absence of evidence to the contrary, be presumed to have been duly stamped; but where it is shown to have been unstamped, it will be presumed to have so continued until the contrary is proved (*Closmadeuc* v. *Carrel,* 18 C.B. 36; *Marine Investment Co.* v. *Haviside,* L.R. 5 H.L. 624; Ros. N.P. 224; *cp. ante,* 104); and where shown to have been unstamped no secondary evidence will be admissible (*Rose* v. *Clarke,* 1 Y. & C.C.C. 534; *Arbon* v. *Fussell,* 3 F. & F. 152), even though the penalty be tendered, for the Act points only to *produced* documents (*cp. Rajah Venkata* v. *Inuganti,* 15 T.L.R. 475; Ameer Ali & Woodroffe, Law of Evidence in India, 4th ed. 862).

Cancellation. Adhesive stamps may be cancelled by the required person writing his name or initial, with date thereon, or part of the name, or the date only or by lines or cross only; otherwise proof must be given that the stamp was affixed at the proper time (Stamp Act, 1891, s. 8; *McMullen* v. *Hickman Co.,* 71 L.J. Ch. 766).

No *New Trial* (O. 39, r. 8), or appeal, either in the High Court (*Blewitt* v. *Tritton,* 1892, 2 Q.B. 327) or County Court (*Mander* v. *Ridgway,* 1898, 1 Q.B. 501), will be allowed where the judge has ruled that the stamp is sufficient, or that none is required, or has received an unstamped document without exacting a penalty (*Lowe* v. *Darling,* 74 L.J.K.B. 794). But such ruling is final only when he decides that the instrument is admissible, and not that it is inadmissible (*Sharples* v. *Rickard,* 2 H. & N. 57; *The Belfort,* 9 P.D. 215; *Bowker* v. *Williamson, sup.*); and if the judge has admitted an unstamped document, the C.A. will also receive it (*Prosser* v. *Lancashire Co.,* 1890, Times, April 23).

CHAPTER XLIII.

CONTENTS OF DOCUMENTS GENERALLY: PRIMARY AND SECONDARY EVIDENCE. CONTENTS OF PARTICULAR DOCUMENTS: PUBLIC, JUDICIAL, AND PRIVATE.

THE Contents of public and judicial documents are provable either by primary, or (more usually) by secondary evidence; the contents of private documents must be proved by primary evidence except in the cases mentioned *post*, 543-9.

[Tay. ss. 394 *et seq.*; Best, ss. 472-491, 492-505; Ros. N.P. 1-15; Steph. chap. ix. For definitions of *primary* and *secondary* evidence, see *ante*, 6].

What are "documents" within the rule. Although a document has been defined as "any writing or printing capable of being made evidence, no matter on what material it may be inscribed" (*ante*, 514), yet for the purposes of the present rule, the material sometimes determines the admissibility. Thus, the term has been held to include Exchequer tallies, wooden scores used by milkmen and bakers (Best, s, 215), and inscriptions upon walls (*Ruscoe* v. *Grounsell*, 20 T.L.R. 5), coffinplates (*R.* v. *Edge*, Wills, Cir. Ev., 6th ed., 309, 340), and rings (*R.* v. *Farr*, 4 F. & F. 336, *post*, 548); and a taximeter has been held to be an "account" under the Fabrication of Accounts Act, 1875 (*Re Solomons*, 101. L.T. 496, C.A.). On the other hand, labels on decanters (*Com.* v. *Blood*, 77 Mass. 74), or parcels (*Burrell* v. *North*, 2 C. & K. 280, 282; *Com.* v. *Morrell*, 99 Mass. 542; *contra*, *R.* v. *Fenton*, cited 3 C.B. 760, and 13 Q.B. 260, *per* Parke, B.; *R.* v. *Hinley*, 1 Cox, 12, 13, *per* Maule, J.; *Ry. Co.* v. *Maples*, 63 Ala. 601), have been held not to be documents, but merely objects to be identified. So, inscriptions on flags and placards exhibited to public view and the effect of which depends on such exhibition, have been said to bear the character rather of speeches than of writings, and so not to be subject to the rules regulating the latter (*R.* v. *Hunt*, 3 B. & Ald. 566; *contra*, *R.* v. *Hinley*, *sup.* In *Jones* v. *Tarleton*, 9 M. & W. 676, Parke B., stated that the evidence in the former case was received as *res gestæ*; but in *Butler* v. *Mountgarret*, 7 H.L.C. p. 639, he considered the better ground to be the inconvenience or impossibility of procuring the banners; *post*, 547-8). So, a cinema film is not a document provable by production under the present rule (*Glyn* v. *Western, &c., Co.*, 1916, 1 Ch. 261). The question of whether a particular object is or is not a document, must, however, be distinguished from the question of whether an object, admittedly a document, is excused from production, as to which see fully *post*, 543-9, 572. As to what constitutes a *Deed*, see *ante*, 517; and for definitions of public, judicial and private documents, *ante*, 514. [Steph. art. 1; Best, s. 215; Chamberlayne's Best, s. 225; Wigmore, s. 1182].

Principle. The general rule requiring primary evidence of litigated documents, is commonly said to be based on the "best evidence" principle, and to be supported by the so-called presumption that if inferior evidence is produced where better might be given, the latter would tell against the withholder. The rule, however, existed long before that principle was formulated, being, in fact, a survival of very ancient practices; and the above presumption has little, if any, application in the present day (*ante*, 46).

History. The above rule appears to have had three distinct, though sometimes overlapping, stages: (1) *Trial by carta or document.* In this stage, disputed documents were tried by the judge, with the help of deed-witnesses, and not by the jury. Afterwards the aid of the latter was invoked, the witnesses, however, not at first testifying in open court, but being summoned with, and giving evidence privately to, the jury (*ante*, 222-3; *cp.* Best, s. 220). (2) *Profert in Pleading.* The second stage is that of profert. Originally, as we have seen (*ante*, 222-3), the jury might go upon their own extra-judicial knowledge of facts and sometimes even of documents, *e.g.* in 1340 they find the existence of a record, unproduced, merely upon the faith of local repute (Y.B. 14 Ed. III. 25; and *cp. Newis* v. *Lark*, 1571,, 2 Plowd, 403 410, *a*). But the rule afterwards grew up of requiring profert of all formal documents, so that the Court and opponent might test their genuineness and validity; as well as, perhaps, in deference to the ancient rule which required all affirmative pleading to be supported by the offer of some mode of proof (Steph. Pl., 1st ed., 441). In the days of oral pleading this meant an actual simultaneous production in Court; but later, when pleadings were written, it meant a mere allegation of profert, satisfied by private inspection before trial. Strictly, however, profert belonged to the stage of pleading, not of trial; and was confined to civil cases, and to deeds and records that were pleaded. Profert was abolished by the Common Law Procedure Act, 1852, s. 55. (3) *Production in Evidence.* When pleading and production were simultaneous, profert was tantamount to a rule of evidence; and even later, when the two stages became distinct, the rule of evidence at the trial appears to have followed the rule of pleading. Finally, from about the end of the seventeenth century, the same analogy led to a general rule requiring actual production at the trial of all documents, whether covered by the profert rule or not. The earliest traces of this rule appear in civil cases in 1571 (*Newis* v. *Lark, sup.*), and in criminal ones in 1640 (*R.* v. *Strafford*, 3 How. St. Tr. 1427, 1432-4). As to the gradual allowance of secondary evidence when the document itself was not forthcoming, see *ante*, 48. [Wigmore, s. 1177; Steph. Plead., 1st ed., 86-9, 439-42; Thayer, Pr. Tr. Ev. 12, 97-112, 503-5.]

Scope of Rule. The present rule applies only to proof of the *contents* of documents and not to cases involving their *existence* or *identity*, e.g. proceedings for conversion, detention, negligent loss or theft, for here there is no distinction between a document and other articles (*ante*, 47, 496), and the plaintiff is not bound to put it in, even though the defendant may be willing to produce it (Tay. ss. 407-8; *Bucher* v. *Jarrett*, 3 B. & P. 143.) Cases of forgery, however, stand upon a somewhat special footing, since among other reasons a minute examination of the instrument and its contents is often vital (Tay. s. 408; *cp. post*, 545).

PRIMARY EVIDENCE. FORMS OF. Primary evidence of the contents of a document may be given by Production of the original; by Admission; or by Copy made under public authority.

(1) **Production of the Original Document.** *History and Present Practice.* The rule requiring original documents to be produced in Court, has, as we have just seen, been traced through three stages, which may be further amplified here, viz: (1) as a form of trial (*by carta,* or document); (2) as a requirement of pleading (profert and oyer); (3) as a rule of evidence. In the first stage, disputed documents were tried by record, Doomsday Book, certificate and the like, production was essential, deeds being tried by their attesting witnesses either before the judges, or later before juries, with whom such witnesses were joined. In the second stage, when pleadings were oral, production was also essential, allegation and profert being simultaneous; afterwards, when pleadings were written, profert though still necessary, was deferred until oyer was demanded, the deed being then produced to the opponent and a copy given. If, however, it were not pleaded, it could not be put in evidence unless required by the jury; while if neither pleaded nor put in, no verdict could in general be founded thereon. But although the doctrine of profert (abolished in 1852) had always implied a corresponding production of the original writing, there had grown up during its currency a quite distinct and much wider rule of evidence, not covered by the profert rule, which latter was strictly confined to civil cases, and to deeds or records in issue therein. During the 16th and 17th centuries there appears indeed to have been only a fluctuating enforcement of production in the case of other original documents, whether in civil or criminal trials; but from that date onward the modern rule began to emerge by which, in the case of *private writings* of all kinds, and subject to certain exceptions, production of such originals is essential, both in civil and criminal proceedings. [Wigmore, Ev. ss. 1177-86; Thayer, Pr. Tr. Ev. 105-112, 503-5; Stephen, Pleading, 1st ed. (1824), 86-9, 439-42; *ante,* 47-8]. So, in proving handwriting by comparison, both the disputed and the genuine writings must be produced (*ante,* 108). As to the production of original documents used to refresh memory, or to contradict a witness, see *ante,* 470, 480. The rule requiring originals has, however, been largely modified in the case of *public and judicial documents,* since here removal from their proper place of deposit, at the call of individuals, entails so much inconvenience and risk that proof of such documents by secondary evidence has long been allowed and sometimes compelled, though the original may be actually in Court (*post,* 543, 560; Tay. 8th ed. ss. 438, 1598; Best, s. 486; *Marsh* v. *Colnett,* 2 Esp. 665). Thus, it has been held that, even in criminal cases, production of the originals of parish registers, books of the Bank of England, books of Customs and Excise, land-tax assessments and answers in chancery, cannot, if refused by their custodians, be enforced (*Sayer* v. *Glossop,* 2 Ex. 409; *Mortimer* v. *M'Callan,* 6 E. & B. 58; *R.* v. *King,* 1782, 2 T. R. 234; *Atherford* v. *Beard, id.* 610, 615), though it is said to be otherwise with rate-books (*R.* v. *Llanfaethly,* 2 E. & B. 940; *post,* 537). So, bankers'-books generally (*ante,* 375-6), and records of the Supreme Court (*post,* 556), are now only producible for special cause and by order of a judge. In Peerage claims, however, it is still the practice in English, but not in Scotch or Irish, cases, to require the originals of parish registers,

inquisitions *post mortem*, and the like, to be produced (Hubb. Ev. of Succ. 535, 590, 608, 643, 677-9, 691); although since the Public Record Office Act, 1838, copies of these documents are at all events admissible (*Fitzwalter Peerage*, Hubb. 608; *Saye and Sele Peerage*, 1 H. & C. 507; *post*, 552, 554). With regard to judicial documents, Mr. Taylor states that the production of the original record is still also compulsory on pleas of *nul tiel record*, and (unless the document be lost, destroyed or in possession of the prisoner) on charges of forgery of a record, or perjury in an affidavit (s. 1535). Sir J. Stephen, however, remarks that the authorities seem hardly to bear out either statement: "they show that production in such cases is the usual course, but not, I think, that it is necessary" (Dig. note xxx.; *post*, 556).

What are Originals. Duplicates and Counterparts (*Discrepancies, Endorsements, &c.*). *Bought and Sold Notes. Policies and Slips. Telegrams. Printed Works.* It is not always easy, however, to determine what is the original document so as to constitute primary evidence in this sense; and sometimes the same document is primary for one purpose and secondary for another. Where there are *duplicate originals, i.e.* two documents both fully executed by each party—both are considered primary evidence; in the case of *counterparts—i.e.* where each document is fully executed by one party only—they are primary evidence against the executing party and his privies (*post*, 545), but secondary evidence only against the non-executing party or his privies, except in cases of ancient possession (*ante*, 112). Where there are discrepancies between a lease by deed and its counterpart, the former will in the absence of evidence be presumed correct (*Burchell* v. *Clark*, 2 C.P.D. 88; *post*, 612); but a patent ambiguity therein may be corrected by the latter (*Matthews* v. *Smallwood*, 1910, 1 Ch. 777); and where they differ, and are not by deed, a signed draft may be looked at to ascertain the true contract (*Ingleby* v. *Slack*, 6 T.L.R. 284; as to evidence to decipher or supply obliterated words, *cp. ante*, 394, 520). With respect to the stamp, the counterpart sealed by the lessor or grantor is deemed the original (Tay. s. 426; Stamp Act, 1891, s. 72). Endorsements on deeds, bearing the same date but proved to have been written before execution, are considered as part of the same instrument and admissible to qualify its terms (*Keele* v. *Wheeler*, 8 Scott, N.R. 323; *Re Howlan*, 34 Ir. L.T.R. 109). As to memorials of deeds, see *post*, 541, 547. In the case of broker's contracts, the *bought and sold notes* are generally considered primary evidence of the contract; but if there are none, or if they disagree, the original signed entry in the *broker's book* may be looked at; while if there be no such entry, and the notes disagree, there is no contract, unless the differences can be reconciled, or shown to be only apparent, by proof of mercantile usage (*Bold* v. *Rayner*, 1 M. & W. 343; *Kempson* v. *Boyle*, 3 H. & C. 763; *cp. Moore* v. *Campbell*, 10 Ex. 323, 330-331). In the case of Fire insurance, the broker's *Slip* has been held a binding contract, and where no policy existed has been itself enforced (*Thompson* v. *Adams*, 23 Q.B.D. 361; *cp. post*, 612, 633). Whether, in cases of Marine Insurance, on refusal to execute a policy, the slip can be stamped after subscription, either as a policy, or as a contract to execute one, seems doubtful [Marine Ins. Act, 1906, s. 22; Stamp Act, 1891, ss. 91, 93, 95, 97; and see an article by Arthur Cohen, K.C., 30 L.Q. Rev. 31; Arnould, Mar. Ins., 9th ed., s. 34-8, 102; Chalmers, M.I. Act, 2nd ed., ss. 35-6, 140]. By s. 21 of the

M.I. Act, 1906, however, the slip is admissible though unstamped, to show when the proposal was accepted; and under s. 89 for other customary purposes, *e.g.* to correct an error in the name of the ship (*Ionides* v. *Pacific Co.*, L.R. 6 Q.B. p. 685), to show when the assured's knowledge ceases to be "material" (*Corry* v. *Patton*, L.R. 7 Q.B. 304), to identify documents referred to (*Lower Rhine Assn.* v. *Sedgwick*, 1899, 1 Q.B. 179), or to rectify the policy for mutual mistake (*Empress Assce. Corp.* v. *Bowering*, 11 Com. Cas. 107, 114). Where rectification is not involved and the slip and policy differ, the former was in one case held to prevail (*Western Assce. Corp.* v. *Poole*, 8 Com. Cas. 108, 118), and the latter in another (*British, &c., Co.* v. *Sturge*, 2 *id.* 244), As to the effect of two slips, see *Scottish Natl. Ins. Co.* v. *Poole*, 18 *id.* 9. In a criminal case, an Office Sidings-book, made up from a Sidings-book kept at the Sidings themselves, has been held sufficiently original to be admitted without accounting for the absence of the latter (*R.* v. *Albutt*, 6 Cr. App. R. 55). [Tay. ss. 420-423; Ros. N.P. 531-533.] The original of a *telegram* is the one sent, not the one delivered (*Henkel* v. *Pape*, L.R. 6 Ex. 7; *Godwin* v. *Francis*, L. R. 5 C.P. 295); and this must be produced from the post office, or else proof of its destruction given, when a copy will be admissible (*R.* v. *Regan*, 16 Cox, 203). So, if the copy of a letter be the document sent, this, and not the letter, will be the original (*per* Judge Woodfall, Westminster Cy. Ct., Times, Ap. 27, 1912, p. 4; *Stowe* v. *Querner*, *inf.*). As to notarial protests, probates, &c., see *infra*, (3). Where a number of documents are made by a uniform process, as printing, lithography, or photography, each is primary evidence of the contents of the rest (*R.* v. *Watson*, 2 Stark. p. 139), but only secondary evidence of the common original (*Nodin* v. *Murray*, 3 Camp. 228). [Steph. art. 64; *post*, 540.]

Production of Original, how Obtained. Identification. When a party desires to obtain an original document which is in the hands of: (1) *his opponent*, the latter may be served either with a notice to produce, under which production is optional, or with a *subpœna duces tecum*, under which it is compulsory (*ante*, 442); when it is in the hands of (2) *a stranger*, a *subpœna* is the proper process (*ante*, 442), except in the case of certain documents (*e.g.* parish registers, whose production cannot be compelled on subpœna, *Sayer* v. *Glossop*, *ante*, 535; though this does not extend to Rate-books whose production may be so compelled, *R.* v. *Llanfaethly*, 2 E. & B. 940), or judicial documents (*post*, 543) or banker's books (*ante*, 375-6); or when the production is required not at the *trial* but only on *motions*, &c. (*ante*, 442), when a judge's order is necessary. In criminal cases, however, the prosecutor, not being strictly a party, must be subpœnaed to produce any necessary documents in his possession; while in the case of the prisoner, the proper process is a notice to produce, and not a subpœna (Archb., Cr. Pl., 24th ed., 375; *R.* v. *Elworthy*, L.R. 1 C.C. p. 105). When an original document is produced it must, unless it has been admitted, or is a public document receivable on its mere production, be identified on oath as being what it purports to be.

(2) **Admissions.** Admissions of the contents of a document made either orally, in writing, or by conduct, are primary evidence thereof against a party, without notice to produce or accounting for the absence of the original, such proof not being open to the same objections as is parol evidence from other

sources (*Slatterie* v. *Pooley*, 6 M. & W. 664; *ante*, 234). Thus, to prove that a certain debt was included in a composition deed, inadmissible because not duly stamped, the defendant's admission to that effect was received (*id.*; *cp. Haughton* v. *Ewebank*, *ante*, 96). So, **Recitals** in a deed are, between the parties thereto, primary evidence of so much of the prior document as is actually recited; the other part must, however, be proved in the ordinary way (*Gillett* v. *Abbott*, 7 A. & E. 783; *post*, 684); and the **Memorial** of a deed, executed by the grantor, is primary evidence against his successor, both of its contents (*Wollaston* v. *Hakewill*, 3 M. & G. 297; *Miller* v. *Wheatley*, 28 L.R.I. 144), and, even though the original be produced, of the date of interlineations therein (*Brown* v. *Armstrong*, I.R. 7 C.L. 130), or that an endorsement on a produced deed was part of the deed (*Re Howlan*, 34 Ir. L.T.R. 109); and where tendered as primary evidence against a party or his successors, proof of search for the original deed is not necessary (*Sinnot* v. *Kehoe*, 1 Ir. L.T. Jo. 5). As to **Abstracts**, see *Pritchard* v. *Bagshawe*, 11 C.B. 459. The tender of the engrossment of a deed for execution, though not an estoppel, is also an admission under this head (*Bulley* v. *B.*, L.R. 9 Ch. 739); and the same rule holds where **Copies** of documents have been delivered by a party (*Stowe* v. *Querner*, L.R. 5 Ex. 155, 159; *Boulter* v. *Peplow*, 9 C.B. 493; *R.* v. *Hunt*, 3 B. & Ald. 566), or knowingly used by him as true in a previous trial (*ante*, 257, 261). So, where the admission has been made by a party's predecessor in title, or others in privity with him [*Price* v. *Woodhouse*, 3 Ex. 616, cited *ante*, 261, in which a copy of a judgment that had been *dealt with* by such predecessor was held primary evidence against the successor, though another copy of which was merely found *deposited among his papers* was only received as secondary evidence after proof of the existence and loss of the original].

(3) **Copies made under Public Authority.** In a few cases, copies of an original document made under public authority are receivable as primary evidence thereof. Thus, probate of a will of personalty is primary evidence of the will and its contents, the original will not being even admissible, though it may be looked at for purposes of construction (*Pinney* v. *Hunt*, 6 Ch. D. 98; *Re Harrison*, 30 Ch. D. 390; *Re Battie-Wrightson*, 1920, 2 Ch. 330); and where proof is required of a declaration of a deceased person contained in a will, the will itself is primary evidence and the probate secondary only (*ante*, 311). So the Act Book, or register, containing an entry of the probate, or even a certificate or examined copy of either, is primary evidence, and receivable without accounting for the non-production of the probate (*Cox* v. *Allingham*, Jacob, 514; *Dorrett* v. *Meux*, 15 C.B. 142; 14 & 15 Vict. c. 99, s. 14; *post*, 528-9). The same rule has been held to apply to Notarial instruments, a duplicate made at any time from the original or protocol in the notarial book being considered equivalent to an original drawn up at the time of the entry (*Geralopulo* v. *Wieler*, 10 C.B. 690; Tay. s. 424; *cp. post*, 548; but see as to notarial copies of other instruments, *Permanent Trustee Co.* v. *Fels*, 1918, A.C. 879, *ante*, 366, *post*, 548, 560). So, also, copies of public registers made under the authority of statute or common law are themselves sometimes regarded as original documents, and provable by copies (*ante*, 346); and the same view has been taken of a copy, similarly made, of an ancient statutory survey (*Poole* v. *Griffith*, cited *ante*, 357); and of enrolment and

memorials of Crown leases, which are themselves primary evidence and provable by authenticated copies (*Rowe* v. *Brenton,* 3 M. & Ry. p. 218).

SECONDARY EVIDENCE. FORMS OF. Secondary evidence of the contents of documents must be legitimate and trustworthy evidence, inferior to primary solely in respect of its derivative character, and must not consist of conjectural or illegal matters (Best, ss. 483, 485; Gulson on Proof, s. 293; *ante,* p. 6). Its chief admissible forms are Copies; Oral Testimony; Admissions; Circumstantial or Presumptive Evidence; and Declarations, made either in Public Documents, or by Deceased Persons.

(A) **Copies** may be: (1) **Government Printer's Copies**—*i.e.* copies printed by the King's printer, or the Government printer, or under the authority of his Majesty's Stationery Office (Documentary Evidence Act, 1882, s. 2); or that of the Legislature of any British colony or possession (31 & 32 Vict. c. 37, ss. 2, 3). (2) **Government Gazette Copies** (*ante,* 337-8). (3) **Copies sealed by foreign States, Courts, Officials, and Notaries**—*i.e.* copies sealed with the seal of any foreign or colonial State or court of justice (14 & 15 Vict. c. 99, s. 7), *e.g.* copies authenticated by a foreign court of an original will in its possession either for probate or for mere custody (*Re Brown,* 80 L.T. 360; *post,* 548, 560). So, a copy under the hand and seal of a Persian religious official has been received (*Re Dost Aly Khan,* 6 P.D. 6). As to Notarial copies, see *sup.* 538, and *post,* 548. (4) **Exemplifications.** An exemplification (a medium of proof now practically obsolete) is a copy of the whole of a record set out either under the Great Seal, or under the seal of the Court in which the record is preserved. Both species of exemplifications are provable by mere production, their seals being judicially noticed (*ante,* 23), and they are of higher credit than ordinary examined copies, being presumed to have undergone a more careful comparison. The records now, however, are never made up (*post,* 550; Odgers, Pl., 6th ed., 292). [Tay. ss. 1536-1537; Ros. N.P. 96; Steph. art. 77.] (5) **Examined Copies.** An examined copy is a copy sworn to be a true copy by a witness who has himself examined it line by line with the original (*Reid* v. *Margison,* 1 Camp. 469); or, which is necessary only in peerage cases, who has alternately with such person read and examined both (*Crawford Peerage,* 2 H.L.C., p. 544; *Slane Peerage,* 5 C. & F. 23, 42). The original must be in characters and a language which the witness understands (*Crawford Peerage, sup.*); and the copy must not contain abbreviations not appearing in the original (*R.* v. *Christian,* Car. & M. 388). A copy examined merely with a completed draft which latter had not itself been examined with the original; or one which is "practically accurate," or sets out only "the material parts" of the original, has been rejected (*Re Halifax Co.,* 79 L.T. 183, 536); as, also, a paper, kept in the same muniment room as a lost deed, *purporting* to be an attested copy thereof, and to have been examined with the original, but no evidence of such examination being forthcoming, though the death and handwriting of the witnesses, who attested both and appeared to be the same persons, were proved (*Brindley* v. *Woodhouse.* 1 C. & K. 647). It may also be necessary to show that the original was in proper custody (*Adamthwaite* v. *Synge,* 1 Stark. 183). Examined copies are, at Common Law, the original and legitimate means of proving, as secondary evidence, every species of document, public, judicial

or private, but are not now usually employed where office or certified copies are available. (6) **Office Copies** are copies made in an office of the High Court, and authenticated by an officer who has the custody of the original document, and is empowered to furnish copies either by law, or by a rule of Court; and they are admitted upon the credit of such officer, without proof of examination with such originals. Office copies of all writs, records, pleadings, and other documents filed in the High Court are admissible therein to the same extent as the originals (O. 37, r. 4); but copies made by officers authorised not by law, but merely by a rule of Court, are only admissible in the same Court and cause. All copies, certificates, and other documents appearing to be sealed with the seal of the Central Office, are now presumed to be office copies, or certificates, or other documents issued from the Central Office, and, if duly stamped, may be received in evidence, and no signature or other formality, except the sealing with the seal of the Central Office, shall be required for the authentication of any such copy, certificate, or other document (O. 61, r. 7). Office copies are the usual means of proving *judicial* documents (except in the Probate and Divorce Division, where examined copies are required, Div. R.R. 118-20), and such private documents as are required to be registered or enrolled, *e.g.* Bills of Sale, acknowledgments by Married Women, &c. (*post,* 564-5). Office copies should be checked and initialled by two clerks, and not by one merely (*Coleman* v. *C.,* 40 L. Jo. 789). [Tay. ss. 1538-1547; Ros. N.P. 98; Steph. art. 78.] (7) **Certified Copies.** A certified copy is a copy signed and certified as true by the officer to whose custody the original is entrusted; and it is admitted, in the same way, upon the credit of such officer without examination with the original. Unless, however, otherwise provided by statute, a certified *extract* or a certificate of the *result or effect* of a document is not admissible (*Finlay* v. *F.,* 31 L.J. Mat. 149; *R.* v. *Newman,* Dears. C.C. 85, as to which case see Ros. N.P., 17th ed., 211; *ante,* 363). If certificates *purport* to be verified in the manner provided by the statutes which render them admissible, they may be given in evidence without proof of the seal, signature, or official character of the party verifying them (Evidence Act, 1845, s. 1). Certified copies are the usual means of proof of such public non-judicial documents as registers and the like; and they are also sometimes used in the case of judicial documents. [Tay. ss. 1599-1659; Ross. N.P. 99-103; Steph. art. 79,] Under the Children Act, 1908, s. 124, proof of wages may be given by a copy of an entry in the employer's wages book or where there is no wages book by a statement signed by the employer or any responsible person in his employ. (8) **Machine, Print, and Photographic Copies.** A copy made by a copying machine is regarded only as secondary evidence of the original (*Nodin* v. *Murray,* 3 Camp. 228). And printed, lithographed, and photographed copies—though, as we have seen, primary evidence of each other's contents—are merely secondary evidence of the common original (*ante,* 537). In *Re Stephens,* L.R. 9 C.P. 187, photographs of non-removable records were received; but the accuracy of a photographic copy, particularly of external objects, must, like that of a map or plan, be established on oath, to the satisfaction of the judge, either by the photographer or some one who can speak to its correctness (*Hindson* v. *Ashby,* 1896, 2 Ch. 21-22). Where the photograph is tendered merely as a general representation of

physical objects, slighter proof will be required than when matters of detail are all-important, as in cases of disputed handwriting. In a criminal case, a photograph has been held admissible to show the permanent and material structure of a house, but not the interior disposition of the furniture, &c., which was required to be proved by witnesses (*R.* v. *Lawton,* 30 Ir. L.T. Jo. 4; *cp. ante,* 398-9). (9) **Counterparts, Drafts, Minutes, Abstracts, Recitals, Memorials.** Counterparts, though primary evidence against the parties executing them, are, as we have seen (*ante,* 536), only secondary evidence against the non-executing party. So, a facsimile or "counterpart original" of a notice under the Public Health Act, 1875, has been held admissible as secondary evidence if proper steps have been taken to excuse production of the original (*Andrews* v. *Wirral, R. C.* 1916, 1 K.B. 816; *post,* 545). And *drafts* from which, by their indorsements, the deeds appear to have been engrossed, are secondary evidence of the deeds even against strangers (*Waldy* v. *Gray,* L.R. 20 Eq. 238, 250; *R.* v. *Hunter,* 4 C. & P. 128; *ante,* 292; as to drafts of wills, see *Sugden* v. *St. Leonards, ante,* 331); but drafts cannot be read unless it be shown that the original was copied from them, and even then the engrossment may have been altered before execution without the corresponding alterations being made in the draft (Powell, Ev., 9th ed., 366). And *minutes* of a judgment are receivable as secondary evidence of the judgment (*Neill* v. *Devonshire,* 8 App. Cas. p. 188). An *abstract* compared with a deed of feoffment has been held good secondary evidence of the latter, no proof being given on either side of the existence of a copy (*Doe* v. *Wainwright,* 5 A. & E. 520; *Moulton* v. *Edmonds,* 29 L.J. Ch. 181; *Doe* v. *Wittcomb,* cited *ante,* 291); but an abstract not produced from proper custody or supported by proof of execution of the original deed has been rejected (*Devonshire* v. *Neill,* 2 L.R.I. p. 166). And *recitals,* though generally speaking only evidence between the parties to the deed (*ante,* 112, 234), are on questions of title receivable as secondary evidence of missing deeds even between strangers (*Moulton* v. *Edmonds, sup.*). So, *memorials,* executed either fully, or by the grantor or grantee alone, and in accordance with which possession has for a long time gone, or even examined copies of the register, have been received not only as primary evidence against the parties to the deeds (*ante,* 538), but, after proof of search for the originals, as secondary evidence thereof even against third persons (*Sadlier* v. *Biggs,* 4 H.L.C. 435; *Scully* v. *S.,* 10 Ir. Eq. R. 557; *Smith* v. *S.,* 1 L.R.I. 206; *Moffett* v. *Gough, id.* 331; *Miller* v. *Wheatley,* 28 L.R.I. 144; *Chism* v. *Lipsett,* 1905, 1 Ch. 60; *cp. Re Attlay, post,* 564).

(B) **Oral Testimony and Admissions.** In addition to testimony as to examined copies (*ante,* 539), the contents of private (but not generally of public or judicial) documents may be proved as secondary evidence by any witness who has in fact read them. A party cannot, however, be compelled by his opponent to admit the contents of documents unproduced in the witness-box (*ante,* 476), although his admissions out of court afford primary, or sometimes secondary, evidence of such contents against himself (*ante,* 537-8).

(C) **Circumstantial or Presumptive Evidence.** In some cases the contents of a lost document may be proved presumptively, *e g.* by the parties having acted in accordance with its supposed terms (*R.* v. *Fordingbridge, ante,* 128; and for evidence inadmissible under this head, see *Smith* v. *S., ante,* 128).

(D) **Entries in Public Registers.** In a few cases entries in public registers have been received as secondary evidence of lost documents (see *Humble* v. *Hunt, Coombs* v. *Coether, Bidder* v. *Bridges,* cited *ante,* 347; *Irish Society* v. *Derry,* cited *ante,* 359; *A.-G.* v. *Horner* (No. 2), 1913, 2 Ch. 140, 157-8; and *cp. ante,* 538).

(E) **Statements by Deceased Persons.** Statements or entries made by deceased persons under circumstances entitling them to admission as exceptions to the hearsay rule, may be tendered as secondary evidence of the contents of documents. Thus, an entry *against interest* made in a rent-book by a deceased landlord has been received as secondary evidence of a lost lease (*ante,* 283). So, copies in the handwriting of deceased clerks made *in the course of duty* to their employers, if conforming to the necessary requirements, but not otherwise, are admissible as secondary evidence of documents (*ante,* 291-2). And *declarations by testators,* and drafts authenticated by them, have been received as secondary evidence of a lost will, *ante,* 331. As to the admissibility of copies and abstracts of deeds, &c., on questions of *public and general interest,* see, however, *Doe* v. *Wittcomb, ante,* 296, 302.

Inadmissible Forms. Copies of Copies, &c. Among inadmissible forms of secondary evidence are copies of copies, which will, in general, be excluded: [*R.* v. *Hains,* (1695), Comberb. 337 (copy of probate as evidence of the will); *Liebman* v. *Pooley,* 1 Stark, 167; *Everingham* v. *Roundell,* 2 M. & R. 138; *McCullough* v. *Munn,* 1908, 2 I.R. 194, 205, C.A.; *Re Halifax Co.,* 79 L.T. 183, 536, where the copy was sworn to have been examined with a "complete draft" of the deed, but there was no proof that the draft had been compared with the deed]; though it is otherwise if the second copy is proved to have been compared with the first, and the first with the original (*Lafone* v. *Griffin,* 25 T.L.R. 308; *Re Halifax Co., sup.;* Ros. Cr. Ev. 12); and copies of copies have been held copies of the original under the Copyright Act, 1862 (*Davis* v. *Baird,* 38 Ir. T.L.R. 23; *Johnson* v. *Hudson,* 7 A. & E. 233 *n*; and *cp. Newmark* v. *National Co.,* 51 Sol. Jo. 412). Shorthand notes of the reading out of a deed by an officer of the Court, or by one of the counsel in a former action, are inadmissible under this head, where the parties to the second action are not the same, and even, perhaps, where they are so (*Doe* v. *Ross,* 7 M. & W. 102, 122-3). Nor can the contents of a document be proved by a witness who has merely heard it read (*Nichols* v. *Kingdom Co.,* 56 N.Y. 618). Nor are certified *extracts* from, or certificates of the *effect* of, documents admissible (*ante,* 363). As to notarial copies, see *ante,* 366; *post,* 548, 560.

No Degrees of Secondary Evidence. The general rule is that there are no degrees in secondary evidence; and that a party is at liberty (subject to comment if more satisfactory proof is withheld) to adduce any admissible description he may choose (*Brown* v. *Woodman,* 6 C. & P. 206; *Doe* v. *Ross,* 7 M. & W. 102; *Hall* v. *Ball,* 3 M. & G. 242; Tay, ss. 550-553; Best, s. 483). The reason assigned is the inconvenience of requiring evidence to be strictly marshalled according to weight; and of compelling a party, before tendering inferior evidence, to account for the absence of all which is of superior value, but the very existence of which he may have no means of ascertaining (*Doe* v. *Ross, sup.;* Tay. s. 551; formerly, however, the *Best Evidence* principle was applied, secondary evidence being marshalled strictly according to degree, *ante,* 48). **Exceptions.** There are, however, exceptions to the rule. Thus,

when the originals are not required, as to which see *ante,* 535, (1) the contents of ***Public Documents*** are provable by copies properly authenticated, and not by oral evidence (*Breton* v. *Cope,* 1 Peake, 43; *Marsh* v. *Collnett,* 2 Esp. 665; Best, s. 485), and only when the originals are lost and copies are not obtainable will such evidence be admitted (*Thurston* v. *Slatford,* 1 Salk. 284; *Macdougal* v. *Young,* Ry. & M. 392); though *aliter* as to mere proof of handwriting therein (*ante,* 400). So, documents from the Record Office must, in the absence of the originals, be proved by certified copies (Public Record Office Act, 1838, ss. 12-13; *post,* 524; Tay., 8th ed., s. 1600, *note* 10); and though in criminal cases Non-parochial registers must be produced (*ante,* 535), in civil cases they are provable by certified and not by other copies (*Re Woodward,* 1913, 1 Ch. 392; *ante,* 400). And generally (2) *Judicial Documents* are provable by office, certified, or examined copies and not by oral evidence [*R.* v. *Bourdon,* 2 C. & K. 366;; *Hartley* v. *Hindmarsh,* L.R. 1 C.P. 553, 556; *Mash* v. *Darley,* 1914, 3 K.B. 1226, C.A.; *post,* 556-63; Mr. Best remarks that in few, if any, instances is oral evidence receivable to prove the contents of a record, or public book, which is in existence (s. 485); *post,* 556-63]; and in the case of *Depositions,* parol testimony, or a copy of the deposition, can only be given when the original is lost, destroyed, in the possession of the opposite party who refuses to produce it after notice (*R.* v. *Wylde,* 6 C. & P. 380; but *cp. Tod* v. *Winchelsea, post,* 569-70), or inadmissible because not complying with the statute (*R.* v. *Erdheim,* 1896, 2 Q.B. 260; *ante,* 215).

CASES IN WHICH SECONDARY EVIDENCE IS ADMISSIBLE. Secondary evidence of the contents of documents, may, provided the originals would themselves be admissible, be given in the following cases:

(1) **When the Original is a Public or Judicial Document, or a Private one required by law to be enrolled, or registered.** By reason of the great inconvenience and risk which would attend the removal of documents of public concernment at the call of private individuals, the contents of public documents, whether judicial or non-judicial, are generally allowed and sometimes required to be proved by secondary evidence, and without notice to produce the originals (*ante,* 535; Tay. 8th ed., ss. 439, 1598; Best, s. 485). Indeed, no affidavit or record of the Court can, without the order of a judge or master, be taken out of the Central Office; nor can a *subpœna* for the production of such document in any case be issued (O. 61, r. 28). So, no banker or officer of a bank, is, in any legal proceedings to which the bank is not a party, compellable to produce the bank books, or to appear as a witness to prove their contents, unless by order of a judge for special cause (Bankers' Books Evidence Act, 1879, s. 6; *ante,* 375, 442, 537). And where documents, even of a private nature, require to be *enrolled or registered,* secondary evidence thereof is generally admissible (*ante,* 530; *post,* 563-5).

(2) **When the Original is in the Possession of the Adversary.** When a document is in the possession of the adverse party or of some one bound to give up possession thereof to him [*e.g.* his solicitor (*Irwin* v. *Lever,* 2 F. & F. 296: *R.* v. *Hunter,* 4 C. & P. 128); banker (*Partridge* v. *Coates,* Ry & M. 156); deputy (*Taplin* v. *Atty,* 3 Bing. 164); agent or servant (*Baldney* v. *Ritchie,* 1 Stark. 338; *contra, R.* v. *Pearce,* Peake, N.P. 75); but not a stakeholder (*Parry* v. *May,* 1 M. & R. 279; assignee (*Knight* v. *Martin,* Gow. R.

103); nor person under whom the adversary justifies in an action of trespass (*Evans* v. *Sweet*, Ry. & M. 83)], and such party refuses to produce it either after notice, or when notice is excused, the other party may, in civil cases, provided that it was duly stamped (*ante*, 531), give secondary evidence of its contents. If the adversary has not appeared, this rule is said still to hold, unless he is abroad, or his address is unknown (*Case* v. *C.*, 2 L.T. 391, *per* Willes, J.). The possession may be proved by showing that the document was last seen in the adversary's hands; or by calling his solicitor, who may be compelled to testify to its possession (*ante*, 206); or by the admission of his counsel (*Duncombe* v. *Daniell*, 8 C. & P. 222); or, presumptively, by showing that it belongs exclusively to him, or would in the ordinary course of business be in his custody (*Henry* v. *Leigh*, 3 Camp. p. 502; *Robb* v. *Starkey*, 2 C. & K. 143; Tay s. 440.) The adversary may, on the other hand, interpose evidence to disprove the possession; but he cannot escape the effect of the notice by voluntarily parting with the document after the notice, or even perhaps before, unless he discloses the name of the transferee (*Knight* v. *Martin, sup.*; *Sinclair* v. *Stevenson*, 1 C. & P. 582).

Notice to Produce. The object of a notice to produce is to enable the adversary to have the document in court, and if he does not, to enable his opponent to give secondary evidence thereof, so as to exclude the argument that the latter has not taken all reasonable means to procure the original (*Dwyer* v. *Collins*, 7 Ex. 639, 647). It must, in civil cases (O. 31; r. 16; O. 32, r. 8; O. 66, r. 1), but not in criminal (*Smith* v. *Young*, 1 Camp. 439), be in writing, and be served either on the party or his solicitor; but it is sufficient to leave it with a servant at the residence of the former, or with a clerk at the office of the latter (*Evans* v. *Sweet*, Ry. & M. 83; *Doe* v. *Martin*, 1 M. & Rob. 242). The service on ordinary days should be before 6 P.M., and on Saturdays before 2 P.M., (O. 64, r. 11). The sufficiency of the service, however, is for the judge, who must be satisfied that it was such that the recipient might, by using reasonable diligence, have complied with the notice (*Lloyd* v. *Mostyn*, 10 M. & W. 478). Proof of the fact and time of service may be given by affidavit of the solicitor or his clerk (O. 32, s. 8); and fresh notices are not necessary on a new trial (*Hope* v. *Beadon*, 17 Q. B. 509). The form of notice may, unlike that of a *subpœna duces tecum* (*ante*, 442), be general—*e.g.* to produce "all accounts relating to the matters in question in this cause" (*Rogers* v. *Custance*, 2 Moo. & Rob. 179); or "all letters written by the plaintiff to the defendant relating to the matters in dispute in the action" (*Jacob* v. *Lee*, 2 M. & Rob. 33; *Morris* v. *Hauser*, *id.* 392). And a notice to produce "a letter purporting to enclose an account" will let in secondary evidence of the account (*Engall* v. *Bruce*, 9 W.R. 536). But a notice to produce "all letters" (*Gardner* v. *Wright*, 15 L.T. 325, *per* Blackburn, J.), or "letters and copies of letters, and all books relating to the cause" (*Jones* v. *Edwards*, M.'Cl. & Y. 139), has been reld too vague to admit secondary evidence of a letter; as also has a notice to produce "all plaintiff's books of accounts containing entries of dealings between him and defendant for Sept. 1896; and all letters from defendant or others to plaintiff relating to relevant matters" (44 Sol. Jo. 95, *per* Kekewich, J.). The proper way is for a party to refer to the specific description given in his opponents' affidavit of documents (*id.*). Inaccuracies, however, will not

vitiate a notice unless the recipient has been misled thereby (*Lawrence* v. *Clarke,* 14 M. & W. 250). If the document when produced is inspected or used by the party calling for it, he thereby makes it his evidence; but it is otherwise when, though produced, he declines to inspect or use it (*Sayer* v. *Kitchen,* 1 Esp. 210; *ante,* 477); and when it is not produced, the non-producing party cannot afterwards give it in evidence (*ante,* 477).

When Notice to Produce is unnecessary. Notice to produce the original is not necessary—(a) when the document tendered is a *duplicate original,* or a *counterpart* executed by the opponent (*ante,* 536), since here the evidence is primary and not secondary (*Houghton* v. *Kœnig,* 18 C.B. 235; Tay. s. 449 A.; Ros. N.P. 3); (b) when the document to be proved is itself *a notice* which has been served on the adversary (*Re Turner,* 1910, 1 K.B. 346; though not on a third person, *Robinson* v. *Brown,* 3 C.B. 754; *Andrews* v. *Wirral R.C.* 1916, 1 K.B. 863, *ante,* 541—*e.g.* a notice to produce, or to quit, or of action, or of the dishonour of a bill when the action is brought upon the bill (Tay. ss. 450-451), or of intention to remove a building, pursuant to a by-law under the Public Health Act, 1875 (*Andrews* v. *Wirral R. C. sup.*), or of an intention to add a charge of habitual criminality to an indictment (*R.* v. *Turner, sup.*); (c) where, from the nature of the case, the adversary must know that he will be charged with the possession of the instrument (*ante,* 523) —*e.g.* in trover for a bond (*Scott* v. *Jones,* 4 Taunt, 865; *Bucher* v. *Jarrett,* 3 B. & P. 143); or on a charge of theft of the document (*R.* v. *Aickles,* 1 Lea. pp. 297 *n,* 300 *n,* approved in *R.* v. *Elworthy,* L.R. 1 C.C. 103; *contra, R.* v. *Farr, ante,* 533, where on a charge of burglary the prosecutor, though allowed to state that there was an inscription on the stolen ring and otherwise identify it, was not allowed to state the contents of the inscription, no notice having been given; *sed qu*); or on an indictment for administering an unlawful oath, which was read out from a certain paper (*R.* v. *Moors,* 6 East, 421*n; ante,* 533, *post,* 572); or as to motor licenses, on charges of driving at excessive speed (*Marshall* v. *Ford,* 72 J.P.Rep. 480; *Martin* v. *White,* 74 *id.* 106); though where the matter is collateral, notice to produce must be given before secondary evidence is admissible—*e.g.* on a charge of perjury in falsely swearing that a certain draft did not exist (*R.* v. *Elworthy,* L.R. 1 C.C. 103); or on a charge of forgery (*R.* v. *Haworth,* 4 C. & P. 254), or uttering [*R.* v. *Fitzsimons,* Ir.R. 4 C.L. 1; in *R.* v. *Barris,* 112 C.C.C. Sess. Pap. 822, however, it was held that though not absolutely necessary to produce a forged document, yet a notice to produce laid no foundation for secondary evidence, since it compelled the judge to decide the prisoner's identity, which was for the jury; but *cp. ante,* 11-12, 193, and in a later charge of larceny of the same document, the evidence was received, 112 C.C.C. Sess Pap. 836]; or of arson in setting fire to a house to obtain the moneys secured by a policy (*R.* v. *Ellicombe,* 5 C. & P. 522; *R.* v. *Kitson,* Dears. C.C. 187); so, in an action on a cheque, where the defendant admits the making, but pleads in avoidance, he cannot call upon the plaintiff to produce the cheque without notice (*Goodered* v. *Armorer,* 3 Q.B. 956). (d) Where the adversary or his solicitor has admitted the loss of the document [*R.* v. *Haworth, sup.*; Tay. s. 455; a party cannot, however, prove the destruction of a document traced to his opponent's possession, and then tender secondary

evidence thereof unless he has first given notice to produce, for the adversary may dispute the destruction, *Doe* v. *Morris,* 3 A. & E. 46]. (e) Where the adversary or his solicitor has the document in court (*Dwyer* v. *Collins,* 7 Ex. 639; Tay. s. 456). (f) Where the adversary has obtained possession of the document by fraud or force (*Leeds* v. *Cook,* 4 Esp. 256; Tay. s. 453). (g) Merchant seamen are allowed to give secondary evidence of the contents of their agreements with the masters of their ships without giving notice to produce the originals (Merchant Shipping Act, 1894, s. 123; see *Bowman* v. *Manzelman,* 2 Camp. 315, *ante,* 523). [Tay. ss. 440-456 *n;* Ros. N.P. 7-14; Steph. art. 72.]

(3) **When the Original is in the Possession of a Stranger.** When the stranger is compellable by law to produce, on *subpœna, an original document* in his possession (see *ante,* 442-3, 537), but fails to do so, secondary evidence of its contents cannot be given, although the witness will be punishable for disobedience (*R.* v. *Llanfaethley,* 2 E. & B. 940). When, however, he is not compellable by law to produce it, and refuses to produce it either when summoned as a witness with a *subpœna duces tecum* (*Doe* v. *Ross,* 7 M. & W. 102; *Marston* v. *Downes,* 1 A. & E. 31; *Mills* v. *Oddy,* 6 C. & P. 728; *ante,* 442-3), or when sworn as a witness without a *subpœna* but admitting that he has the document in court (*Doe* v. *Clifford,* 2 C. & K. 448; *Newton* v. *Chaplin,* 10 C. B. 356), secondary evidence of its contents may be given. Mere refusal to produce the document will not, therefore, let in secondary evidence thereof; the witness must be justified in his refusal, for otherwise the party has no remedy except as against him (*Jesus Coll.* v. *Gibbs,* 1 Y. & C. Ex. R. 145, 156; *R.* v. *Llanfaethly,* 2 E. & B. 940), and even a justified refusal will not let in secondary evidence of certain documents protected by public policy (*ante,* 195). The witness may be *justified* in such refusal where the document is, *e.g.* one on which he has a lien for money lent (*Doe* v. *Ross, sup.*), or is a title-deed, or an incriminating document, or one which he holds as trustee, solicitor, or mortgagee for another, and which that other would himself be justified in withholding (*ante,* chap. xvi.; 442-3). Where he holds for another, as solicitor for client, it will probably be necessary (unless he can swear to a distinct authority from the client to produce or withhold the document, *Phelps* v. *Prew,* 3 E. & B. 430), to *subpœna* the latter to determine the matter (*Doe* v. *Ross,* and *Newton* v. *Chaplin, sup.; Re Cameron's Co.,* 25 Beav. 1). In criminal cases, however, the document must be given up, notwithstanding any instructions from the depositor (*R.* v. *Daye,* 1908, 2 K.B. 333; *ante,* 443). When a document is in the possession of a stranger within the jurisdiction who has not been subpœnaed to produce it, secondary evidence of its contents cannot be given (*Andrews* v. *Wirral,* 1916, 1 K.B. 863). As to when the document is in the hands of a stranger *abroad* who refuses to produce it, see inf. (5). [Ros. N.P. 157-160; Tay. ss. 457-460; 918-919; Steph. arts. 118-119].

(4) **When the Original has been lost or destroyed** (Tay. ss. 429-437). The party tendering secondary evidence must prove the *existence* and *execution* of the document directly, if possible (*ante,* 514-25), or presumptively, where not, *e.g.* an assignment of a patent has been proved by a long course of dealing between the parties chiefly consistent therewith (*Dennison* v. *Ashdown,* 13 T.L.R. 226); and a lost grant by long possession (Ros. N.P. 30-41); so, the existence, execution, and contents of a lost indenture of

apprenticeship may be presumed from the parties having acted in that capacity (*R.* v. *Fordingbridge, ante,* 128); though where the question was whether a lost deed contained a certain limitation, which did not appear in the memorial, the subsequent conduct of the parties to the deed was held inadmissible, being equally consistent with that and several other limitations (*Smith* v. *S., ante,* 128). In civil cases, *stamping* must also be shown (*ante,* 531-2). The tendering party must then prove its destruction, positively or presumptively, or establish its loss, either by the admission of the adversary or his solicitor (*R.* v. *Haworth,* 4 C. & P. 254), or by proof that it cannot be found after diligent search. Where a witness swore that he had last seen the document, a forged note, in an old purse which he had eventually given to his clerk who he believed had burnt it as valueless, this was held insufficient evidence of loss without calling the clerk (*R.* v. *Hall,* 12 Cox, 159). In the case of loss of *Bills* and *Notes,* special rules obtain, the holder having a right, on indemnity, to a duplicate, and the Court power to order that on indemnity, the loss shall not be set up. (Bills of Exchange Act, 1882, ss. 69, 70).

Search. The sufficiency of the search necessary to let in secondary evidence is a preliminary question for the judge, and will vary with the importance of the document and the circumstances of the case. Thus, if the document were an envelope in which a letter had been received and the witness said I have searched for it among my papers and cannot find it, this would be sufficient; and where a libel was published in a sectarian newspaper, a copy of which had been left at an institution gratuitously and the person testified that he had searched for it without success and supposed it had been taken away by someone, this was held sufficient; while if he had said that A. had taken it, then he should have gone to A. to get it restored (*Gatherscole* v. *Miall,* 15 M. & W. 319). It is enough if the party has in good faith exhausted all the sources and means which the nature of the case suggested, and which were reasonably accessible to him (*R.* v. *Saffron Hill,* 22 L.J.M.C. 22). It is not necessary that the search should be recent, or made for the purposes of the trial (*Fitz* v. *Rabbits,* 2 M. & Rob. 60); and the answers given by persons likely to have had the document in their custody are admissible not to prove the facts stated, but to show the reasonableness of the search (*R.* v. *Braintree,* 1 E. & E. 51; *R.* v. *Kenilworth,* 7 Q.B. 642; *Smith* v. *S.,* 10 Ir. Rep. Eq. 273; *ante,* 218, 225). Where there is one person chiefly interested in a document, inquiry should be made of him; where two persons have an equal title to its custody—*e.g.* master and apprentice, or lessor and lessee —inquiry should be made of both; though this strictness is not perhaps legally necessary for in the former case search among the papers of the apprentice (*R.* v. *Hinckley,* 3 B. & S. 885), and in the latter among those of the lessor (*Brewster* v. *Sewell,* 3 B. & Ald. 296), has been deemed sufficient. Where, however, inquiry was only made of one out of three persons likely to have the document, this was held insufficient (*Hawker* v. *King,* 108 L.T. Jo. 540; and *cp. R.* v. *Hall, supra*).

(5) **When Production of the Original is physically impossible or highly inconvenient**—*e.g.* inscriptions on walls, tombstones, and the like (*Bruce* v. *Nicolopulo,* 11 Ex. 129, 133; *R.* v. *O'Connell,* 5 St. Tr. N.S. 244-45; if there are circumstances of suspicion, the tombstone itself may have to be produced, *Tracy Peerage,* 10 C. & F. 154; *Boosey* v. *Davidson,* 13 Q.B. p. 265), though

aliter with inscriptions on coffin-plates or rings (*R.* v. *Edge,* 1842, Wills Circ. Ev., 6th ed. 309; *ante,* 533). Where a notice was merely suspended to a wall by a nail, it was held necessary to produce it at the trial (*Jones* v. *Tarleton,* 9 M. & W. 675); but where the notice though movable was one required by statute and under a penalty to be kept constantly affixed, it was held, on grounds of convenience, that secondary evidence thereof might be given without notice to produce the original (*Owner* v. *Beehive Spinning Co.,* 1914, 1 K.B. 105, following *Mortimer* v. *M'Callan,* 6 M. & W. 58, where handwriting in books of the Bank of England, was equally allowed to be proved without production of the books, as also that in public registers, *Sayer* v. *Glossop, ante,* 400; and see now Bankers' Books Ev. Act, 1876, s. 6, *ante,* 375). Inscriptions on flags and banners have been regarded rather as speeches or acts done than as documents, and so provable by oral testimony without reference to the present rule (*R.* v. *Hunt,* 3 B. & Ald. 566; *R.* v. *O'Connell, sup.; ante,* 533); so, with resolutions read at public meetings, and perhaps labels on parcels or decanters (*ante,* 533, *post,* 572). And in cases of copyright, the similarity of the contents of the two works may be shown without the production of either (*ante,* 47; *post,* 573). The rule applies equally where a private document is in the hands of a person resident *abroad* who refuses to produce it (*Boyle* v. *Wiseman,* 10 Ex. 647; 11 Ex. 360; *Kilgour* v. *Owen,* 88 L.T.Jo. 7-8); or is filed in a foreign court (*Crispin* v. *Doglioni,* 32 L.J. P. & M. 109, where though the actual custodian, *i.e.* secretary of the Court, refused production, it was not shown that the *legal* custodian, *i.e.* the Court itself, had been applied to, as it should have been, and refused). A *notarial copy* of a foreign will is admissible on proof by experts that the original is not allowed to be removed, and that the local courts regard such copies as equivalent to the original (*Re Von Linden,* 1896, P. 148; *Re Lemme,* 1892, P. 89; *cp. Brain* v. *Preece,* 11 M. & W. 773, 775); though it has been held that even where the will is in possession of a foreign Court only for custody, and not for probate, a notarial copy is inadmissible here, the original will, or a copy authenticated by a foreign court, being required (*Re Brown,* 80 L.T. 360; see however, *Quihampton* v. *Going,* 24 W.R. 917); and the notarial copy of a marriage settlement similarly deposited has also been rejected (*Permanent Trustee Co.* v. *Fels,* 1918, A.C., 879; *cp. ante,* 366, 538; *post,* 560). Foreign public documents, *e.g.* registers, may be proved by copies under this rule (*Burnaby* v. *Baillie,* 42 Ch.D. 282), as well as under (1), *sup.* Where, however, a document was in S. Africa and the question was merely one of delay, secondary evidence was rejected (*Ward* v. *Murray,* 1900, Times, Mar. 5).

(6) **When leave of Court has been obtained,** *i.e.* by previous summons for directions under O. 30, r. 7 (*ante,* 499).

(7) **In interlocutory proceedings,** secondary evidence may be given of documents without accounting for the absence of the originals, in analogy to the practice which allows deponents in such cases to speak to the information and belief (*Spencer* v. *Bailey,* 93 L.T.Jo. 223; *ante,* 499).

(8) **Other Cases.** The rules allowing testimony of the *result of unproduced documents, and of acting in a public Office without production of the written appointment,* have been considered to constitute further instances of secondary evidence; but in the former case the testimony is equally admissible when

the documents *are* produced (*ante,* 467), and in the latter it can only be tendered in proof of the fact, and not of the terms, of the appointment (*post,* 572).

PUBLIC DOCUMENTS. Statutes: British, Colonial, and Foreign.—*British.* Public Acts, which term now includes every Act passed after the year 1850, are judicially noticed as such, unless the contrary is expressly provided by the Act (52 & 53 Vict. c. 63, s. 9; *R.* v. *Sutton,* 4 M. & S. 542; Tay. s. 5; Steph. art. 58; *ante,* 20). No evidence of their contents is therefore necessary, though for certainty of recollection reference is had to printed copies (not necessarily examined copies or copies published by the King's printer) or, where the accuracy of these is questioned, to the Parliament Roll itself (*Price* v. *Hollis,* 1 M. & S. 105). In cases other than the above the Acts may be proved by copies purporting to be printed either by the King's printer or under the authority of H. M. Stationery Office (8 & 9 Vict. c. 113, s. 3; 45 & 46 Vict. c. 9, s. 2; *Re Yarmouth Ry.,* 1871, W.N. 236); or, where there are no such copies, by an examined copy shown on oath to have been compared with the Roll. *Colonial* statutes may be proved by copies certified by the clerk of the Colonial Legislature (28 & 29 Vict. c. 63, s. 6; *R.* v. *Brixton,* 21 Cox, 387); or by copies purporting to be printed by the Government printer of the colony [Evidence (Colonial Statutes) Act, 1907 (7 Edw. VII. c. 16)]. As to *Foreign* statutes, &c., the old rule was that foreign written law must be proved by an examined copy; though a printed copy of the French Codes, produced by the French consul here and vouched by him, was in one case admitted though unexamined (*Lacon* v. *Higgins,* Dowl. & Ry. N. P. 38; 3 Stark. 178; but *cp. Richardson* v. *Anderson, post,* 550). See now, however, as to foreign law whether written or unwritten, *ante,* 388; and foreign treaties, &c., *infra.* [Tay. ss. 1523-1524; Ros. N.P. 105-106; Steph. arts. 58, 61; Hardcastle on Statutes, 40-3.]

Statutory Rules. Statutory Rules are provable by production of the Annual Vol. of Statutory Rules and Orders, published by authority, or by copies issued by the King's Printer (Archb. Cr. Pl. 25th ed. 393; see Rules Publication Act, 1893, s. 3 (3) and Regulations 1894].

Treaties, Charters, Letters-Patent, &c. Treaties, charters, letters-patent, Crown grants, pardons, and commissions are records and provable at Common Law, by production of the original, by exemplifications, or by examined copies (Tay. s. 1526; Palmer, Peerage Law, 235; Ros. N.P. 106, 107.) Thus, the Patent of a Peerage is provable either by production of the original, or when this is lost, &c., by entries in the Journals of the House of Lords, or examined copy of the record of the patent (*Barony of Saye and Sele,* 1 H. L.C. 507). Letters-patent for inventions, being now sealed with the seal of the Patent Office, are judicially noticed without proof (Patents Act, 1907, s. 64); and certified and sealed copies of patents, specifications, and other documents, and books, are admissible without the production of the originals (s. 79).

Colonial and Foreign Treaties, Proclamations, Judgments, &c. All proclamations, treaties, and other acts of state of any foreign state or of any British colony, and all judgments, decrees, orders, and other judicial proceedings of any court of Justice in any foreign state or in any British

Colony, and all affidavits, pleadings and other legal documents, filed or deposited in any such Court, may be proved in any Court of justice or before any person having by law or by consent of parties authority to hear, receive and examine evidence, either by examined copies or by copies authenticated as hereinafter mentioned; that is to say, if the document sought to be proved be a proclamation, treaty or other act of State, the authenticated copy to be admissible in evidence must purport to be sealed with the seal of the foreign State or British Colony to which the original document belongs; and if the document sought to be proved be a judgment, decree, order, or other judicial proceeding of any foreign or colonial court, or an affidavit, pleading, or other legal document filed or deposited in any such Court, the authenticated copy to be admissible in evidence must purport either to be sealed with the seal of the foregn or colonial Court to which the original document belongs or in the event of such court having no seal, to be signed by the judge, or if there be more than one judge, by any one of the judges of the said Court; and such judge shall attach to his signature, a statement in writing on the said copy that the Court where he is a judge had no seal; but if any of the aforesaid authenticated copies shall purport to be sealed or signed as hereinbefore respectively directed, the same shall respectively be admitted in evidence in every case in which the original document could have been received in evidence, without any proof of the seal where a seal is necessary, or of the signature, or of the truth of the statement attached thereto, where such signature and statement are necessary, or of the judicial character of the person appearing to have made such signature and statement (14 & 15, Vict. c. 99, ss. 3, 7). A sealed copy of a foreign marriage settlement deposited in a foreign Court and not removable therefrom has been held to be covered by similar words in the Ev. Act. 1898 of N.S.W. (*Permanent Trustee Co.* v. *Fels,* 1918, A.C. 879). And a book purporting to contain the Acts of the Legislative Council in India, and produced by a clerk from the India Office, has been held sufficient evidence of those Acts (*Gardner* v. *Wright,* 15 L.T. 325; *cp.* Registers, *post,* 554). Prior to the above Act, a book purporting to be a collection of treaties concluded by America, and to have been published by authority there as a regular copy of the archives, and acted on and vouched by the American minister here, but not examined with these archives, was rejected (*Richardson* v. *Anderson,* 1 Camp. 65 *n*; but *cp. Lacon* v. *Higgins, ante,* 549).

Proclamations and Orders in Council. Royal proclamations, and orders and regulations issued by the Government, may be proved, like other public documents, by the production of the originals or by examined copies thereof; or, in the case of proclamations, by copies purporting to be printed by the printers to the Crown, or by the printers to either House of Parliament (8 & 9 Vict. c. 113, s. 3.)

In addition to these methods of proof, it is enacted by the Documentary Evidence Act, 1868 (31 & 32 Vict. c. 37), s. 2, that *primâ facie* evidence "of any proclamation, order, or regulation issued before or after the passing of this Act, by or under the authority in the first column of the schedule hereto, may be given in all courts of justice and in all legal proceedings whatsoever, in all or any of the modes hereinafter mentioned; that is to say:

> "(1) By the production of a copy of the *Gazette* purporting to contain such proclamation, order, or regulation (see *ante,* 337).

"(2) By the production of a copy of such proclamation, order, or regulation, purporting to be printed by the Government printer, or, where the question arises in a court in any British colony or possession, of a copy purporting to be printed under the authority of the legislature of such British colony or possession. [The Documentary Evidence Act, 1882 (45 & 46 Vict. c. 9), ss. 2, 4, has extended this provision to copies purporting to be printed by a printer to his Majesty in Ireland, or by any printer in England or Ireland acting under the superintendence or authority of his Majesty's Stationery Office. The production of such copies is also *primâ facie* evidence of the publication of the order (*Huggins* v. *Ward*, L.R. 8 Q.B. 521)].

"(3) By the production, in the case of any proclamation, order, or regulation issued by his Majesty or by the Privy Council, of a copy or extract purporting to be certified to be true by the Clerk of the Privy Council, or by any one of the Lords or others of the Privy Council, and, in the case of any proclamation, order, or regulation issued by or under the authority of any of the said departments or officers, by the production of a copy or extract purporting to be certified to be true by the person or persons specified in the second column of the said schedule in connection with such department or officer.

"Any copy or extract made in pursuance of this Act may be in print or in writing, or partly in print and partly in writing.

"No proof shall be required of the handwriting or official person certifying, in pursuance of this Act, to the truth of any copy of or extract from any proclamation, order, or regulation."

By s. 6 the provisions of the above Act are to be deemed in addition to, and not in derogation of, any existing statutory or common law powers of proving documents.

SCHEDULE AS AMENDED BY SUBSEQUENT ACTS.

COLUMN I. (*Name of Department or Officer.*)	COLUMN II. (*Names of Certifying Officers.*)
The Commissioners of the Treasury.	Any Commissioner, Secretary, or Assistant Secretary of the Treasury.
The Commissioners for executing the office of Lord High Admiral.	Any of the Commissioners for executing the office of Lord High Admiral, or either of the Secretaries to the said Commissioners.
Secretaries of State.	Any Secretary or Under-Secretary of State.
Committee of Privy Council for Trade.	Any member of the Committee of Privy Council for Trade, or any Secretary or Assistant Secretary of the said Commissioners.
The Poor Law Board (now absolished; see Local Government Board, *infra*).	Any Commissioner of the Poor Law Board, or any Secretary or Assistant Secretary of the said Board.
The Local Government Board (see L. G. B. Act 1871, s. 5; and also Public Health Act 1875, ss. 130, 135, 297, sub-s. 7; and P. H. (Ir.) Act 1878, s. 265).	Any member of the Local Government Board, or any Secretary or Assistant Secretary of that Board.
Board of Education (see B. E. Act 1899, s. 83).	Any Member of the Education Department or any Secretary or Assistant Secre-

COLUMN I. (*Name of Department or Officer.*)	COLUMN II. (*Names of Certifying Officers.*)
The Postmaster-General (see Post office Act, 1908).	tary of that Department, or the Board, or a Secretary or person authorised by the President or some member of the Board to act on behalf of a Secretary.
A Secretary of State acting under the Artillery and Rifle Ranges Act, 1885, s. 6; and Drill Grounds Act 1886.	Any Secretary or Assistant Secretary of the Post Office.
The Board of Agriculture & Fisheries [see Documentary Evidence Act, 1895. s. 1)].	Any of his Majesty's Principal Secretaries of State.
	The President, Secretary, or any member of the Board, or any person authorised by the President to act on behalf of the Secretary.
The Local Government Board for Ireland [the Ev. (Amendment) Act 1915, s. 5].	A Commissioner of the Local Government Board for Ir., or a Secretary or Assistant Secretary of the said Board.
The Minister of Pensions (The Ministry of Pensions Act 1916. s. 6).	The Minister, Secretary of the Ministry, or person authorized by former to act for latter.
The Ministers of Labour, Food, Shipping and National Service and the President of the Air Board [The New Ministries and Secretaries Act 1916. s. 11; The Ministry of National Service Act 1917. s. 2].	The Minister, Secretary of the Ministry or person authorised by former to act for latter.
The Air Council [Air Force (Constitution) Act, 1917, s. 10.]	The President or Secretary of the Council, or person authorised by former to act on behalf of the Council.

Parliamentary Journals, signed by the Speaker, are provable either at Common Law by production of the originals or examined copies (*R.* v. *Ld. Gordon,* Doug. 590, 593; 21 St. Tr. 543; *R.* v. *Ld. Melville,* 29 St. Tr. 683-5; *Barony of Saye & Sele,* 1848, 1 H.L.C. 507; the dictum to the contrary as to copies in *Mortimer* v. *M'Callan,* 6 M. & W. 58, 67, seems erroneous), or under Statute by copies purporting to be printed by the printers to the Crown or, by the printers to either House of Parliament (8 & 9 Vict. c. 113, s. 3); or perhaps by authority of H. M. Stationery Office (45 & 46 Vict. c. 9. s. 2.). *Hansard's* Debates are not admissible as Parliamentary Journals under these Acts (*McCarthy* v. *Kennedy,* 1905, Times, Mar. 4). As to admissibility of these Journals, of the Text Roll, Return Book and Division Registers, as evidence of the facts stated therein, see *ante,* 335-6.

The General Records of the Realm in the custody of the Master of the Rolls are provable by copies certified by the deputy keeper of the records, or one of the assistant record keepers, and purporting to be sealed or stamped with the seal of the Record Office; and when so authenticated they are receivable before all Courts of Justice, and before all legal tribunals, and before either House of Parliament, or any committee of either House, without any further or other proof thereof, in every case in which the original record could be received (The Public Record Office Act, 1838, 1 & 2 Vict. c. 94, ss. 12, 13; see also the Pub. Rec. Ir. Acts, 1867, 1875; Tay. 8th ed. ss. 1485, 1533). Where the record is lost, proof may be given by a certified copy of the entry in the judgment book in the same custody (*Re Tollemache, Exp. Anderson,* 14 Q.B.D. 606). The Records, both public and judicial, deposited in the above custody, include *inter alia* all the

records of the superior courts of common law, equity and admiralty which are more than *twenty years old;* the records formerly in the custody of the Queen's Remembrancer; the records of the Land Revenue Record Office, the Lord Chamberlain's Office, and the Augmentation Office; the log-books of the Navy; various records of forfeited estates; duplicates of land and assessed taxes; the records of the Court of Wards and Liveries; and those of first fruits and tenths; Domesday Book; Parliament, statute, patent and closed rolls; some of the Crown land surveys; and the lieger books and chartularies of the dissolved monasteries (Tay. s. 1845). All records and documents of the old Common Law side of the Court of Chancery filed or deposited in the Petty Bag Office may be proved by office copy (12 & 13 Vict. c. 109, s. 13; as to other documents of a public nature which are deposited in particular courts or offices, see Tay. s. 1486).

General Provisions as to proof of the authenticity and Contents of Public Documents. (1) *Documents admissible if "purporting" to be duly signed, &c.* It is provided by many statutes that various certificates, official and public documents, documents and proceedings of corporations and of joint-stock and other companies, and certified copies of documents, by-laws, entries in registers and other books, shall be receivable in evidence of certain particulars in courts of justice, provided they are respectively authenticated in the manner prescribed by such statutes. Whenever by any Act now or hereafter in force any such certificate, &c., shall be so receivable, it is admissible if it *purports* to be authenticated in the manner prescribed, and no proof need be given of the stamp, seal, or signature, or of the official character of the person appearing to have signed the same (8 & 9 Vict. c. 113, s. 1; see as to this Act, Tay. s. 7; Ros. N.P. 101; Steph. art. 79). Where proof of signature is given, that of the *de facto* custodian of a record is sufficient, though he be not the officer *de jure* (*R.* v. *Parsons*, L.R. 1 C.C. 24; *R.* v. *Jones*, 2 C. & K. 524).

(2) *Documents of a public nature provable by examined or certified copies.* The removal of books of general concernment from their proper place of deposit, at the call of individuals, involves, however, so much inconvenience and risk, that it has long been a rule of the Common Law that whenever a document is of a *public,* which here includes *judicial,* nature, and would be evidence if produced, an *examined copy* thereof is also evidence, without production of the original, or accounting for its absence (*ante,* 535, 543), *e.g.* copies of church registers, of corporation-books, of Manor-books, of proceedings in the Ecclesiastical and Admiralty Courts, of notes of judgments in inferior Courts, though not entered upon record, or probates of wills of personalty (though not of realty over which Ecclesiastical Courts had no jurisdiction, *post,* 565), of Bargains and Sales, of Deeds inrolled, and the like; but where the document is of a *private nature, e.g.* a rent-roll, the original must be produced unlesss lost or destroyed, when copies will be admitted [*Lynch* v. *Clerke* (1697), 3 Salk. 154, *per* Holt, C.J.: *R.* v. *Ld. Gordon* (1781) Doug. 590, 593; *R.* v. *Hains*, 1695, Comb. 337; *Hoe* v. *Nathorp* (1697) 1 Ld. Ray. 154; Tay. 8th ed. s. 1598]. This rule has since been confirmed as to *examined,* and extended to *certified,* copies by statute, it being enacted that: Whenever any book or other document is of *such a public nature as to be admissible in evidence on its mere production*

from the proper custody, and *no statute exists* which renders its contents provable by means of a copy, any copy thereof or extract therefrom shall be admissible provided it be *proved* to be an examined copy or extract, or *purport* to be signed and certified as a true copy or extract by the officer to whose custody the original is entrusted (14 & 15 Vict. c. 99, s. 14). Where the copy is signed and certified as the section provides it is admissible on its mere production in court without calling a witness to verify it or prove the custody (*R.* v. *Weaver,* L.R. 2 C.C. 85); where it is informally certified and therefore inadmissible, it may be proved to be an examined copy, the provisions of the section being cumulative (*R.* v. *Mainwaring,* 26 L.J.M.C. 10, 14). This Act virtually supersedes 8 & 9 Vict. c. 113, so far as it refers to public documents, but the two Acts are construed cumulatively and the earlier one extends to certain private documents as well (Powell, Ev., 9th ed., 250 *n*). Their effect, as applied to the various classes of public and judicial documents commonly met with in practice, is set out below:—

Registers: British, Colonial and Foreign. The statutory registers, *ante,* chap. xxx., are provable either by production of the originals (which, though it may be allowed, cannot even in criminal cases, be enforced, *ante,* 535); or by certified copies under the various Acts rendering them admissible, it being now sufficient if such copies merely *purport* to be duly certified (8 & 9 Vict. c. 113, s. 1, *sup.; Re Hall,* 22 L.J. Ch. 177; *Re Porter,* 25 *id.* 688); or by examined copies (*Sayer* v. *Glossop,* 2 Ex. 409). And oral evidence of the identity of signatures therein is admissible without production of the register (*Sayer* v. *Glossop, sup.; Mortimer* v. *M'Callan,* 6 M. & W. 58; *ante,* 400). Public registers, admissible as such by common law, may also be proved either by production, or by examined or certified copy under 14 & 15 Vict. c. 99, s. 14, *sup.* Non-parochial registers deposited with the Registrar-General must in *criminal* cases be proved by production and not by copy (3 & 4 Vict. c. 92, s. 17; 21 & 22 Vict. c. 25, s. 3). So, in peerage cases, the original registers must in all cases be produced if English, but not perhaps if Irish or Scotch [Hubb., Ev. of Succ., 97, 98; *Roscommon Peerage,* 6 C. & F. 97, 105; *Barony of Saye and Sele,* 1 H.L.C. 507, where the marriage register being lost, the copy of an entry in the Prerogative office in Ireland of the grant of a dispensation to solemnize the marriage, was admitted to supply its place; *ante,* 535-6]. And the same rule holds where registers inadmissible as public documents are received on other grounds (*R.* v. *Gwyn,* 1 Stra. 401). Indian registers of baptism (*Queen's Proctor* v. *Fry,* 4 P.D. 230) and marriage, whether before 14 & 15 Vict. c. 40 (*Ratcliffe* v. *R.,* 1 S. & T. 467), or since (*Regan* v. *R.,* 67 L.T. 720; *Westmacott* v. *W.,* 1899, P. 183; *Braid* v. *B.,* 25 T.L.R. 646), are provable either by production of the registers, or of the copies thereof transmitted to, and now deposited at, the Indian Office (*ante,* 346; *cp. Gardner* v. *Wright, ante,* 550); or by examined or certified copies of the original registers (*Regan* v. *R., sup.;* 14 & 15 Vic. c. 99, s. 14, *sup.*), or now more usually by production of the certificates from the Indian Office (*Westmacott* v. *W.,* 1899, P. 183; *Braid* v. *B.,* 25 T.L.R. 646; *De Gruyther* v. *DeG.,* 1900, Times, Nov. 2). A copy of a Nova Scotia parish register has been admitted on proof that the witness examined it with the original register, that it was in the handwriting of the rector, and that the register was required to be kept by the local law (*Evans* v. *Ball,* 38 L.T. 141). Foreign registers are

provable by examined copy, the originals in general not being allowed to be removed (*Abbott* v. *A.*; 29 L.J.P.M. & A. 57; *Burnaby* v. *Baillie,* 42 Ch. D. 282), or by certified copies of extracts (*Lyell* v. *Kennedy,* 14 App. Cas. 437, the case of a Scotch register).

Public Inquisitions, Maps, Surveys, Extents, and Reports (see *ante,* chap. xxxi.) seem, notwithstanding 14 & 15 Vict. c. 99, s. 14, *sup.,* to be provable by production of the original from proper custody and not generally by copies, unless the originals have been lost or destroyed. Where the inquisition is taken *ex officio* under a general commission, or under a special commission relating to a matter of general concernment, or where the inquisition is ancient, the return may be read without producing, or accounting for the absence of, the commission under which it was taken. But in other cases the commission must be produced or accounted for, to show that the inquisition was taken under proper authority. [Tay., 8th ed., ss. 1582, 1585; Ros. N.P., 17th ed., 112; Hubb. Ev. of Succ. 584-606]. Ordnance maps may be proved under 14 & 15 Vict. c. 99, s. 14, *sup.,* by copies certified to be correct by the Government officials who made them; and copies produced from, and stamped by, the Board of Agriculture, have also been received (*North Staff. Ry.* v. *Hanley Corp.,* 1909, 8 L.G.R. 375, 378-80).

Assessments of land-tax, poor-law valuations in Ireland, and poor-rate books are provable either by the production of the original books containing the rate of assessment, or by examined or certified copy under 14 & 15 Vict. c. 99, s. 14 (Tay. s. 1600; *Justice* v. *Elstob,* 1 F. & F. 256; *post,* 573). As to proof of Irish Census Returns, see *Dublin Corp.* v. *Bray,* 1900, 2 I.R. 88.

Corporation and Bankers' Books. At common law, entries in corporation books which are of a *public* nature are provable either by the production of the original books or by examined copies (*Brocas* v. *London* (*Ld. Mayor*), 1 Stra. 307), or now, probably, by certified copies under 14 & 15 Vict. c. 99, *sup.* Entries of a *private* nature must be proved by production of the originals, and copies though long preserved among the corporate muniments are not admissible (*R.* v. *Gwyn,* 1 Stra. 401). Minute books and registers kept as authorised by the Companies Clauses Consolidation Act, 1845, the Companies Act, 1908, the Municipal Corporations Act, 1882, and similar statutes, are in general provable by production of the original and not by copies (*ante,* 373-4.) A resolution by a District Council is provable by a minute thereof duly authenticated; and not by oral evidence of its passing, or a letter to that effect by the Clerk (*A.-G.* v. *Barker,* 44 Sol. Jo. 603; 83 L.T. 245). As to proof of Bankers' Books, see *ante,* 375-7, 543. [Tay. s. 596; Ros. N.P. 123, 124].

By-laws. The proof of by-laws varies according to the language of the statutes authorising them. Under the Companies Clauses Consolidation Act, 1845, s. 127, the by-laws of companies regulated by that Act are provable by written or printed copies purporting to be sealed with the common seal of the company, which are sufficient evidence thereof in all prosecutions under the same. So, under the Municipal Corporations Act, 1882 (incorporated with the Local Government Act, 1888), s. 24, the production of a written copy of any by-law under that Act is, "if authenticated by the corporate seal," sufficient evidence, until the contrary is proved, that the by-law was duly made and all conditions precedent to its validity complied with (*Robinson* v. *Gre-*

gory, 1905, 1 K.B. 534), though *aliter* as to mere production without proof of such authentication (*Drew* v. *Harlow*, 39 J.P. 420). On the other hand, the by-laws of Railway Companies in order to affect strangers must be proved to have been duly published, and the originals, or examined or certified copies, must be produced (*Motteram* v. *Eastern Counties Ry.*, 7 C.B.N.S. 58), and see as to proof of by-laws under the Towns Improvement (Ir.) Act, 1854, *Kingstown Council* v. *Carson*, 40 Ir. L.T.Jo. 287. The validity of by-laws may, however, sometimes be presumed from their long user (*R.* v. *Powell*, 3 E. & B. 377; and *cp. Johnson* v. *Barnes*, L.R. 8 C.P. 529). [Tay. ss. 1654 A-1659; 69 J.P. 481.] As to proof of service of notice under by-laws, see *Andrews* v. *Wirrall R.C.*, cited *ante*, 545.

Certificates are admissible in evidence if they *purport* to be verified as directed by statute, without proof of the seal, signature, or official character of the party certifying (8 & 9 Vict. c. 113, s. 1; *ante*, 553).

Manor-Books. Court-rolls are provable either by production of the originals or by examined copies duly stamped (Ros. N.P., 18th ed., 119-120; *ante*, 112, 297-8, 354; Stamp Act, 1891, s. 65). As to their proper custody, see *ante*, 525.

Military and Naval Records and Documents. The Articles of War, and Rules of Procedure superseding them under the Army Act, 1881, ss. 69-70, are judicially noticed without other proof, but not the Regulations as to the Territorial Force, which are provable by Government Printer's Copy (*ante*, 20). As to military registers and records, Muster Rolls, Pay Lists and Medical Sheets, see *ante*, 350-2; Army and Navy Lists, 353; Certificates of Military or Naval Service, 371; Log and Muster books, &c., 351-2.

Notarial Protests. A formal protest from a Foreign Notary's books is primary evidence and admissible as such, though it has been doubted whether secondary evidence thereof is so (*Geralopulo* v. *Wieler*, 10 C.B. 690; *cp. ante*, 366, 538, 548; *post*, 560).

JUDICIAL DOCUMENTS. Superior Courts. Records in the Supreme Court are provable: (1) By production of the originals. But no affidavit or record of the Court shall be taken out of the Central Office without the order of a judge or master, and no subpœna for the production of any such document shall be issued (O. 61, r. 28; so, as to district registries, O. 35, r. 22). When the document is not in the Central Office, but is one of the *general records of the realm* in the custody of the Master of the Rolls, it must be proved by certified copy (*ante*, 543, 553), though in cases of importance, in the H.L. or elsewhere, permission may be given to one of the assistant-keepers to produce the original record (Tay. s. 1533). Actual production of the original is said to be essential on a plea of *nul tiel record*, in the Court to which the record belongs; or, (unless the document be lost, destroyed, or in possession of the prisoner) on a charge of forging the record, or of perjury in an affidavit or deposition (Tay. s. 1535; Ros. N.P., 17th ed., 115; but see Steph. *note* xxx., and Ros. Cr. Ev., 13th ed., 141; *ante*, 536). In *R.* v. *Hockham*, 119 C.C.C. Sess. Pap. 59, it was held, on a charge of perjury at the hearing of a summons in a Civil Court, that the summons must be produced to show that the matter was properly before the Court. (2) By exemplification under the Great Seal, or seal of the Court to which the record belongs, a method of proof now practically obsolete (*ante*, 539). (3) By examined copy (Tay. s. 1535). (4) By office copy (O. 37, r. 4, which provides that office copies of all writs,

records, pleadings and documents filed in the High Court shall be admissible in evidence in all causes and matters, and between all persons and parties, to the same extent as the original would be admissible, *ante,* 540). Moreover, by O. 61, r. 7, "All copies, certificates, and other documents appearing to be sealed with a seal of the Central Office shall be presumed to be office copies or certificates or other documents issued from the Central Office, and if duly stamped may be received in evidence, and no signature or other formality, *except the sealing* with a seal of the Central Office, shall be required for the authentication of any such copy, certificate, or other document." And by Jud. Act, 1873, s. 61, all writs and documents issued out of, or filed in, a district registry and purporting to be sealed with the seal of such registry shall, in all parts of the United Kingdom, be received in evidence without further proof thereof [see *ante,* 23.] As to proof of criminal convictions and proceedings, see *infra.;* and for forms of secondary evidence inadmissible to prove judgments, &c., see *Mash* v. *Darley, &c., ante,* 543; *post,* 569; and *Bridges* v. *Highton* and *Renshaw* v. *Dixon,* cited *ante,* 348.

In addition to the above provisions, office copies of certain of the records of the Supreme Court and of the Central Office are by statute rendered admissible in all Courts, *e.g.* office copies of bills of sale and of acknowledgments of deeds by married women (*post,* 564-5). Judgments of the House of Lords are proved either by an examined copy of the minutes, which latter constitute the judgments, or by printed copies of the journals in which they are entered (*Jones* v. *Randall,* 1 Cowp. 17; Tay. s. 1570; *ante,* 552). In Irish Divorce Bills, Irish judgments are provable by certified copy (*Galway Divorce Bill,* 51 Sol. Jo. 306). Where ancient judicial records have been *lost* or *destroyed,* their existence and contents have been allowed to be proved less formally, *e.g.* by oral evidence (Ros. N.P., 18th ed., 109), or by a copy, which has long accompanied possession of the land affected (*Green* v. *Proude,* 1 Mod. 117; *Permanent Trustee Co.* v. *Fels,* 1918, A.C. p. 885), or by the parties having acted thereon (*Macdougal* v. *Young,* Ry. & M. 392, cited *ante,* 129).

Criminal Proceedings. The trial and conviction or acquittal of any person charged with an *indictable offence,* must, at common law, have been proved by production of the record, or an examined copy thereof (*R.* v. *Smith,* 8 B. & C. 341; *Hartley* v. *Hindmarsh,* L.R. 1 C.P. 133), and the sentence of an Assize Court was provable in the same manner and not by oral evidence of a witness who heard it, or by the calendar signed by the Clerk of Assize (*R.* v. *Bourdon,* 2 C. & K. 366). By the Evidence Act, 1851 (14 & 15 Vict. c. 99), s. 13, however, the trial, &c., of indictable offences may, without producing the record or a copy thereof, be proved in any proceeding whatever by the certificate (or a document purporting to be such) of the clerk or other officer of the Court having the custody of the records, or the deputy of either, which certificate shall contain a copy of the record omitting the formal parts thereof, And on charges of perjury or subornation committed on trials for felony or misdemeanour the fact of the former trial is provable by a similar certificate, without proof of the signature or official character of the clerk, &c., appearing to have signed, &c. (Perjury Act, 1911, s. 14). A previous *conviction* may also, when required to discredit a witness, be proved by a certificate, signed as above, of the substance and effect only of the indictment and conviction (*ante,* 367, 482); or for any purpose, by production of a record or extract of such con-

viction, with proof of identity, such record or extract to consist, in the case of *indictable* offences, of a certificate containing the substance and effect only (omitting the formal parts of the indictment and conviction) and purporting to be signed by the Clerk of the Court, or other officer, having the custody of the records, or his deputy; or in the case of *summary* offences, of a copy of the conviction purporting to be signed by any justice of the peace having jurisdiction over the offence, or to be signed by the proper officer of the Convicting Court, or by the clerk or other officer of any Court to which the conviction was returned (Prevention of Crimes Act, 1871, s. 18). As to proof under the Prevention of Crimes Act, 1908, of previous convictions, see *ante*, 47. A conviction cannot, however, where the record is in existence, be proved orally by a witness who merely heard it pronounced (*Mash* v. *Darley*, 1914, 3 K. B. 1226, 1 C. A.; *R.* v. *Bourdon, sup.*).

In actions for *Malicious Prosecution*, it is said to be essential for the plaintiff, in addition to proving the acquittal, to put in as part of his case the depositions before the magistrate, to show absence of reasonable and probable cause, since the burden of that issue is upon him, and this can, it is said, only be established thereby [*Lea* v. *Charrington*, 5 T.L.R. 218; *Walker* v. *S. E. Ry.*, L.R. 5 C.P. 640; *Foss* v. *G.E. Ry.*, 105 L.T. Jo. 221; *Skinner* v. *Hunt*, 66 J.P. 425].

Orders of Quarter Sessions may be proved by production of the record, or an examined copy thereof (Tay. s. 1546); or in other than indictable offences, as to which see *supra*, and where no other record is kept, by the sessions book, or a copy thereof, in which they are entered, if this sufficiently discloses the jurisdiction (*R.* v. *Yeoveley*, 8 A. & E. 818; *Giles* v. *Siney*, 13 W. R. 92); or, in the case of appeals from justices where the decisions of the latter are *not* confirmed, by a copy of the memo. of the Q. S. Decision directed to be added to the copy or certificate of the original decision, by the Summary Jurisd. Act, 1879, s. 31 (6).

By the Summary Jurisd. Act, 1879, s. 22, the register of the minutes or memorandum of convictions, orders and proceedings directed to be kept by courts of summary jurisdiction and also any extract from such register certified by the Clerk of the Court keeping the same, are *primâ facie* evidence of the matters entered therein for the purpose of informing a Court of summary jurisdiction acting for the same county, borough, or place as the Court whose convictions, &c., are entered in the register [but nothing in this section shall dispense with the legal proof of a previous conviction for an offence when required to be proved against a person charged with another offence]. Under this Act it has been held that the use of the register for the purpose of proving a previous conviction was confined to the Court in which the previous conviction took place (*Commr. of Police* v. *Donovan*, 1903, 1 K.B. 495; *cp. London School Board* v. *Harvey*, 4 Q.B.D. 451); but the Cr. Just. Admn. Act, 1914, which repeals the clause in brackets, *sup.*, provides in s. 28, that the record or extract by which a conviction may be proved under the Prevention of Crimes Act, 1871, s. 18, *sup.*, may in the case of a summary conviction consist of a copy of the minute or memo. of the conviction entered in the register required to be kept under the Summary Jurisd. Act, 1879, s. 22. Orders by Justices as to Highway matters are provable by copies thereof certified by the clerk of the peace (27 & 28 Vict. c. 101, s. 12).

Where a Court consists of two justices its orders must be signed by both (*Wing* v. *Epsom Council,* 68 J.P. Rep. 259). As to proof of the dismissal of charges at Petty Sessions, see *ante,* 367-8. As to proof of the fiats of a judge, law officer, or public prosecutor, which are presumed to have been obtained, unless challenged, and of the various formalities on charges of being an habitual criminal under the Prevention of Crimes Act, 1908, see *ante,* 189.

By the Army Act (1881), s. 164, amended by the Army Act, 1913, s. 7, whenever any person subject to military law has been tried by any Civil Court, the clerk or other officer having the custody of the records of such Court, shall if required by the commanding or other officer of such person, transmit to him a certificate setting forth the offence for which he was tried, together with the judgment or order of the Court thereon, or if he was acquitted, the acquittal. And any such certificate shall be sufficient evidence of the conviction and sentence, or of the order of the Court, or of the acquittal of the prisoner, as the case may be.

Complete Record when necessary. When a judgment was tendered as evidence of the facts decided, it used to be necessary that the record should be complete, unless completion was impracticable, as where a motion for a new trial was pending. Thus, a judgment in the High Court could not be proved by the minutes from which it was to be made up, for, until made up, it was no record (*Godefroy* v. *Jay,* 3 C. & P. 192; *R.* v. *Birch,* 3 Q.B. 431). So, also, in the case of a magistrate's conviction, it has been held that though the oral judgment is the conviction and even when drawn up may, on appeal, be amended before being returned to the Sessions, yet before a conviction can be proved the law requires that there should be one properly drawn up (*Hartley* v. *Hindmarsh,* 1866, 35 L.J.M.C. 255; *cp. London School Board* v. *Harvey,* 48 L.J.M.C. 130). But now, the records are never made up, either in civil or criminal cases (O. 36, rr. 39-42; *Holtby* v. *Hodgson,* 24 Q.B.D. 103, 106-7; Archb. Cr. Pl., 25th ed., 409-10; *Commr. of Police* v. *Donovan,* 1903, 1 K.B. 897, 904). Where, however, the object was merely to prove the existence of the proceedings, irrespective of the matters decided, the above rule was relaxed. Thus, proof of a former bill, answer and decree, together with the identity of a party, has been allowed to be given by affidavit (*White* v. *Cox,* 2 Ch. D. 387, 397). So, on a charge of perjury, the production of the filed copies of the writ and pleadings, with the order made thereon, was held sufficient proof of a former civil action (*R.* v. *Scott,* 2 Q.B.D. 415, C.C.R.), and that of the caption, indictment, verdict, sentence, and minutes of trial, sufficient proof, at all events in the same Court, of a former criminal one (*R.* v. *Newman,* 2 Den. C.C. 390), without, in either case, producing the record, or a certificate of the trial as mentioned *supra.* Where the former proceeding was not in the same Court, it seems doubtful if the completed record, or such certificate, was not requisite, even though the object was merely to prove the existence of the particular proceeding (*R.* v. *Coles,* 16 Cox, 165; *R.* v. *Smith,* 8 B. & C. 341; though see *R.* v. *Scott, sup.*). A conviction, generally speaking, comprises both verdict and judgment, so that on appeal from the latter alone, the respondent not appearing, the whole conviction has been quashed (*R.* v. *Surrey,* 1892, 2 Q.B. 719). Where, however, the object is to prove a "previous conviction" for evidential purposes, *e.g.* under the Coinage Offences Act, 1861, ss. 9, 12, the verdict only need be proved (*R.* v. *Blaby,* 1894, 2 Q.B.

170; see *sup.*); and as to verdicts, see further *ante*, 433. [Tay. ss. 1570-1575; Ros. N.P. 108-110; Ros. Cr. Ev., 12th ed., 144-148.]

Appeals. Chambers. As to proof of proceedings in court on *appeals*, see O. 58, rr. 11-13. Proceedings in chambers are provable, on appeal, by the Master's or Registrar's notes, and not by the affidavits of witnesses present (*Sykes* v. *S.*, 1897, P. 306).

Probates and Letters of Administration, British, Colonial, Foreign. The primary modes of proving probate or letters are: (1) by production of the document itself, when the seal will be judicially noticed; or (2) by production of the Act-book or register, which it seems will be admissible without accounting for the non-production of the probate or letters (*Cox* v. *Allingham*, Jacob, 514); or (3) by a certified or examined copy of the Act-book or register (14 & 15 Vict. c. 99, s. 14; *Dorrett* v. *Meux*, 15 C.B. 142; *McKenna* v. *Eager*, I.R. 9 C.L. 79; *ante*, 538); or (4) when no other record has been kept, by production of the original will, bearing the indorsement of the surrogate or deputy-registrar that the executor has proved it and that probate has passed the seal (*Doe* v. *Mew*, 7 A. & E. 240; *Gorton* v. *Dyson*, 1 B. & B. 219). Since, also, the Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 69 provides that an official copy of the whole or any part of a will, or an official certificate of the grant of letters of admin. may be obtained from the registry on payment of a fee, Mr. Taylor considers such certificate constitutes a further method of proof (s. 1590; *sed. qu.*, perhaps, as the Act says nothing as to the effect of such copies or certificates). The original will can under no circumstances be admitted to prove title to personal estate (*Pinney* v. *Pinney*, 8 B. & C. 335; *Pinney* v. *Hunt*, 6 Ch. D. 98). It is otherwise, however, when the will is required merely to prove a declaration by the testator (*ante*, 311), or to construe the will (*Re Harrison* and *Re Beattie-Wrightson*, *ante*, 538), or to correct the translated probate copy of a foreign will (*Re Cliffe*, 1892, 2 Ch. 229). By 20 & 21 Vict. c. 77, s. 22, all probates, letters of administration, orders, and other instruments, and exemplifications and copies thereof respectively, purporting to be sealed with any seal of the Court of Probate, shall in all parts of the United Kingdom be received in evidence without further proof thereof. As to devises of real estate, which may now be proved by the probate, or a sealed office copy thereof, see *ante*, 432-3. By the Colonial Probates Act, 1892, ss. 2, 3, probates of Colonial Courts, or of British Courts in a foreign country, when sealed by the English Probate Court, have the same effect as if granted in this country (*Re Smith*, 20 T.L.R. 119; *cp. Re Tootals Trusts*, 23 Ch.D. 532, and *Re Vallance*, 24 *id.* 177). *Foreign Probates* are provable by copies certified or attested by the notary or other official having custody of the original (Coote, Probate, 14th ed., 50-5; *Re Cliff*, *sup.*; *Re Callaway*, 15 P.D. 147; *Re Fraser*, 1891, P. 285; *cp. Re Paul*, 23 T.L.R. 716, where probate not having yet been obtained, a verified copy of an American will was received), or perhaps by examined or sealed copies under 14 and 15 Vict. c. 99, *post*, 561. *Foreign wills* are proved by examined or certified copies, the last named Act not applying thereto (*Halkett* v. *Dudley*, 1907, 1 Ch. 590, 604; *ante*, 548, *post*, 561). [Tay. ss. 1588, 1590; Ros. N.P. 119-120; *cp. ante*, 431-3; and *post*, 563-4].

Bankruptcy Proceedings. Receiving orders and adjudications may be proved by production of the order under seal of the Court, or by copy of the

Gazette containing them, which are conclusive evidence thereof (*R.* v. *Thomas,* 11 Cox, 535; *ante,* 337-8). So, petitions, orders, certificates, affidavits, and other documents (or copies thereof) used in the course of any bankruptcy or other proceeding under the Act, shall, if they appear to be sealed with the seal of any bankruptcy court, or purport to be signed by the judge, or are certified as true copies by the registrar, be receivable in evidence in all legal proceedings whatever (Bankruptcy Act, 1914, s. 139). And all documents purporting to be orders or certificates made or issued by the Board of Trade and to be sealed with the seal of the Board, or to be signed by a secretary or assistant-secretary of the Board, or any person authorised in that behalf by the President of the Board, shall be received in evidence, and be deemed to be such orders or certificates without further proof unless the contrary is shown (s. 144). So, a minute of proceedings at a meeting of creditors under this Act, signed at the same or ensuing meeting by a person describing himself as, or appearing to be, chairman of the meeting at which the minute is signed, shall be received in evidence without further proof (s. 138; as to the *effect* of such minutes as evidence of the facts stated, see *ante,* 349).

Proceedings in County Courts, Mayor's Court, Sheriff's Courts, Courts Baron, &c. By the County Courts Act, 1888, s. 28, the registrar's book kept under the Act, or copies of entries therein bearing the seal of the Court and purporting to be signed and certified as true copies by him, shall, in *all* courts and places, whatever, be admitted as evidence of the entries and proceedings referred to and of the regularity of such proceedings (*e.g.* the due appointment of a deputy-judge, *R.* v. *Roberts,* 14 Cox, 101), without any further proof. This clause does not seem to dispense with proof of the seal, though perhaps this is cured by 8 & 9 Vict. c. 113, s. 1, or 14 & 15 Vict. c. 99, s. 14, cited *ante,* 553-4 (Ros. N.P. 118). Such entries are conclusive, and cannot be contradicted even by entries in the judge's own minute book (*Dews* v. *Ryley,* 20 L.J.C.P. 264; *Stonor* v. *Fowle,* 13 App. Cas. 20), though as to explanation, see *post,* 576.

The proceedings in other inferior civil courts, *e.g.* Mayors' Courts, Sheriffs' Courts, Courts-baron, like those in inferior Criminal Courts (*inf.*), may, if it be shown that they are not reduced into more formal shape, be proved by the production of the register, or minute-book in which they are entered; or by an examined copy thereof; or, if no such book is kept, or no entry has, in fact, been made, then by the officer of the Court or any other competent witness (Tay. s. 1572).

Foreign and Colonial Proceedings. All judgments, decrees, orders, and other judicial proceedings of any court of justice in any Foreign State or British Colony, and all affidavits, pleadings, and other legal documents, filed or deposited in any such court, may be proved either by examined copies, or copies purporting to be sealed with the seal of the court to which the originals belong, or where there is no seal, to be signed by a judge of such court, who must certify that there is no seal. If these conditions exist, no proof is required of such seal, signature, or certificate, or of the official character of the judge (14 & 15 Vict. s. 99, s. 7; *cp. ante,* 549-50). This Act does not apply to a Scotch Will, which may be proved by the production of the official extract answering to our probate, and a certified copy of the original (*Halkett* v. *Dudley,* 1907, 1 Ch. 590, 604; as to Foreign Probates generally, see *ante,*

560). A copy of a judgment of the Court of Inquisition in Italy, sealed by the Court and by the Secretary of State, and supplemented by expert evidence as to the Italian law on the subject, has been received to prove the existence of such judgment, though not to prove the facts found (*R.* v. *Newman,* 3 C. & K. 215), was admitted.

Reciprocal Admissibility of Documents in England, Ireland, and the Colonies. Every document which is admissible in England or Wales in proof of any particular, without proof of the seal, stamp, or signature thereof, or of the judicial or official character of the person appearing to have signed the same, is admissible to the same extent and for the same purpose in Ireland; and Irish documents are similarly admissible in England and Wales (*Re Mahon,* 9 Hare, 459). And documents admissible in either are also admissible in the Colonies (14 & 15 Vict. c. 99, ss. 9-11).

Verdicts and Awards. As to verdicts, see *ante,* 433. Awards must be proved not only by the production of the award duly executed by all the arbitrators in the presence of each other (*Stalworth* v. *Inns,* 13 M. & W. 466; *Wright* v. *Graham,* 3 Ex. 131), but by the production of the submission as well, since otherwise the authority of the arbitrators does not appear (*Ferrer* v. *Oven,* 7 B. & C. 427; *Brazier* v. *Jones,* 8 B. & C. 124). Where the submission is by written agreement, execution by all the parties, including those relying on it, must be shown (*id.;* even though it has been made a rule of court pursuant to one of the terms, *Berney* v. *Read,* 7 Q.B. 79); but where the submission is by rule of court or judge's order in an action, production of either respectively is sufficient (*Gisborne* v. *Hart,* 5 M. & W. 50; *Dresser* v. *Stansfield,* 14 M. & W. 828). Moreover, where the submission contains any special powers which have been acted on—*e.g.* to enlarge the time, or to appoint an umpire—the instrument by which such powers have been exercised must be proved in addition to the submission and prior to proof of the award, a mere recital in the award of the exercise of such powers not being sufficient (*Still* v. *Halford,* 4 Camp. 19; *Davis* v. *Vass,* 15 East, 97). The maxim *omnia præsumuntur rite esse acta* will not dispense with strict proof of the above particulars in the case of private arbitrators, although it is otherwise in the case of awards by public officers (*R.* v. *Haslingfield,* 2 M. & S. 558; *Doe* v. *Mostyn,* 12 C.B. 268). Thus, under several of the Inclosure Acts, the commissioners' awards are made conclusive evidence of the observance of the statutory formalities. In many instances these and other awards are also provable, under statute, by certified copy (Tay. s. 1607). [Tay. ss. 1583-1584.]

Fines and Recoveries. As to proof of these, see Ros. N.P. 110. A fine levied by a married woman of lands by descent is valid even before entry, though made without proclamations, nor need her separate examination be shown (*Miller* v. *Wheatley,* 28 L.R.I. 144).

Affidavits, Depositions, Pleadings, Writs. Except in cases of perjury, when the original must, if obtainable, be produced (*ante,* 556), affidavits, in common with writs, pleadings, and documents, filed in the High Court, may, as we have seen, be proved by office copy (O. 37, r. 4; O. 38, r. 15; O. 65, r. 27. regs. 53, 54; Ros. N.P. 114-116; *ante,* 540). As to proof of testimony given in *former* trials, see *ante,* 436; and depositions before examiners therein may be proved either by office copy (O. 66, r. 7 (*f*); O. 61, r. 7), or by examined or

certified copy (Tay. ss. 1577, 1580). As to proof of depositions in earlier stages of the *same* criminal case, or before coroners, and of the examination of the prisoner, see *ante,* 102-13. Affidavits sworn in any Colony or foreign country before any person authorised to administer oaths otherwise than by a law of a foreign country may be proved by mere production, their seals, &c., being judicially noticed (*ante,* 24); in the case of affidavits, &c., sworn in foreign countries before foreign officials, the authority of the latter must be verified by the certificate, either of a British Consul (*Re London Asphalte Co.,* 23 T.L.R. 406; *Brittlebank* v. *Smith,* 50 L.T. 491), or of the local courts (*ante,* 366; Stringer on Oaths, 3rd ed., pp. 46-9), or of a notary public (*ante,* 366), or of a consul of such country accredited to this country (*Warren* v. *Swinburne,* 9 Jur. 510), but not of a non-British Consul accredited to such foreign country (*Re De Salazar,* 21 W.R. 776) [see *ante,* 24, 461]; and even if sworn before a notary his authority must also be verified (*Sharpe* v. *Jackson,* 39 L.Jo. 400; *Re London Asphalte Co., sup.*). As to proof of the swearing, &c., of affidavits in trials for perjury, see *R.* v. *Barnes,* 10 Cox, 539; *R.* v. *Benson,* 2 Camp. 508; *R.* v. *Howard,* 1 M. & Rob. 187; *R.* v. *Macdonald,* 21 Cox, 70; Ros. Cr. Ev., 13th ed., 141, 678-82). And as to the admissibility of, and errors in, affidavits, see *ante,* 495-9. Where the affidavit is by an ignorant person, proof must be given that it was read over to him before swearing (*R.* v. *Petrieus,* 138 C.C.C. Sess. Pap. 886).

Writs and warrants before they are returned must be proved by actual production; after return they become matters of record, and may be proved either by production or, as above, by office copy (*R.* v. *Scott,* 2 Q.B.D. 415; Ros. N.P. 111). It must be remembered in this and other cases that a copy served by a party on his opponent is always considered primary evidence of the document as against the former (*ante,* 538).

PRIVATE DOCUMENTS, WHEN REGISTERED, ENROLLED, &c. As to proof of the fact of registration, enrolment, or acknowledgment, see *ante,* 530. The contents of private documents must generally, as we have seen, be proved by the production of the originals, secondary evidence not being admissible until the absence of the original is explained (*ante,* 533, 539-49). Where, however, the document is required to be registered or enrolled, this rule does not always hold, and secondary evidence is sometimes the appropriate medium of proof (*ante,* 530, 543).

Wills. Probate is obtained either in Common Form, without citation of the parties interested, in which case if the attestation form be sufficient, probate will be granted on the affidavit of the executor alone, otherwise an affidavit by at least one subscribing witness is necessary (Williams, Exors. 10th ed. 2, 3, 9; Pr. Rules, 1862, r. 4); or in Solemn Form, after citation of such parties, when usually one only of the subscribing witnesses need be called (*Belbin* v. *Skeats,* 1 S. & T. 148), though one must be called (*id.*; *Bowman* v. *Hodgson,* L.R. 1 P. & D. 362; *Coles* v. *C., id.* 70), except possibly in undefended suits (*ante,* 522). [Williams, Exors, 10th ed. 228-50]. As to when the attesting witness denies or forgets the execution, or is incapable of being called, or the will is lost, &c., see fully *ante,* 520-3.

When probate has been obtained, *wills of personalty* are ordinarily provable by production of the probate, which is a public document constituting primary

evidence of the validity and contents of the will, except when the latter is merely tendered as evidence of the declaration of the testator or in aid of construction or to correct the translation of a foreign will (*ante,* 311, 431-3, 560). *Wills of realty* are now also generally provable by probate (*ante,* 432); but the will itself must, where the testator died before January 1, 1898, or the lands are copyhold, or customary freehold, be produced. In such cases, and against the heir, all the attesting witnesses capable of being called should be called; though in an action against the devisee by the heir, all need not be (*Tatham* v. *Wright,* 2 Russ. & Myl. 1). On an application by next-of-kin, the memorial of registration and affidavit filed therewith were admitted as secondary evidence of a lost will, to show that the latter related only to realty, and that there was an intestacy as to the personal estate (*Re Attlay,* 67 L.T. 502). Where the testator died after January 1, 1898, his real estate, with the above exceptions, vests in his executor (Land Transfer Act, 1897, ss. 1, 2, 25), and the probate is consequently the only admissible evidence of the will. [Tay. ss 1759-1761, 1856; Ros. N.P. 18th ed. 144-151]. Wills 30 years old in general prove themselves (*ante,* 523-5). As to Foreign and Colonial Wills and Probates, see *ante,* 548, 560.

Bills of Sale. The Bills of Sale Act, 1878, s. 16, provides that "any copy of a registered bill of sale, and affidavit purporting to be an office copy thereof, shall in all Courts and before all arbitrators or other persons, be admitted as *primâ facie* evidence thereof, and of the fact and date of registration as shown thereon." A certificate of registration under this Act has been held no evidence that the required affidavit has been filed or that the filed copy of the bill is a correct copy thereof, where these points were not stated in the certificate (*Turner* v. *Culpan,* 36 W.R. 278.) So, under the Act of 1854, a certificate stating merely that "a document purporting to be an office copy of a bill of sale was registered," was held no evidence that the affidavit required by the Act had not also been filed, on the ground apparently that the section did not direct the officer not to file the bill without the affidavit (*Mason* v. *Wood,* 1 C.P.D. 63; *cp. ante,* 122, 370). And in another case a certificate which stated that "an affidavit and copy bill of sale" indorsed with the names of the grantor and claimant were filed as required, was held insufficient without producing an office copy of the bill of sale to show it was the same as that executed (*Emmott* v. *Marchant,* 3 Q.B.D. 555). In this case, Lush, J., said the certificate was evidence that a document purporting to be a bill of sale had been delivered to the officer, together with an affidavit which was correct in form—i.e. as stating the residence and occupation of the grantor —and therefore he thought it was not necessary to produce an office copy of the affidavit, but only of the bill of sale. Having regard to these cases, it will, in proving registration, be prudent to produce office copies both of the bill of sale and affidavit, as mentioned in s. 16, *sup.* (Ros. N.P. 1198). Where the filed copy omits the date of execution, or signatures of grantee and witnesses, these may be cured by the affidavit (*Thomas* v. *Roberts,* 1898, 1 Q.B. 657; *Coates* v. *Moore,* 1903, 2 K.B. 140). The affidavit must, however, state not only the name and address, but the description, of the attesting witness (*Sims* v. *Trollope,* 1897, 1 Q.B. 24); though not necessarily the description of the commissioner (*Exp. Johnson,* 26 Ch.D. 338; see *ante,* 496), but it must not be sworn before the grantor's solicitor (*ante,* 461). As to what misdescriptions will invalidate, see *Jackson* v. *Gaton,* 39 Ir. T.L.R. 41.

Deeds of Arrangement. Under the Deeds of Arrangement Act, 1887 (50 & 51 Vict. c. 57), deeds to which the Act applies must be registered within seven days of execution, by the filing of a copy thereof, together with affidavits verifying the date of execution, &c. (ss. 5, 6). Under s. 7, a register of such deeds is kept at the central office; and under s. 11, an office copy of, or extract from, such deeds is *primâ facie* evidence thereof, and of the fact and date of their registration. Under this Act execution by creditors after registration has been held not to invalidate the deed or registration (*Re Batten, Exp. Milne,* 22 Q.B.D. 685, C.A.).

Other Documents. In addition to the above, the following private documents, amongst others, are either required or permitted by various statutes to be enrolled or registered—Bargains and Sales, Conveyances in Mortmain or under the Charitable Trusts Amendment Act, 1855; Disentailing or Annuity Deeds, Deeds relating to land in Yorkshire or Middlesex (*ante,* 349, 370, 530), Deeds of Relinquishment by persons under the Clerical Disabilities Act, 1870, and Articles of Clerkship (Tay. s. 1646); and such documents are then provable by *office copies* of the instrument, the copies being usually evidence both of the fact of enrolment, &c., and of the contents of the document enrolled; while the *certificate* or memorandum of enrolment or registration endorsed on the original instrument returned to the party, is also generally evidence of the fact and date of enrolment or registration, without proof of the signature or official character of the person signing it [Tay. ss. 1117-1127, 1646-1654; *ante,* 530-1, 543.] Acting on the document, by those bound by it, has also been received as secondary evidence of enrolment (*Macdougal* v. *Young, ante,* 129). Acknowledgments of deeds by married women, made before 1883, are provable by office copy of the filed certificate of acknowledgment (3 & 4 Will. IV. c. 74, ss. 84, 88; 4 & 5 *id.* c. 92, s. 79 (Ir.); Conveyancing Act, 1882, 45 & 46 Vict. c. 39, s. 7); those since 1882, by the memorandum of acknowledgment made on the deed by the official authorized to take it (Conveyancing Act, 1882, *sup.*). By 51 & 52 Vict. c. 43, s. 184, judges of County Courts are now empowered to take such acknowledgments.

CHAPTER XLIV.

EXCLUSION OF EXTRINSIC EVIDENCE IN SUBSTITUTION OF DOCUMENTS.

When a transaction has been reduced to, or recorded in, writing either by requirement of law, or agreement of the parties, the writing becomes, in general, the exclusive memorial thereof, and no evidence may be given to prove the terms of the transaction except the document itself or secondary evidence of its comments as stated in chap xliii.

[Tay. ss. 399-408; Ros. N.P. 1-4; Ros. Cr. Ev. 2-4; Steph. arts. 90, 92. The present rule, which deals with the *exclusiveness* of documentary evidence, and that in the next chapter relating to its *conclusiveness,* are often loosely referred to as the "*parol evidence*" rule. In Sir J. Stephen's Digest they are dealt with under one head (art. 90); in the Indian Evidence Act they are treated as separate rules (ss. 91-2), and since neither the excluding principles nor the exceptions to the rules are quite identical this seems the preferable course. As to the meaning, and forms, of *parol* evidence, as used in the present connection, see *post,* 575.] The question whether a contract was reduced into writing and what were its terms, is one of fact. Thus, where A. bought goods orally from B. and B. afterwards sent A. a sold note containing an additional term to which A. had not assented, the contract was held to be an oral and not a written one (*Roe* v. *Naylor,* 87 L.J.K.B. 958, 964-5, C.A.). And if the identity of the document containing the contract is disputed, evidence is admissible to determine the point (*Froude* v. *Hobbs,* 1 F. & F. 612, cited *ante,* 523).

History. The history of the parol-evidence rule, both in its exclusive and conclusive aspect, has, like that of most other evidential topics, been a gradual reversal of primitive doctrines. Its evolution has been traced through four more or less clearly defined stages. (1) In origin it dates back to early Germanic procedure, when writing being unfamiliar, a legal system of formal oral transactions prevailed. The *carta,* when first employed, was partly symbolic and partly testimonial; but it was neither exclusive nor conclusive in effect. Thus, if the transaction were disputed, its terms might, according to an elaborate and well-settled procedure, be established by the attendant witnesses regardless of the existence or contradiction of the writing. (2) The rise of the seal, however, marked a new era for documents, for it not only supplied a convenient method of authentication, but by introducing the principle of estoppel, tended to supersede the functions both of transaction-witnesses and compurgators. At first it was the king only who had a

seal; then the superior courts, counts, and bishops; till, by the end of the thirteenth century, the "free and lawful man" either had a seal of his own, or could get his charters sealed by a sheriff or noble. The king's seal was indisputable; and the analogy working downward, the sealed writing tended to become no longer merely testimonial, but dispositive, the contractual act itself. (3) Evidence now began to be classed according to grade, matter of *record* being higher than *writing* (*i.e.* deed), and both than matter of *averment*. Coincidently the doctrine appears, probably as a borrowing from the Roman law, that each can only be dissolved by matter of equal or higher, but not of inferior degree (Y.B. 33 & 35 Ed. I. 127, 330-1, 547; *cp.* Doctor and Student, 1, 12). This principle had a double bearing, shutting out inferior evidence when offered either in substitution of, or in opposition to, superior. Thus, the decrees of Courts of Record were not only the exclusive evidence of their own existence, admitting of no alternative proof ("A thing which can be averred by the judgment and record of the Court is not to be tried by an inquest," Y.B. 35 Ed. I. 528); but also conclusive, admitting of no contradiction (*Recordationem Curiæ Regis negare licet,* Laws of Hen. I. c. 31; *cp.* Beams' Glanville, Bk. 8, ch. 8). On the other hand, the decrees of inferior courts, which were not "of record," might be contradicted by witnesses. With regard to Deeds, the same principles were partially, though not universally, taking effect, the tendency being perhaps most marked in transactions traceable to a Roman source. Thus, as an example of exclusiveness, where a bond (an instrument introduced by the Lombard bankers) existed, the creditor might not prove his debt by parol, the reason given being sometimes that the contract and obligations were two different undertakings of which the greater discharged the less (Y.B. 1 Hen. VI. 7, 31), and sometimes that the production and cancellation of the deed were necessary for the protection of the debtor (Y.B. 17 Ed. III. 24, pl. 11); while, as to conclusiveness, it was early laid down that a deed could not be annulled or altered except by deed, otherwise averment would prevail over specialty (Y.B. 20 & 21 Ed. I. 64; 32 & 33 *id.* 80, 136; 1604, *Countess of Rutland's Case,* 5 Co. Rep. 25). So, parties were estopped by their admissions of fact in a deed (Y.B. 21 & 22 Ed. I. 436; 41 Ed. III. 10, 6; 39 Hen. VI. 34, 46); and in the same way a release under seal, like the Roman *acceptilatio,* operated to discharge the obligation whether there had been performance or not, while a mere oral payment did not, since that would have made matter of writing of no greater authority than matter of fact (1542, *Waberley* v. *Cockerel,* Dyer, 51). On the other hand, there were important instances in which primitive ideas had never been dislodged. Thus, in 1323, in a case of power *assensu patris,* the plaintiff, while tendering a deed testifying the assent, was ready to aver the consent by those who were present; whereupon the Court remarked "We have nothing to do with the witnesses named in the deed, for it is not denied, but we will cause those to come whom you name as present when you were endowed, together with a jury" (Y.B. Ed. II. 507). So, in transactions affecting land, it was the livery of seisin (the ancient Gothic conveyance), not the charter of feoffment which raised the estoppel, the charter being, for long, testimonial merely, not dispositive, *i.e.* not "I hereby give," but "know ye that I have given," the question being whether A. made the gift, not whether he made a charter attesting it (Poll. & Mait. Hist. Eng. Law, 82, 84 *n,* 626).

Indeed, a charter was said by some to be void if it testified that a gift had been made, while in fact there had been no livery of seisin, or if the deed was to one effect and the words of livery to another; at all events it gave no *jus ad rem,* nor could it be read as an agreement to give (*id.* 83). Similarly, a deed of feoffment, though absolute on its face, might be shown by parol to have been merely conditional (Y.B. 20 & 21 Ed. I. 430.) There were other cases, also, in which the new principles did not obtain; thus, in a contract of loan by deed indented, the plaintiff might count either on the contract or the indenture (Y.B. 30 Hen. VI. 34, 46); and, generally, where the action was based not solely on the deed, but also on matter *in pais,* there the latter was admissible in answer. (4) The last stage in transition to the modern idea is marked by the Statute of Frauds, which, by abolishing the power of creating freehold estates by oral livery of seisin merely, emphasized the dispositive as opposed to the testimonial character of the written instrument, and by permitting leases to be made without seal, extended that character to unsealed documents as well. Two further influences had greatly helped towards this advance; first, the increasing vogue of mercantile instruments, which already enjoyed an indisputability based on the analogy of the Roman law; and secondly, the general spread of letters, which not only emphasised the trustworthiness of writing as compared with "the uncertain testimony of slippery memory," but also fostered the substitution of manual signature for the seal as a mode of authentication. By 1709, it had thus became possible to lay down the rule, alike for sealed and unsealed documents, that "if an agreement made by parol to do anything be afterwards reduced into writing, the parol agreement is thereby discharged; and if an action be brought for non-performance of the agreement, it must be brought upon the agreement reduced into writing and not upon the parol agreement, for both cannot stand together, because it appears to be but one agreement, and that shall be taken which is later and reduced to the greater certainty of writing" (Viner's Abridg. Contr. G. 18). This is the exclusive aspect of the rule. With regard to the conclusive, the old rule that matter of deed could not be controlled by matter of averment (*sup.;* 1604, *Countess of Rutland's Case,* 5 Co. Rep. 25), began now to be extended to unsealed writings, which henceforth, and save in exceptional cases, might neither be varied nor supplemented by oral testimony (1771, *Meres* v. *Ansell,* 3 Wils, 275). [Wigmore, s. 2426; Thayer, Pr. Tr. Ev. 17-24, 97-112; Holmes, Common Law, 255-77; Salmond, 6 Law Quart. Rev. 75-85; 2 Poll. & Mait. Hist. Eng. Law, 82, 105, 205, 223, 598-9 625-6.]

Principle. The present rule is commonly said to be founded on the "best evidence" principle (*ante,* 45); but, like other alleged applications of that principle, it is, as has been shown above, historically much older. Prof. Thayer considers it to be merely "a doctrine of the substantive law of the subjects to which it is applied, *e.g.* in the case of written contract that all preceding and contemporaneous oral expressions of the thing are merged in the writing or displaced by it; and in the case of wills, that the written form is essential to the thing itself" (Pr. Tr. Ev. 398; Wigmore, s. 2400).

Burden of proving the Existence and due Stamping of the Document: on whom rests. The party whose witnesses show that the transaction was reduced to writing must produce, or explain the absence of, the instrument; and the

opponent, in order to ascertain the fact, may either interpose in chief (*ante,* 41) or reserve the question for cross-examination, and where it is denied may at once prove the existence of the writing. If, however, the plaintiff can establish a *primâ facie* case without betraying the document, he will not be prejudiced by the defendant proving its existence, for the burden will then be shifted, and if the latter rely on the document he must produce it (with the usual liability as to stamping, *ante,* 531) as part of his own case, even though he had served notice to produce on the plaintiff (*Magnay* v. *Knight,* 2 Scott, N.R. 64; Tay. s. 404). Moreover, a vague admission by the plaintiff's witnesses that there was an agreement relating to the matter is not sufficient, there must have been a binding contract between the parties at the date of the trial; nor will a solicitor's admission, made in mere conversation, that there was a written agreement on the subject, suffice (*Watson* v. *King,* 3 C.B. 608, cited *ante,* 249).

Judicial Documents. Extrinsic evidence is, in general, inadmissible in substitution of judicial documents. Thus, the record, or a copy thereof, is the proper legal evidence of a proceeding in the High Court (*ante,* 556-63; *Thomas* v. *Ansley,* 6 Esp. 80; *R.* v. *Bourden,* 2 C. & K. 366). Parol evidence has even been rejected to prove the date on which a cause came on for trial (*R.* v. *Page,* 6 Esp. 83); but as adjournments during sittings are not noticed on the record, such evidence may often afford the only proof of the actual day of trial (*Whitaker* v. *Wisbey,* 12 C.B. p. 52; and, in the *Tichborne Case,* the testimony of the officer of the court was stated to be receivable to prove the date on which the charge was made, depositions tendered for that purpose being rejected, vol. i. p. 193); see also *infra* as to the existence, as distinct from the terms, of a judgment; and as to parol evidence to explain the grounds of a judgment, see *ante,* 415, and *post,* 476. The same rule applies to the memorials of county courts, which are the proper evidence of proceedings therein (*R.* v. *Rowland,* 1 F. & F. 72). And on a charge of perjury committed before justices, the proceedings taken before the latter must be proved by the summons, or charge-book (*R.* v. *Hurrell,* 3 F. & F. 271; *R.* v. *Hockham,* 119 C.C.C. Sess. Pap. 59); or the written information if there be one (*R.* v. *Dillon,* 14 Cox, 4), though, if these be destroyed, secondary evidence thereof may be given (*id.*) So, the date of a prisoner's apprehension must be proved by the warrant and not by parol (*R.* v. *Phillips,* Rus. & Ry. 369). Where, however, no memorials are kept, a judgment may of necessity be proved by witnesses (*Harmer* v. *Bean,* 3 C. & K. 307; Tay. s. 1572).

In like manner, the statutory deposition of a witness in a civil or criminal proceeding, or the statutory examination of a prisoner, is the only proof receivable of what either has stated (*Leach* v. *Simpson,* 5 M. & W. 309; *R.* v. *Coll,* 24 L.R.I. 522; Tay. s. 399; Ros. Cr. Ev. 57-58; *ante,* 543). If, however, no deposition, or an informal one, has been returned, parol evidence of what was said by the witness may be given (Tay. ss. 400, 416; Ros. Cr. Ev. 58); so, also, with the examination of the prisoner (*R.* v. *Erdheim, ante,* 215, 509; *R.* v. *Thomas,* 13 Cox, 77; Tay. ss. 400, 894). And the same result has followed where, although a formal deposition had been taken, the witness testified to what he had stated before the magistrate, no objection by the opposite side having been raised at the trial, or reserved (*R.* v. *Coll, ante,* 494). While, where a witness, since deceased, had signed a written deposition, and

afterwards testified orally, parol evidence of either was held admissible at the option of the party (*Tod* v. *Winchelsea,* 3 C. & P. 387).

Private Formal Documents. Where a private transaction is required by *law* to be in writing (*e.g.* a will, contract under the Statute of Frauds, bill of sale, or policy of marine insurance), or where a contract, grant, or other disposition of property, though not so required, is reduced to writing by *agreement of the parties* and intended by them to be complete and operative as such,—no extrinsic evidence is admissible to supersede the document, or to prove the terms of the transaction independently. Thus, where a contract of agency had been orally made between the parties, but had subsequently been put into writing and signed by them, it was held that the document was the only admissible evidence of the agreement (*Morris* v. *Delobbel-Flipo,* 1892, 2 Ch. 352). So, where the secretary of a society sued the committee for salary, and it appeared he had been appointed by a resolution in the book of the committee, of which book he had had the care, it was held that though he was no party to the resolution, which was passed before his appointment, yet as he accepted the situation and benefit in pursuance of it, he was bound by it, and that the terms could only be proved by the book (*Whitford* v. *Tutin,* 10 Bing, 395; see *Rennie* v. *Clarke, &c., ante,* 69; *R.* v. *Stacey, &c., ante,* 110-1, 128). The above rule holds even though the real term had been acted on before reduction into writing, and, although the document itself would, if produced, be inadmissible, *e.g.* a bill of sale void for want of registration or stamp (*Exp. Parsons, Re Townsend,* 16 Q.B.D. 532, 542; *Yorke* v. *Smith,* 21 L.J. Q.B. 53; *Charlesworth* v. *Mills,* 1892, A.C. 231, 239; *cp. post,* 572). On the other hand where there is an oral agreement, and a mere informal note or memorandum, which cannot be deemed to be a reduction of the agreement into writing, is afterwards given, the parol agreement will prevail (see *infra,* Private Informal Documents). Where A.'s traveller showed B. a specification of goods on sale, with their prices, and B. marked those he wanted and was told he could have them, and the next day A. sent B. a sold note setting out the above but adding the additional term "subject to being in stock," in obscure print, which B. did not notice nor accept;—in an action by B. for non-delivery, it was held by the County Court judge and the Div. Court, that the contract was contained in the sold note (omitting the obscure term), but on appeal that it was an oral one on which B. might sue, irrespective of the note (*Roe* v. *Naylor,* 87 L.J.K.B. 958, C.A.; *cp.* Passenger's Tickets, *ante,* 147). So, where an agreement is partly oral and partly written, and the oral terms only are sued on, the document need not be produced (*Hay* v. *Moorhouse,* 6 Bing, N.C. 52); but where the written terms are sued on, it must be (*Falmouth* v. *Roberts,* 9 M. & W. 469, cited *ante,* 528).

Even between strangers, indeed, the *terms* of the transaction can only be shown by the production of the document itself, and not by oral testimony. Thus, in an action by an execution creditor against the sheriff for wrongfully withdrawing an execution, the defence being that a distress was in for rent, the sheriff was not allowed to ask the landlord, whom he called as a witness, the amount of rent due, it appearing that there was a lease which might have been produced (*Augustein* v. *Challis,* 1 Ex. 279). So, in a settlement case, the applicants having proved that a pauper occupied a tenement

of £10 a year and paid the rent and taxes, the respondent attempted to prove by parol that the letting was to the pauper and two others, but on cross-examination, as it appeared that the letting was by writing, it was held necessary to produce it (*R.* v. *Rawden,* 8 B. & C. 708; *Fenn.* v. *Griffith,* 6 Bing. 533). And, in another settlement case, where a hiring agreement had been executed by the servant but not by the master, who, however, had accepted the agreement, it was held that the terms of the hiring could only be proved by the document (*R.* v. *Houghton Le Spring,* 2 B. & Ald. 375); while there the terms of the agreement had been written down by a third person in the presence of both parties but the document had not afterwards been seen nor recognized by them, it was held that the terms of the hiring might be proved by parol (*R.* v. *Wrangle,* 6 Bing, N.C. 52). So, where A. let land to B., on which C. had wrongfully cut down timber, thereby injuring A.'s reversion, in an action by A. against C. it was held B. could not prove A.'s reversion by parol, but must produce the lease (*Cotterill* v. *Hobby,* 4 B. & C. 465; in *Strother* v. *Barr,* 2 M. & P. 207, the judges appear to have been equally divided on the point.)

EXCEPTIONS. To the rule as above stated are three classes of exceptions:

(1) **Public Documents** are, in general, given no exclusive (nor conclusive, *post,* 577, 588) authority by law as instruments of evidence. Thus, an entry of marriage (*Evans* v. *Morgan,* 2 C. & J. 453; *R.* v. *Wilson,* 3 F. & F. 119), or of the nationality of a ship (*R.* v. *Seberg,* L.R. 1 C.C. 264) in a public register; or the certificate of the registration of a company, even when by statute rendered "conclusive evidence" (*Agricultural Cattle Company* v. *Fitzgerald,* 16 Q.B. 432; *R.* v. *Langton,* 2 Q.B.D. 296; *ante,* 109, 369), will not exclude independent proof of those facts. So, the Gazette, though "conclusive evidence" of an adjudication (*ante,* 338, 560-1), or of the abandonment of a tramway (*A.-G.* v. *Bournemouth,* 1902, 2 Ch. 714, disapproving *Re Dudley Tramways,* 42 W.R. 126, *contra*), is not exclusive evidence thereof. And where the proceedings of directors, commissioners, public trustees, and the like, are directed by statute to be entered in minute-books, extrinsic evidence of such proceedings is nevertheless receivable (*Miles* v. *Bough,* 3 Q.B. 845, 872; *Inglis* v. *Great Northern Ry.,* 1 Macq. H.L. 112, 118). Nor will recitals in statutes, gazettes, and other official documents exclude independent evidence of the facts recited (Stark. Ev., 4th ed. 718). So, where a written order by a public officer was held privileged as a public document, no secondary evidence being allowed, the effect was held to be the same as if it were not in existence, and proof was allowed, not of the contents of the document, but that the act was done by order of the officer (*Cooke* v. *Maxwell,* 2 Stark. 183; *ante,* 181). As to the exclusionary effect of a statutory certificate of the value of lands, see *M'Knight* v. *Gardner,* 83 Ir.T.L.R. 108. Foreign written law is, indeed, as we have seen, exclusively provable by the oral testimony of experts (*ante,* 388-9); but it is otherwise as to domestic written law (*ante,* 20; 549).

(2) **Private Documents when Collateral or Informal.** Extrinsic evidence is admissible in substitution of any document intended by the parties to operate merely as a collateral or informal memorandum of a transaction, and not as a contract or other binding legal instrument. Thus, payment of a debt

may be proved orally, although a cheque was given and a receipt taken, the latter of which was produced (*Carmarthen Ry.* v. *Manchester Ry., ante,* 66; and *cp. infra* (3)). So, an *order for goods,* insufficient under the Statute of Frauds, will not exclude parol evidence (*Lockett* v. *Nicklin,* 2 Ex. 93). And where possession of goods was taken on a certain understanding, although a receipt and inventory were also signed (*Newlove* v. *Shrewsbury,* 21 Q.B.D. 41; *Charlesworth* v. *Mills,* 1892, A.C. 231; *Grigg* v. *National Co.,* 1891, 3 Ch. 206; and *cp. Harris* v. *Rickett, post,* 591), or where a loan was secured collaterally by a promissory note (*Birchall* v. *Bullough,* 1896, 1Q.B. 325), oral evidence of the former was admitted. The opposed results are well shown in cases of merger: thus, where a loan is secured by a covenant to pay, the loan being merged can only be proved thereby; while, if secured by a mortgage without such covenant, there is no merger, and the loan may be proved independently (Ros. N.P., 17th ed. 594; *post,* 580). So, if during employment under a written contract, a distinct verbal order is given for wholly separate work, the document need not be produced (*Reid* v. *Batte,* M. & M. 413; Tay. s. 405); but it is otherwise if these points are not clearly shown, for, in that case, the document might furnish evidence both as to the inclusion of, and remuneration for, the alleged extra items (*Vincent* v. *Cole,* M. & M. 257; *Buxton* v. *Cornish,* 12 M. & W. 426; *Edie* v. *Kingsford,* 23 L.J.C.P. 123; Tay. s. 402; and see *Cooper* v. *Ipswich,* 73 J.P.Jo. 312, where to show that inclusion was intended, proof was admitted that both works were of the same character and so probably contemplated by the parties). Where, also, there is merely an *unaccepted proposal* in writing, oral evidence of the contract is admissible (*Stones* v. *Dowler,* 29 L.J. Ex. 122). And parol evidence of a hiring was admitted where, although the terms had been written down, they had not been signed nor otherwise treated as an agreement (*R.* v. *Wrangle,* 2 A. & E 514; *Trewhitt* v. *Lambert,* 10 A. & E. 470). Again, where an auctioneer sold an article described in an *unsigned catalogue* as silver for £6., but publicly stated at the sale that it was only plated, evidence of this statement was received, since the contract was really an oral one (*Eden* v. *Blake,* 13 M. & W. 614); and where lands were let by auction, and a paper of the terms of letting was delivered by the auctioneer to the bidder, which paper was not signed by the latter or either of the parties, parol evidence of the terms was received (*Ramsbottom* v. *Tunbridge,* 2 M. & S. 434; though *aliter* where the paper had been signed by the auctioneer, *Ramsbottom* v. *Mortley, id.* 445; see also *Hawkins* v. *Warre,* 3 B. & C. 697, where the same distinction between signed and unsigned papers was taken) [*cp. post,* 597]. So, where a resolution, proposed at a public meeting, was read out from a paper, it was held that the paper need not be produced, for the question was not what the paper contained, but what the speaker proposed (*R.* v. *Sheridan,* 31 How. St. Tr. 673-4; *cp. R.* v. *Moors, ante,* 533, 545, where an unlawful oath was similarly read out).

(3) **Existence as distinct from Terms of Transaction.** Extrinsic evidence is sometimes admissible to prove *the existence as distinguished from the terms* of some transaction or relationship which has been reduced into writing. Thus, the existence of a partnership may be shown without producing the deed (*Alderson* v. *Clay,* 1 Stark. R. 405); acting in a public office (*ante,* 110), or the oral testimony of the official that he holds it (*Ross* v. *Helm,* 1913, 3 K.B. 462), is *prima facie* evidence of due appointment, without

producing the written instrument; and the fact of the recovery of judgment, as distinguished from its contents, may be proved without the record (*Henman* v. *Lester,* cited *ante,* 477); so, also, the fact of bankruptcy (*id.*); or conviction for crime (*ante,* 482, 557); and oral evidence is receivable to show that A. agreed to sell goods on commission for B., though the terms of the transaction had been committed to writing (*Whitfield* v. *Brand,* 16 M. & W. 282). So, the fact that a husband and wife are living apart voluntarily may be shown without production of the separation agreement (*Fengl* v. *F.,* 1914, P. 274, where the document was inadmissible for want of a stamp). Again, the fact of occupation of land, irrespective of the details of the tenancy, may be proved without producing the lease—*e.g.* by evidence that the tenant has been seen in occupation, or has paid rent (*R.* v. *Holy Trinity,* 7 B. & C. 611; *Doe* v. *Harvey,* 8 Bing. 239, 242; see, however, *Strother* v. *Barr,* 5 Bing, 136; *Twyman* v. *Knowles,* 13 C.B. 222); and the mere relation of landlord and tenant (*Augustien* v. *Challis,* 1 Ex. 280, *per* Alderson, B.), or the date when possession *had been* (*Re Lander,* 1892, 3 Ch. 41), but not *was to be* (*Biggs* v. *Brennan,* 41 Ir. L.T.R. 60), taken, may be proved by parol, though it has been held that the actual party under whom the tenant came into possession (*Doe* v. *Harvey, sup.*), or to whom a demise has been made (*R.* v. *Rawden,* 8 B. & C. 708), or the payment of the rent reserved (*R.* v. *Merthyr Tydvil,* 1 B. & Ad. 29; *Augustein* v. *Challis, sup,*), cannot be so shown.

On the other hand, strict proof of a transaction by the production of the document is sometimes required, though the terms thereof may not be in dispute. Thus, on a charge of perjury committed in proceedings before justices for refusing to leave licensed premises, the license must be produced, and oral testimony by the proprietor that he is licensed is inadmissible (*R.* v. *Evans,* 17 Cox, 37; *R.* v. *Lewis,* 12 *id.* 163; *R.* v. *Willis,* 12 *id.* 164). So, in prosecutions for bigamy, a Jewish marriage must be established by production of the written contract with proof of its execution, and not by a mere witness of the marriage ceremony (*R.* v. *Althausen,* 17 Cox, 630; *Horn* v. *Noel,* 1 Camp, 61; *ante,* 344, 384). Again, the fact that a person is rated to the relief of the poor can only be proved by the rate-book, or secondary evidence thereof, and not by parol (*Justice* v. *Elstob,* 1 F. & F. 256; *ante* 555). And the proper evidence of an insurance is the policy, or secondary evidence thereof (*R.* v. *Doran,* 1 Esp. 127; *R.* v. *Kitson,* 1 Dears, C.C. 187; *cp. R.* v. *Gilson,* Rus. & Ry. 138). Similarly, the taking of an oath under the Toleration Act (1 W. & M. c. 18), being matter of record in the court where sworn, could not be proved by parol (*R.* v. *Hube,* 1 Peake, N.P.C. 132). And on a question of infringement, where the identity of the contents of two rival operas was in dispute, the best evidence of the prior publication of one was held to be the production of the printed music; and oral testimony that the witness had seen such opera in print in a foreign country several years before, or heard it played in society there, was rejected (*Boosey* v. *Davidson,* 13 Q.B. 257; this case, however, was not approved in *Geralopulo* v. *Wieler,* 10 C.B. 690, 696, and though cited in, appears to be inconsistent with, *Lucas* v. *Williams,* 1892, 2 Q.B. 113, C.A., where the infringement of a picture by an engraving was allowed to be proved, without production of the former, by oral testimony of a comparison made out of court; *ante,* 47).

CHAPTER XLV.

EXCLUSION OF EXTRINSIC EVIDENCE TO CONTRADICT, VARY, OR ADD TO DOCUMENTS.

When a transaction has been reduced to, or recorded in, writing either by requirement of law, or agreement of the parties, extrinsic evidence is, in general, inadmissible to *contradict, vary, add to or subtract from*, the terms of the document.

[Tay. ss. 1132-57; Best, s. 26; Ros. N.P. 15-29; Steph. art. 90; Gulson, ss. 446-55; Norton on Deeds, 124-39; Thayer, Pr. Tr. Ev. 390-410; Wigmore, ss. 2425-54. In *Equity*, the rule that a written contract could not be varied by parol, was *primâ facie* the same as at *Common Law* (*Woolam* v. *Hearn*, 7 Ves. 211; *Hill* v. *Wilson*, 8 Ch. App. 888; *Flight* v. *Gray*, 3 C.B.N.S. 320). But in equity there were the special exceptions that an extraneous parol agreement might form a ground for refusing specific performance, and that mistakes in documents might be rectified; while at Common Law there was the peculiarity that a collateral parol agreement might be enforced by separate action or counterclaim (*Henry* v. *Smith*, 39 Sol. Jo. 559, *per* Wright, J.; *Druiff* v. *Parker*, L.R. 5 Eq. 131, cited *post*, 586)].

Principle. The grounds of exclusion commonly given are: (1) that to admit inferior evidence when the law requires superior would be to nullify the law; and (2) that when the parties have deliberately put their agreement into writing, it is conclusively presumed between themselves and their privies that they intended the writing to form a full and final statement of their intentions, and one which should be placed beyond the reach of future controversy, bad faith, or treacherous memory. The rule, however, is sometimes thought to be based on the "best evidence" principle (*Guardhouse* v. *Blackburn*, L.R. 1 P. & D. 117; *Davis* v. *Symonds*, 1 Cox, Ch. 402); sometimes on the doctrine of estoppel, for "in each the party is precluded by his acknowledgment in writing from disputing what is so acknowledged —in estoppel, however, it is matter of fact, here it is the terms of an agreement" (Salmond, 6 Law Quart. Rev. 81; Stephen, Pleading, 7th ed. 182-3; *post*, chap. xlviii.); and sometimes on the substantive law purely [Leake, Contracts, 5th ed. 118; Elphinstone, Deeds, 1-2; Mr. Gulson remarks that the rule is one of substantive law directed not against parol evidence as an improper mode of *proving* the contract, &c., but (1) against such evidence as an improper mode of *making* it (ss. 448-9); and (2) against *extrinsic facts* (however proved) being received to affect the meaning of the written instrument (ss. 450-54). Prof. Thayer also regards the rule and its exceptions as doctrines of substantive law disguised in terms of evidence, observing of the *rule* that, "it is the use of such matter, not the proving

of it, which is objectionable; the averment of it in pleading, the having an issue on it, the going to the jury with it, that is forbidden" (Pr. Tr. Ev. 401); and of the *exceptions* that "the true inquiry is whether certain claims or defences are allowable. If relief can be had in such cases the law of evidence has nothing to say as to any kind of evidence, good under the general rules, which may be offered to prove these things. In so far as extrinsic facts are a legal basis of claim or defence, extrinsic evidence is good to prove them" (*id.* 409). So, Prof. Wigmore, s. 2425: "It is a rule of substantive law, because it deals with the question in what sources and materials are to be found the terms of a legal act, and not a rule of evidence dealing with the value of one fact as probative of another"; and see 17 Harv. L. Rev. 240, where the rule is considered one of substantive law because it rejects the fact offered as irrelevant, and does not merely forbid the proving of it in a particular way.] For the history of the rule, see *ante,* 566-8.

Forms of Extrinsic or Parol Evidence. The evidence excluded under the present rule is often called *parol evidence,* a term which, though sometimes applied to written matter as opposed to instruments under seal, and sometimes to oral testimony or statements as opposed to written, is in the present connection used to describe *all* evidence extraneous to the document itself. Such evidence is generally inadmissible whether it consists of (1) direct oral testimony by the parties; (2) their admissions, declarations of intent, or conversations out of court (*Doe* v. *Webster,* 12 A. & E. 442; Tay. s. 1132; *ante,* 234; *post,* 633); (3) their statements against interest, &c., tendered after death (*Lalor* v. *L., ante,* 285); or (4) of facts and events not in the nature of declarations, whether happening before, at, or after the date of the instrument, *e.g.* their previous course of dealing tendered to supplement a complete, though *aliter* an incomplete, contract (*Pontifex* v. *Hartley,* cited *post,* 590), or to contradict the instrument (*Ford* v. *Yates, post,* 591); for examples of course of dealing admissible, or not, to affect the construction of documents, see *post,* 560, 564. So, (5) all documents and correspondence other than those constituting the transaction in issue, or incorporated therewith by reference (*ante,* 525-8; *post,* 612), *e.g.* drafts, deleted clauses or prior informal agreements, are in general excluded, being deemed to be merged in and superseded by the final agreement (*Halhead* v. *Young,* 25 L.J.Q.B. 290, 293; *Inglis* v. *Buttery,* 3 App. Cas. 552; *Leggott* v. *Barrett,* 15 Ch.D. 306; *National Bank* v. *Falkingham,* 1902, A.C. 585, 591; as to the admissibility of such documents in aid of interpretation, see *post,* 616, 633-9). On the other hand, when extrinsic evidence is admitted by exception, all forms are not necessarily receivable. Thus, though the due execution of a deed may be impeached by parol, declarations by a deceased subscribing witness are not admissible for that purpose (*Stobart* v. *Dryden, ante,* 277). So, though declarations of intention by a testator are receivable as original evidence to invalidate his will, his mere hearsay assertions are not (*ante,* 325; *Provis* v. *Reed, ante,* 330). And it has been held that a joint tenancy under a document may be proved to be a tenancy in common by the conduct, but not by the declarations of intention, of the parties (*Harrison* v. *Barton, post,* 581). As to the exclusion of declarations of intention when tendered to affect construction, see *ante,* 325-6, and *post,* 611, 613.

Judicial Documents. Extrinsic evidence is in general inadmissible to contradict or vary judicial documents (*post,* 584-5). Thus, a County Court judgment cannot be varied by the judge's notes (*Dews v. Ryley,* 20 L.J.C.P. 264), still less by the informal memoranda or letters of the registrar (*Stonor* v. *Fowle,* 13 App. Cas. 20, 27-8). And the note or certificate of his judgment supplied by a County Court judge for appeal is conclusive, and cannot be varied by affidavit or shorthand notes (*Huddleston* v. *Furness Ry.,* 15 T.L.R. 238, C.A.). So, where out of five justices, one only was recorded as dissenting, the K.B.D. was held bound by the record and evidence to show that a decision was not that of the majority was rejected [*R.* v. *Tyrone,* JJ., 1917, 2 I.R. 437, Campbell, L.C. remarked, "In recent cases the Court has gone very far in allowing affidavits contradicting matters which appear regular on the face of the record. We are not inclined to extend that practice."] And an award speaks for itself, and no evidence to contradict, vary, or add to it is receivable (*ante,* 196). As to where a justice's summons and the order and certificate of the order vary *inter se,* see *Doherty* v. *Miles,* 40 Ir.L.T.R. 39. Parol evidence has, however, been received to explain the ground on which a former order was quashed (*R.* v. *Wheelock,* 5 B. & C. 511; though see *R.* v. *Knaptoft,* 2 *id.* 883); and such evidence is constantly resorted to, on pleas of *res judicata,* to ascertain the identity, or non-identity of the issues upon which the former judgment was given (*ante,* 315). So, a County Court judge has been allowed to explain, by correspondence with the parties, the meaning of an ambiguous phrase in his judgment, *e.g.* that by "plaintiff was a trespasser" he meant "plaintiff was not there by right" (*Lowery* v. *Walker,* 27 T.L.R. 83, H.L.) As to the explanation of Awards, see *ante,* 196. *Depositions.* The same rule applies to the statutory deposition of a witness in a civil or criminal proceeding, and the statutory examination of a prisoner, neither of which can be contradicted, or varied by extrinsic evidence. As to *additions* to the depositions, it has been considered that since such documents are now required by statute to contain the whole statement of the deponent, and not merely so much as the justice deems material, all parol additions should be excluded (Tay. s. 893; Ros. Cr. Ev. 58, where, however, it is suggested that though additions should not be allowed when the deposition is used as substantive evidence, *i.e.* to supply the testimony of an absent witness, yet they may be when it is used merely to contradict a witness, *sed qu.* as to this distinction); but since the statute has been held to be satisfied if so much only of the testimony as the justice deems material is included (*ante,* 506), there seems no valid reason why parol additions should not now (as formerly, see *Leach* v. *Simpson,* 5 M. & W. 309) be admitted.

Private formal Documents. Where private documents are required *by law* to be in writing—*e.g.* wills, contracts within the Statute of Frauds, bills of exchange, marine policies, and the like, extrinsic evidence is generally inadmissible to contradict, vary, or supplement their terms. And the same rule holds with regard to contracts, grants, and dispositions of property which, though not required by law to be in writing, have been reduced thereto *by agreement of the parties;* though here it is in some respects less stringently applied (*post,* 577-8, 587-8). This rule has sometimes been extended to less formal *unilateral* writings, *e.g.* entries by deceased persons in the course of

duty, which cannot be contradicted by their declarations at other times (*Stapylton* v. *Clough, ante,* 276-7, 293); and see *R.* v. *Pembridge, infra.*

EXCEPTIONS TO THE RULE. To the rule as above stated there are several exceptions, some of which might, perhaps, be treated as falling outside its scope altogether.

(1) **Public Documents** are in general only *primâ facie,* and not conclusive, evidence of the facts therein contained. Thus, unless otherwise provided by statute an entry in a public register may be contradicted by parol (*The Recepta,* 14 P.D. 131; *Kemp* v. *Elisha,* 1918, 1 K.B. 228, C.A.). Evidence has, however, been rejected to supplement an entry in a vestry-book (*R.* v. *Pembridge,* Car. & M. 157).

(2) **Private Documents when (*a*) informal, or (*b*) inter alios.** (*a*) *Informal*: Evidence is, in general, admissible to contradict or vary any document intended by the parties to operate merely as a collateral or informal memorandum of a transaction, and not as a contract or other binding legal instrument. Thus, a *receipt* will not, even between the parties, unless amounting to an estoppel, exclude extrinsic evidence to contradict the writing (*Lee* v. *Lanc. & Yorks. Ry.* L.R. 6 Ch. 527; *Prosser* v. *Lancashire Co.,* 6 T.L.R. 285; *Ellen* v. *G. N. Ry.,* 17 T.L.R. 453; *Oliver* v. *Nautilus Co.,* 1903, 2 K.B. 639; *Nathan* v. *Ogdens,* 94 L.T. 126, C.A.; Ros. N.P. 66); and in actions between owners and consignees or indorsees, a receipt in a bill of lading is, unless expressed to be conclusive (*Crossfield* v. *Kyle Co.,* 1916, 2 K.B. 885, C.A.), usually only *primâ facie* evidence of the shipment or description of the goods (*Smith* v. *Bedouin Co.,* 1896, A.C. 70; *Bennett* v. *Bacon,* 2 Com. Cas. 102; *Hine* v. *Free, id.* 149; *Cox* v. *Bruce,* 18 Q.B.D. 147; *Parsons* v. *N. Zealand Co.,* 1901, 1 K.B. 548; *New Chinese Co.* v. *Ocean Co.,* 1917, 2 K.B. 664. C.A.; *cp. Compania Naviera* v. *Churchill,* 1906, 1 K.B. 237; Ros. N.P. 468, 474; 104 L.T.Jo. 199; 120 *id.* 171). A broker's receipt for premium on a policy of marine insurance is, in the absence of fraud, conclusive between insurer and assured, but not between insurer and broker (Mar. Ins. Act, 1906, s. 54). As to receipts in deeds, see *post,* 586-7. So, where A. sold B. a horse, signing and giving B. a paper as follows:—"Bought of A. a horse for £7 2s 6*d.*," this was held not to preclude B. from proving that A. had verbally warranted the animal quiet in harness (*Allen* v. *Pink,* 4 M. & W. 140); nor, where A. hired a horse from B., did a paper signed by B., "six weeks at 2 guineas," preclude A. from proving an oral agreement that B. was to be liable for accidents caused by shying (*Jeffery* v. *Walton,* 1 Stark. 267); and though it was said in the latter case that the *written* terms could not be contradicted, yet this was doubted by Willes, J., in *Malpas* v. *L. & S. W. Ry.,* L.R. 1 C.P. 336, since they did not purport to be an agreement (*post,* 589).

(*b*) *Inter alios.* Where a transaction has been reduced into writing merely by agreement of the parties, extrinsic evidence to *contradict or vary* the writing is excluded only in proceedings between such parties, or their privies and not in those between strangers, or a party and a stranger; since strangers cannot be precluded from proving the truth by the ignorance, carelessness, or fraud of the parties (*R.* v. *Cheadle,* 3 B. & Ad. 833); nor, in proceedings between a party and a stranger, will the former be estopped, since there would

be no mutuality. Thus, in settlement cases, a conveyance of land to the pauper may be contradicted both as to the consideration and the description (*R.* v. *Cheadle, sup.; R.* v. *Scammonden,* 3 T.R. 474; *R.* v. *Langunnor,* 2 B. & Ad. 616; *R.* v. *Wickham,* 2 A. & E. 517; this would now, however, apply also between parties to the deed, *post,* 586). [Tay. ss. 1149-1150; Stark. Ev., 4th ed. 725-728; Steph. art. 92, and note xxxiv; Whart. s. 923; Browne, Parol Ev. 31-40.] So, in criminal cases (*R.* v. *Adamson,* 2 Moody, 286; Steph. art. 92).

On the other hand, in actions by creditors against sureties an oral reservation of the former's rights against the latter cannot, at law, be superadded to a written release of the debtor (*Mercantile Bank of Sydney* v. *Taylor,* 1893, A.C. 317; *Cocks* v. *Nash,* 9 Bing. 341, 346, where Tindal, C.J., denied the above distinction as to parties and strangers; as to the equity rule, however, see *post,* 582). Mr. Browne remarks that the oral variation of written contracts by strangers must be limited to rights independent of the instrument, and that, as to those which originate in the relations established thereby, the ordinary rule must prevail (Parol Ev. p. 40, citing *Wodock* v. *Robinson,* 24 Atl. Rep. 73, *post,* 589). Moreover, the exception does not apply to proof of the contents of documents (*ante,* 533); nor to the *substitution* of oral for documentary evidence in the case of instruments executed by strangers (*Auguslien* v. *Challis, ante,* 573).

(3) **Private formal Documents: Terms of Transaction.** *Additional Terms.* Where a contract, not required by law to be in writing, purports to be contained in a document which the Court infers was not intended to express the *whole agreement* between the parties, proof may be given of any omitted or supplemental oral term, expressly or impliedly agreed between them *before* or at the *time* of executing the document, if it be not inconsistent with the documentary terms (Steph. art. 90; Ros. N.P. 17; as to *subsequent* terms and agreements, see *post,* 587). The inference that the writing was, or was not, intended to contain the full agreement may be drawn not only from the document itself, but from extrinsic circumstances (*Mercantile Bank of Sydney* v. *Taylor,* 1893, A.C. 317, 321); it is a question of fact for the jury (*Imperial Press* v. *Johnston,* 1899, Times, May 5; *cp. Ellen* v. *G.N. Ry., post,* 588); and the burden of proof is upon the party alleging non-completeness (*Tucker* v. *Bennett,* 38 Ch.D. 1, 9.) Bills and notes, though required by law to be in writing, may however be *varied* by contemporaneous written (but not oral) agreement, provided it is made between the same parties and is parcel of the transaction, *i.e.* that the bill and writing together form one contract (*Maillard* v. *Page,* L.R. 5 Ex. 312; *Young* v. *Austen,* L.R. 4 C.P. 533, 556-7; *Brown* v. *Langley,* 4 M. & G. 466, 470, *per* Tindal, C.J.; *Salmon* v. *Webb,* 3 H.L.C. 510; Byles on Bills, 17th ed. 120-1). If it is not parcel of the contract, but merely collateral, it will only be available by cross-action or counter-claim and not defence (*Maillard* v. *Page, sup.; Henry* v. *Smith,* 39 Sol. Jo. 359), and if supported by valuable consideration (*Salmon* v. *Webb, sup.;* so, also, in this respect with *subsequent* written agreements, *McManus* v. *Bark,* L.R. 5 Ex. 65; *post,* 587).

Collateral Agreements and Warranties. Moreover, although there exists a contract purporting to be fully expressed in writing, whether required by law to be so or not, proof may be given of a prior or contemporaneous oral agreement or warranty, not inconsistent with the document, and which forms

part of the consideration for the main contract (*Heilbut* v. *Buckleton,* 1913 A.C. 30, 47-51; *Newman* v. *Gatti,* 24 T.L.R. 18 C.A.; *De Lassalle* v. *Guildford,* 1901, 2 K.B. 215; *Morgan* v. *Griffith,* L.R. 6 Ex. 70; Steph art. 90). The questions of what matters are collateral, and what representations amount to a warranty, have given rise to some conflict. In *Newman* v. *Gatti, sup.* Williams, L.J., remarked "Sometimes one had a collateral contract, the consideration for which was the entering into the principal contract, as where one party says he won't enter into the latter unless the other enters into the former." In *Heilbut* v. *Buckleton, sup.,* Ld. Moulton stated "It was clear there might be a contract the consideration for which was the making of some other contract. The effect was to increase the consideration of the main contract, and the natural and usual way would be to modify the terms of the latter and not to execute a concurrent collateral contract, which is viewed with suspicion because its sole effect is to vary or add to the main contract. Both the *terms* of the collateral agreement and *animus contrahendi* of the parties thereto, must, therefore, be strictly proved. An affirmation at the time of the contract is a warranty if it be so intended; but this intention can only be deduced from the totality of the evidence and there is no 'decisive test' as stated by Smith, M.R., in *De Lassalle* v. *Guildford, sup.*" If the collateral oral agreement included parties other than those to the original contract, it will be inadmissible (*Hollinshed* v. *Devane,* 49 Ir. L.T.R. 87; *cp. Salmon* v. *Webb, &c., sup.*) So where the alleged collateral agreement is really a material term of a contract required by law to be in writing, it will be inadmissible on that ground (*Bailey* v. *Woolstone,* 1907, 42 L.Jo. 457, C.A.); but where it is on an independent matter, this does not apply (*Angell* v. *Duke,* L.R. 10 Q.B. 174, cited *post,* 594).

Terms annexed by Usage or Law. Usage is, as we have seen, admissible to annex unexpressed incidents, *not inconsistent* with those expressed, to written contracts, grants, and wills, the presumption being that the whole terms were not intended to be expressed in the document, but that the customs of the market or place were tacitly adopted (*ante,* 105). Indeed, a collateral oral agreement to annex a term different from the customary term has been held inadmissible on the ground that the latter has the same effect as if it were expressed in the document (*per* Blackburn, J., in *Fawkes* v. *Lamb,* 31 L.J.Q.B. 98, and *Mollett* v. *Robinson,* L.R. 7C.P. p. 103; *sed qu* and see *inf.* and Whart. s. 958). As to evidence of usage in aid of interpretation see *post,* 629. *Terms implied by law* being judicially noticed are not provable by parol; although they may in some cases be contradicted, or varied thereby. Thus, in contracts under the Sale of Goods Act, 1893, such terms may be negatived or varied by express agreement, or by the course of dealing between the parties or by a usage which binds them both (s. 55; *Cointat* v. *Mayham,* 110 L.T. 749, C.A.) So, also, terms implied by law in contracts outside the Act may be excluded by oral agreement collateral to the written contract (*Pearson* v. *P.,* 27 Ch.D. 145, 148-149; *Macdonald* v. *Whitfield,* 8 App. Cas. 733, cited *post,* 599; *Burgess* v. *Wickham,* 33 L.J.Q.B. 17, *per* Cockburn, C.J., *diss.* Blackburn, J.). [Tay. ss. 1170-1186.]

(4) **True Nature of Transaction, and Relationship of Parties.** Extrinsic evidence (including, in some cases, direct declarations of intention) is admissible to show the true nature of the transaction, or the legal relationship of

the parties, although such evidence may vary or add to the written instrument. (*Cp. ante,* 325-6, 517).

Sale or Mortgage. Merger. Thus a sale, absolute on its face, may be proved by extrinsic evidence to be a loan on security (*Maas* v. *Pepper* 1905, A.C. 102; *Johnson* v. *Rees,* 84 L.J.K.B. 1276); a conveyance, merely a mortgage (*Lincoln* v. *Wright,* 4 De G. & J. 16; *Barton* v. *Bank of N.S.W.,* 15 App. Cas. 379; *Re Marlborough,* 1894, 2 Ch. 133); an assignment of income, merely an acknowledgment of debt (*Re Sheward,* 1893, 3 Ch. 502); or a mortgage for a specific sum, a security only for a sum to be afterwards ascertained (*Trench* v. *Doran,* 20 L.R.I. 338). So, parol evidence is admissible to show intent in cases of merger, *e.g.* of an equity of redemption and intervening charge (*Thorne* v. *Cann,* 1895, A.C. 11; *Tyrwhitt* v. *T.,* 32 Beav. 244; *Astley* v. *Mills,* 1 Sim. p. 324-7; *post,* 671); or of a lease and the fee (*Capital & C. Bank* v. *Rhodes,* 1903, 1 Ch. 631; *Lea* v. *Thursby,* 1904, 2 Ch. 57; *Re Fletcher,* 1917, 1 Ch. 339, C.A., cited *ante,* 85).

Trust or Beneficial Interest. The acceptance (*James* v. *Frearson,* 1 Y. & C. Ch. 370), or disclaimer (*Re Birchall,* 40 Ch. D. 436), of a written trust may be proved by parol; as also, apart from the question of construction, may the position of the writer, the circumstances by which to his knowledge he was surrounded, and the degree of weight and credit to be attached to the letters creating a trust (*Morton* v. *Tewart,* 2 Y. & C. Ch. 67, 77). (*a*) *Express Trusts.* Where a trustee is expressly constituted such by a written document, parol evidence is not receivable to contradict the writing or show that he was intended to take beneficially (*Re Huxtable, post; Croome* v. *C.,* 59 L.T. 582; *Barrs* v. *Fewkes,* 13 W.R. 987; *Irvine* v. *Sullivan,* 8 Eq. 673, 677). Where, however, no trust appears on the face of instrument, which often happens for the mere sake of convenience, as where trustees lend on mortgage (see for the effect of this *Carritt* v. *Real, &c., Co.,* 42 Ch. D. 263; *Re Harman,* 24 *id.* 720), extrinsic evidence may generally be given to engraft one, even though, in some cases, the document expressly negatives a trust (*Strode* v. *Winchester, ante,* 286; *Re Spencer's Will,* 57 L.T. 519; *Rowbotham* v. *Dunnett,* 8 Ch.D. 430). Thus a conveyance, absolute on its face, may be proved to be subject to a parol trust, express or inferential, for the grantor (*Booth* v. *Turle,* L.R. 16 Eq. 182; *Gladding* v. *Yapp,* 5 Mad. 56; *Rochefoucauld* v. *Boustead,* 1897, 1 Ch. 196). And although trusts relating to land (other than resulting trusts, *inf.*) must by the St. of Frauds, s. 7, be evidenced by writing signed by the declarant, yet this section will not avail where the grantee or his assigns seeks to retain the land in fraud of the trust (*id.; Re Marlborough,* 1894, 2 Ch. 133). So, notwithstanding the Wills Act, a bequest absolute in terms may be proved to be subject to a *Secret Trust,* declared orally or in writing either before or after the execution of the will, provided the trust was communicated to and accepted by the trustee before the testator's death (*Re Boyes,* 26 Ch.D. 531; *Re King,* 21 L.R.I. 273; *French* v. *F.,* 1902, 1 I.R. 172, H.L.). This rule, though nominally aimed against fraud, operates even where the donee himself seeks to enforce the trust (*id.; Re Spencer's Will, sup.; O'Brien* v. *Tyssen,* 28 Ch.D. 372; *Re Marchant,* 1893, P. 254; *Re Fleetwood,* 15 Ch.D. 594; *Scott* v. *Brownrigg,* 9 L.R.I. 246). As to the effect of a devise to joint-tenants, when the trust is only communicated to one, see *Re Stead,* 1900, 1 Ch. 237, and *cp. Re Gardom,*

1914, 1 Ch. 662, C.A.. Neither the existence of the trust, however (*Turner* v. *A.-G., ante,* 286), nor its communication to the trustee (*Re Downing, ante,* 328), can be proved by hearsay evidence. (*b*) *Resulting Trusts.* Where a resulting trust arises by *construction* of a written instrument, no extrinsic evidence is admissible to contradict it or show the real intention of the parties (*Barrs* v. *Fewkes,* 13 W.R. 987; *Croome* v. *C.,* 59 L.T. 582; *Re Bacon,* 31 Ch.D. 460; *Re West,* 1900, 1 Ch. 84; *Irvine* v. *Sullivan, ante,* 580); where, however, it arises merely by *presumption* of law, such evidence may be given both to rebut and in reply to support the presumption (*id.; post,* 665, 669, 674). Examples of the former occur where an express trust fails to exhaust the property, but the words negative a beneficial interest in the trustee; or, in the case of an executor's right to the residue, where a legacy is given to him "for his trouble." Examples of the latter occur on the purchase of property in the name of a stranger; or, in the case of an executor's right to the residue, where a legacy is given to him *simpliciter* (*post,* 669-70).

Joint, Common, or Several Interest. A contract, joint on its face, may be proved by the prior or subsequent conduct of the parties, though not, it has been held, by their direct declarations, to have been intended to be in common, or *vice versâ* (*Harrison* v. *Barton,* 30 L.J.Ch. 213; *Re Trimmer,* 91 L.T. 26; *cp. Steeds* v. *S.,* 22 Q.B.D. 537). And this applies to advances made by joint purchasers or mortgagees, whether in equal or unequal shares (*Edwards* v. *Fashion,* Prec. Chan. 332; *Robinson* v. *Preston,* 4 K. & J. 505; *Re Scott,* 97 L.T. 537; *Re Wray,* 122 L.T.Jo. 463), and even though it is expressly recited that the advance was on joint account (*Re Jackson,* 34 Ch.D. 732). The same rule obtains, also, where land is purchased out of partnership profits and used for trading purposes, the course of dealing by the parties being admissible to show that a tenancy in common was intended (*Jackson* v. *J.,* 9 Ves. 591).

Principal or Agent. As to the effect of signatures qualified by words on the *face* of the document, see *ante,* 516-7, and *post,* 592. Where, however, it is doubtful whether A. signs a document as agent for B., or as charging himself as well, extrinsic evidence, *e.g.* his declarations at the time, may be given, such evidence going really to the *factum* of the instrument (*Young* v. *Schuler, ante,* 75; *McCollin* v. *Gilpin,* 29 W.R. 408, reported less fully, 6 Q.B.D. 516; *cp. ante,* 326-7). Extrinsic evidence may, indeed, generally be given to add a new party to a contract, *e.g.* where A. signs in his own name, evidence may be given to charge, or give the benefit of the contract to, B. as the real principal (*Higgins* v. *Senior,* 8 M. & W. 834; but *cp. Robinson* v. *Rudkins,* 26 L.J. Ex. 56), though not to discharge an apparent one (see, however, *Clever* v. *Kirkman, post,* 583), unless such discharge formed the express consideration for his signing (*Wake* v. *Harrop,* 30 L.J.Ex. 273, affd. 31 *id.* 451; *Cowie* v. *Witt,* 23 W.R. 76; Ros. N.P., 17th ed. 366-367, 412-413), or unless it is apparent from other portions of the contract that he did not intend to bind himself personally. In *Cowie* v. *Witt, sup.,* it was held that mere unilateral declarations by A. that he intended to sign only as agent were insufficient, unless assented to by the opposite party; *contra, Young* v. *Schuler, sup.,* where, however, the effect was to add, and not to discharge, a party. Where A. signed a charter-party as "charterer," evidence was admitted that he was only agent for B., the real principal who was entitled to sue on the contract

(*Drughorn* v. *Rederiaktiebolaget,* 1919, A.C. 203; *Reigate* v. *Union, &c., Co.,* 1918, 1 K.B. 592). But where A. was described in, and signed a charter-party as, "owner," proof was rejected to enable B., as real principal, to sue thereon (*Humble* v. *Hunter,* 12 Q.B. 310); and where he signed as "Proprietor," parol evidence that he was only an agent was excluded [*Formby* v. *F.,* 102 L.T. 116, C.A. following *Humble* v. *Hunter, sup.,* and disapproving the doubt as to that case expressed in *Killick* v. *Price,* 12 T.L. R. 263; see comments on *Humble* v. *Hunter,* in *Drughorn's Case, sup.*] On the other hand, where A. signs as "director" (*McCollin* v. *Gilpin, sup.; Landes* v. *Marcus,* 25 T.L.R. 478; *contra, Chapman* v. *Smethurst, id.* 383, C.A.), or as "agent" or "broker" (*Hutcheson* v. *Eaton,* 13 Q.B.D. 861; *Woolf* v. *Horne,* 2 Q.B.D. 355; *Beigtheil* v. *Stewart,* 16 T.L.R. 177), he is not necessarily exonerated from liability, though he cannot ordinarily sue on such a contract as principal (*Fairlie* v. *Fenton,* L.R. 5 Ex. 169; *Sharman* v. *Brandt,* L.R. 6 Q.B. 720), unless the name of his principal was not disclosed (*Schmaltz* v. *Avery,* 16 Q.B. 655; *Harper* v. *Vigors,* 1909, 2 K.B. 549), or unless he be an auctioneer (*Davis* v. *Artingstall,* 49 L.J. Ch. 609; *Wood* v. *Baxter,* 49 L.T. 45; *Manley* v. *Berkett,* 1912, 2 K.B. 329, 333). [2 Smith L. C., 12th ed. 365-402; Ros. N.P. 18th ed. 17-18, 92-93; and see as to the admissibility of usage to charge or discharge the parties, *ante,* 123-5.] Where an agent buys property for his principal, though in his own name and with his own money, evidence of the agency is admissible to fix him with the trust (*Rochefoucauld* v. *Boustead,* 1897, 1 Ch. 196, C.A.)

Principal or Surety. A party signing a document without qualification could always in equity, and may now at law, prove that he signed merely as surety and not as principal debtor [*Reynolds* v. *Wheeler,* 10 C.B. N.S. 561; *Overend* v. *Oriental Corp.,* L.R. 7 H.L., 348; *Macdonald* v. *Whitfield,* 8 App. Cas. 733; *Goodsell* v. *Lloyd,* 27 T.L.R. 383. As to sureties in the case of bills or notes, see further *infra* 'Parties to Bills'; and as to oral agreements by sureties qualifying the terms of bills, see *Abrey* v. *Crux, &c., post,* 593, 603; and *cp. Glenie* v. *Bruce Smith, post,* 586, 602]. Where the principal debtor has been released by the creditor under a written contract, any reservation of the creditor's rights against the surety to which the latter is not a party must, at law, appear on the face of the document and cannot be proved by parol (*Cocks* v. *Nash, ante,* 578; *Exp. Glendinning,* Burk, 517; *Mercantile Bank of Sydney* v. *Taylor,* 1893, A.C. 317); in equity, however, this rule is not always followed (*Wyke* v. *Rogers,* 21 L. J. Ch. 611; *Exp. Harvey,* 23 L.J. Bky. 26; Rowlatt, Sureties, 260; Byles on Bills, 16th ed. 332). As to extrinsic evidence to *construe* guarantees, see *post,* 617, 636.

Parties to Bills. Joint or Successive Liability. Similarly, the whole facts as to the making, issue, and transfer of a bill or note may be proved in order to ascertain the true relation to each other of those signing as makers or indorsers; and inferences of fact may be drawn to alter, qualify, or invert their relative liabilities according to the law merchant (*Macdonald* v. *Whitfield, sup.; Castrique* v. *Buttigieg,* 10 Moo. P.C. 94). Thus, the indorsees of a bill may be shown to be co-sureties and so jointly and not successively liable (*id.*); or the drawer by mistake to have signed as indorser (*Glenie* v. *Bruce Smith, supra*). As to extrinsic evidence to impeach the consideration of bills, &c., see *post,* 587; to vary or qualify the terms of payment,

post, 592; to prove that the bill was delivered as an *escrow*, *infra*, and *post*, 599-600; and to discharge the bill, *post*, 588.

Penalty or Liquidated Damages. So, extrinsic evidence is admissible to show that a sum, stated to be liquidated damages, was intended merely as a penalty [*Pye* v. *British Syndicate*, 1905, 1 K.B. 425; *Diestal* v. *Stevenson*, 1906, 2 K.B. 345; see generally as to the tests applicable to this question, *Dunlop Co.* v. *New Garage Co.*, 83 L.J.K.B. 1574, H.L.]

(5) **Invalid or Conditional Documents. Escrows. Fraud. Mistake. Want of Consideration, &c.** Extrinsic evidence is admissible to prove any matter which by substantive law affects the validity of a document, or entitles a party to any relief in respect thereof, notwithstanding that such evidence tends to vary, add to, or, in some cases, contradict the writing—*e.g.* defective or conditional execution, contractual incapacity, fraud, forgery, duress, undue influence, illegality of subject-matter, mistake, or want or failure of consideration.

Inoperative, Duplicate, or Conditional Instruments. Extrinsic evidence (*e.g.* a party's declarations of intention at the time of signing a deed or will) may, apart from fraud, be given to impeach or support the validity of its execution (*ante*, 326-7, 517). So, where A. and B. signed written terms for the sale of A.'s business to B., the latter was allowed to prove that it was not intended he should purchase the business himself, but merely act as A.'s agent for its sale to another (*Clever* v. *Kirkmam*, 24 W.R. 159; *cp. Higgins* v. *Senior*, *ante*, 581); or, though intended to be a contract, that the parties were not really *ad idem*, *e.g.* where by a written contract, A. sold goods to B. to "arrive ex *Peerless*, from Bombay," and there proved to be two ships of that name, each party intending a different one (*Raffles* v. *Wichelhaus*, 2 H. & C. 906; *cp. Preston* v. *Luck*, 27 Ch.D. 497). In the same way, a will or codicil may be proved to have been executed with some collateral object and not *animo testandi;* or two identical codicils as duplicates and not distinct instruments (*ante*, 326-7). *Escrows.* So, evidence may be given to show that a deed was delivered, or a contract signed, by both (*Pym* v. *Campbell*, 6 E. & B. 370), or one (*Pattle* v. *Hornibrook*, 1897 1 Ch. 25), of the parties, merely as an escrow and subject to a condition through the non-fulfilment, or suspended fulfilment, of which no contract has ever arisen (*post*, 599-601). It is not necessary that the restrictive delivery should be express, all the circumstances of the case may be considered (*Murray* v. *Stair*, 2 B. & C. 82; *Gudgen* v. *Besset*, 6 E. & B. 986; *London Freehold Co.* v. *Suffield*, 1897, 2 Ch. 608); nor made to a third person, for delivery may be conditional though the document is retained by the grantor (*Xenos* v. *Wickham*, L.R. 2 H.L. 296, 323), or even handed to the grantee (*Bell* v. *Ingestre*, 12 Q.B. 317; *Watkins* v. *Nash*, 20 Eq. p. 266; *London Freehold Co.* v. *Suffield*, *sup.*; *Johnson* v. *Clark*, 1908, 1 Ch. 303, 319; *Equitable Office* v. *Ching*, *post*, 600). But where A. in executing a deed of appointment, told his solicitor that, to avoid publicity, it was not to be registered or become operative till further orders, this was held an absolute and not a conditional delivery (*Gore-Booth* v. *G.-B.*, 1902, Times, May 6, C.A.). And a deed cannot be delivered as an escrow subject to an over-riding power to recall it altogether, or to be considered as complete in case of the grantor's death, for in the latter case it is a will and not a deed (*Foundling Hospital* v. *Crane*, 1911, 2 K.B.

367). Where delivery as an *escrow* depends on facts proved by oral evidence, the question is for the jury; but where the facts are in writing, *e.g.* a letter accompanying a deed, stating that the latter is only signed on certain conditions, the question is for the judge alone (*Furness* v. *Meek*, 27 L.J. Ex. 34; *ante*, 15). The same doctrine applies to *Bills* and *Notes* which, between immediate parties or holders not in due course, may be shown to have been delivered conditionally, or for a special purpose only, and not for the purpose of transferring the property in the bill [Bills of Ex. Act, 1882, s. 21, sub-s. 2 (*b*); *Deasy* v. *Donoghue*, 36 Ir. L.T. Jo. 221; and *cp.* cases *post*, 592-3]. It is doubtful, however, whether a *Will* can be proved conditional merely by extrinsic evidence (*ante*, 327); though if its own language is capable of that meaning, the surrounding circumstances, as well, perhaps, as the declarations of the testator, may be resorted to, to aid such a construction (*id.*). So, evidence may be given to show whether an attesting witness signed *animo attestandi*, or otherwise (*ante*, 326), or to impeach the validity of the signature in other respects (*Re Maddock*, L.R. 3 P. & D. 169; *Re Leverington*, 11 P.D. 80); though subsequent declarations by a deceased witness impugning his attestation are inadmissible (*ante*, 277).

Fraud. Illegality. Fraud vitiates all instruments, however solemn. Thus, judgments may, as we have seen, be impeached upon this ground, as well as upon others peculiar to that class of documents (*ante*, 406). So, with a will; and in such cases of declarations of intention by the testator, though not his hearsay assertions, are admissible to prove the fraud (*ante*, 327). And proof that a party's signature was obtained by fraudulent misrepresentation as to the *nature* of the document is a defence, even against a *bonâ fide* holder for value of a bill or note (*Foster* v. *Mackinnon*, L.R. 4 C.P. 704; *Lewis* v. *Clay*, 67 L.J.Q.B. 224; *Carlisle, &c., Co.* v. *Bragg*, 1911, 1 K.B. 489, C.A.); though as to misrepresentation, merely of the *contents* of the document, see *Howatson* v. *Webb*, 1908, 1 Ch. 1, C.A. Extrinsic evidence is also admissible to establish any other defence, *e.g.* that the object of an agreement is unlawful (Pollock on Contracts, chap. vii.)

Mistake will in some, but not in all, cases let in extrinsic evidence. Thus, the *Records of Courts of Justice*, being presumed to be correct, cannot generally be rectified by parol, the proper course being to apply to amend the record, either under the inherent jurisdiction of the Court (*Re Swire*, 30 Ch. D. 239, C.A.; *Hatton* v. *Harris*, 1892, A.C. 547; *Wilding* v. *Sanderson*, 1897, 2 Ch. 534; see *Leonard's Case*, 46 Ir. L. T. R. 51, C.A.); or in the case of a clerical mistake, or an accidental slip or omission, under O. 28, r. 11. As to amendment of mistakes in drawing up orders of County Courts, see *Re Beard, Exp. Lewis*, 10 Morr. 178; of the City of London Court, *The Recepta*, 9 T.L.R. 535; and of convictions by magistrates, *R.* v. *Slade*, 18 Cox, 153; *R.* v. *Mackenzie*, 1892, 2 Q.B. 519; *R.* v. *Bradley*, 70 L.T. 379. An arbitrator cannot even correct a manifest clerical error in his award after signing it, but should apply to the Court (*Mordue* v. *Palmer*, L.R. 6 Ch. 22); nor can the registrar of a County Court correct his own error in drawing up, the proper course being to apply to the judge (*Re Beard, sup.*) So, where a verdict and judgment were tendered as evidence of a public way, proof that the verdict was erroneously entered by the officer was rejected (*Reed* v. *Jackson*, 1 East, 355). But where a verdict awarding damages was entered generally,

oral evidence was admitted to show that it was recovered on one count only (*Preston* v. *Peeke*, 27 L.J.Q.B. 424; *contra*, however, in the case of a general award, *O'Rourke* v. *Commrs. for Railways*, cited *ante*, 196); and as to parol proof of the actual date of a trial, see *ante*, 569; and of the precise issues upon which judgment was given, *ante*, 415. Evidence has also been allowed to show that an order of justices was in fact signed three days after its apparent date (*R.* v. *Flintshire*, 3 Dowl. & L. 537), and where a judgment roll, which had been erroneously made up after the commencement of a second action between the same parties, did not accurately represent the verdict given in the first, the Court refused to grant an injunction to enforce the judgment, and admitted parol evidence of the actual finding of the jury (*Want* v. *Moss*, 70 L.T. 178, P.C.). [Tay. s. 85; Ros. N.P. 21.]

With regard to *Deeds and Contracts*, recitals and descriptions of formal matters, as distinguished from the expression of the intention of the parties, may, when not operating by way of estoppel, often be corrected by extrinsic evidence, for these are not generally matters of agreement at all, and may well be presumed to have been stated without careful precision (Tay. s. 1150; Ros. N.P. 21). Thus, the *date* of execution of a deed (*Exp. Slater*, 76 L.T. 529; *Jayne* v. *Hughes*, 10 Ex. 430; *Steele* v. *Mart*, 4 B. & C. 272; *Re Maher*, 1910, 1 I.R. 167), or charter-party (*Hall* v. *Cazenove*, 4 East, 477; *Cooper* v. *Robinson*, 10 M. & W. 694), may be contradicted, or, if omitted, supplied (*Lobb* v. *Stanley*, 5 Q.B. 574; *ante*, 515; *post*, 681). So, in cases of misdescription, which are more usually treated under the head of construction, parol evidence, other than direct declarations of intention, is admissible to identify the persons or property referred to, although they have been erroneously designated in the document (*post*, 624-6).

Where the mistake is one of substance, relief may be had in several ways; and parol evidence which at common law was wholly inadmissible, may now usually be given to prove the error, whether it be held sufficient to entitle the party to a remedy or not. Thus, it may be shown, as we have seen, that, by a mistake, the parties were never really *ad idem*, and so did not validly contract at all (*Raffles* v. *Wichelhaus*, *ante*, 583). So, a *plaintiff* may, where the mistake is unilateral, bring an action for rescission; or where it is mutual (but not where it is unilateral, *Fowler* v. *Sugden*, 85 L.J.K.B. 1090), for rectification (*Paget* v. *Marshall*, 28 Ch.D. 255; *Wilding* v. *Sanderson*, 1897, 2 Ch. 534, C.A.; *Cowen* v. *Truefitt*, 1899, 2 Ch. 309, C.A.; *Beale* v. *Kyte*, 1907, 1 Ch. 560; *Lovell* v. *Wall*, 104 L.T. 85, C.A.; Williams V. & P. 2nd ed., 780-804; but see *May* v. *Platt*, 1900, 1 Ch. 616, followed but not approved in *Thompson* v. *Hickman*, 1907, 1 Ch. 550). He may also, contrary to the former rule, prove mistake in the written contract by parol evidence, and in the same action obtain specific performance of the contract so varied (*Olley* v. *Fisher*, 34 Ch.D. 367; *Shrewsbury Co.* v. *Shaw*, 89 L.T. Jo. 274; Fry on Specific Performance, 4th ed., 353; *Williams*, V. & P. 788-93; *contra*, *May* v. *Platt*, *sup.*, *sed. qu.*); and this even where the Statute of Frauds is pleaded (*Johnson* v. *Bragge*, 1900, 1 Ch, 28; Williams, V. & P., *sup.*); or he may abandon his construction of the contract, and obtain specific performance to the extent admitted by the defendant (*Preston* v. *Luck*, 27 Ch. D. 497). So, the *defendant* may, by way of defence to specific performance, prove by parol a mistake or any other ground of equitable relief (Tay. s. 1140); and in

some cases mistake may be relied on as a defence to an action at law, even though the defendant does not counterclaim for rectification (Ros. N.P., 17th ed., 21). In the case of *Bills* and *Notes,* the old rule was that, at Common Law, a party suing on an instrument was not allowed to adduce evidence that it did not correctly represent the contract entered into, but in Equity there was an established jurisdiction to correct mistakes in documents (*Druiff* v. *Parker,* L.R. 5 Eq. 131, where a plaintiff's name inserted by mistake as drawer, was struck out). Even at Common Law, however, extrinsic evidence was sometimes admitted to aid in the correction of mistakes, *e.g.* to rectify an erroneous date (*Fitch* v. *Jones,* 5 E. & B. 238; *post,* 602), or an endorsement made by mistake by the drawer (*Matthews* v. *Bloxsome,* 33 L.J.Q.B. 209). In *Steele* v. *M'Kinley,* 1880, 5 App. Cas. 754, Ld. Blackburn, who was a party to the last named case, while expressing some doubt about it, remarked that "it can only be an authority for considering a bill as if it were amended so as to be what it was intended to be, when the evidence is clear what the intention was, and that the bill was drawn up in its actual form by a blunder." The last two cases were followed in *Glenie* v. *Bruce-Smith,* 1907, 2 K.B. 507, 512, affd. 1908, 1 K.B. 263, C.A.; *post,* 602. With regard to *Wills,* extrinsic evidence is, as we have seen, admissible to show that they were executed or revoked under a mistake; or that words were by inadvertence introduced without the knowledge of the testator (*ante,* 327-8); or that the date of execution is erroneous, *e.g.* that a will dated 1855 was really executed in 1865, and so revoked a prior one executed in 1858 (*Reffel* v. *R.,* L.R. 1 P. & D. 139; so, also, as to codicils, *Re May, id.* 575; *Re Ince,* 2 P.D. 111; *Re Anderson,* 39 L.J.P. 55; Theobald, 6th ed., 64-6). And extrinsic evidence, other than direct declarations by the testator, is admissible to identify persons or things misdescribed in the will (*ante,* 327-8; *post,* 624-5). In some cases, however, the mistake will be conclusive; thus, an erroneous recital of the amount of advances made to a legatee cannot be contradicted by the latter, unless a contrary intention appears (*Re Kelsey,* 1905, 2 Ch. 465, and cases cited, *post,* 603; and *cp.* Ademption, *post,* 669, 671-2). As to legacies given on mistaken assumptions of fact see *post,* 619.

Consideration. Want or failure of consideration may, under proper pleadings, always be proved to impeach a written agreement not under seal, even though, as in the case of bills and notes, the words "for value received" are inserted. So, words importing a past consideration may be shown by extrinsic evidence to relate to a contemporaneous or future one (*Goldshede* v. *Swan,* 1 Ex. 154; *Morrell* v. *Cowan,* 7 Ch. D. 151; Ros. N.P. 19). And though a *deed* imports a consideration, yet where this fact comes in question it is generally allowable to inquire into it, notwithstanding any written averment (Ros. N.P., 17th ed., 19; Norton, Deeds, 201, 205; *Barton* v. *Bank of N.S.W.,* 15 App. Cas. 379; but *cp. Frith* v. *F., inf.*). Thus, where no consideration, or a nominal or good consideration only, is expressed, a valuable one may be proved (*Townend* v. *Toker,* 1 Ch. App. 446; *Re Holland,* 1902, 2 Ch. p. 388); or where a valuable consideration is expressed, an additional one may be shown (*Re Barnstaple,* 50 L.T. 424; *Frith* v. *F.,* 94 *id.* 383, P.C.; and see *Newman* v. *Gatti,* and *Heilbut* v. *Buckleton, ante,* 579). Moreover, since the Jud. Act, the equity rule prevails, and as between the parties to a deed, the receipt for the consideration in the body of the deed, or even that

indorsed, may always (unless the facts amount to a waiver or an estoppel, *Roberts* v. *Security Co., post,* 600; *Powell* v. *Browne,* 97 L.T. 854), be contradicted (*Equitable Office* v. *Ching,* cited *post,* 600; *Batteman* v. *Hunt,* 1904, 2 K.B. 530; *Bickerton* v. *Walker,* 31 Ch. D. p. 153); though *aliter* against transferees taking without notice and in reliance on such receipt (*Bickerton* v. *Walker,* and *Bateman* v. *Hunt, sup.; French* v. *Hope,* 56 L.J. Ch. 363; *Saunders* v. *Kent,* 1885, W.N. 147). By the Conveyancing Act, 1881, s. 54, it is now provided that a receipt for the consideration contained in the body of the deed is a sufficient discharge to the person paying it, without an indorsed receipt; and by s. 55 either is sufficient in favour of a subsequent purchaser who has no notice of the non-payment. Under the former of these sections the receipt is only *primâ facie* evidence, under the latter it is conclusive, provided the acknowledgment be distinct (*Renner* v. *Tolley,* 68 L.T. 815; *King* v. *Smith,* 1900, 2 Ch. 425; *Rimmer* v. *Webster,* 1902, 2 Ch. 163). Similarly, the consideration expressed in a bill of sale may be shown by extrinsic evidence not to be the true one, so as to render the instrument void against trustees in bankruptcy and execution creditors (*Exp. Carter,* 12 Ch. D. 908; *Cochrane* v. *Moore,* 25 Q.B.D. 57, 73).

(6) **Subsequent Rescission or Variation of the Transaction.** Where an agreement, *not required by law to be in writing,* has been reduced thereto, it is competent to the parties, at any time before breach of it, by a new contract not in writing, either (1) altogether to annul the former agreement; or (2) in any manner to add to, subtract from, vary, or qualify the terms of it, and thus to make a new contract, which is to be proved partly by the written agreement, and partly by the subsequent oral terms engrafted upon what will thus be left of the written agreement (*Goss* v. *Nugent,* 5 B. & Ad. 58, 65). And an agreement by conduct, or an equity arising from the circumstances though not amounting to an agreement, will have the same effect (*Hughes* v. *Metropolitan Ry.,* 2 App. Cas. 439; *Bruner* v. *Moore,* 1904, 1 Ch. 305, 312; *Morrell* v. *Studd,* 1913, 2 Ch. 648). [Tay. ss. 1141-1146; Ros. N.P. 28-29; Steph. art. 90].

A contract *required by law to be in writing,* may, whether before or after breach, be *wholly rescinded* by an oral agreement, even though the latter be not itself enforceable [*Morris* v. *Baron,* 1918 A.C. 1 (disapproving *Williams* v. *Moss's Empires,* 1915, 3 K.B. 242); *Goss* v. *Nugent, sup.; Noble* v. *Ward,* L.R. 2 Ex. 135]; but it cannot be *partially abandoned* or *varied* thereby (*id.; Stead* v. *Dawber,* 10 A. & E. 57; *Sanderson* v. *Graves,* L.R. 10 Ex. 234; *Vezey* v. *Rashleigh,* 1904, 1 Ch. 634), and although this be attempted, the original contract will remain valid and subsisting (*Noble* v. *Ward, sup.; Stowell* v. *Robinson,* 3 Bing. N.C. 928; *Vezey* v. *Rashleigh, sup.,* approved in *Morris* v. *Baron, sup.; Cutts* v. *Taltal Ry.,* 62 S.J. 423). The question of rescission or variation is one not of law, but of fact, to be determined by the intention of the parties, which may be either express, or implied, *e.g.* from the substantial inconsistency of the old and the new terms (*Morris* v. *Baron, sup.*). But the mere acceptance of a substituted mode of performance (*Leather Co.* v. *Hieronimus,* L.R. 10 Q.B. 140), or a voluntary postponement of performance at the request of the other party (*Ogle* v. *Vane,* L.R. 3 Q.B. 272; *Hickman* v. *Haynes,* L.R. 10 C.P. 598; *Plevins* v. *Downing,* 1 C.P.D. 220), will not amount to a new contract rescinding the old.

At common law contracts by *deed* could neither be *rescinded* nor *varied* by parol (*West* v. *Blakeway*, 2 M. & Gr. 729, 751-3; *Steeds* v. *S.*, 22 Q.B.D. p. 539). Now, however (following the equitable rule, *Webb* v. *Hewitt*, 3 K. & J. 438), deeds, though they cannot technically be released, may be *wholly discharged* by parol (*Cort* v. *Ambergate Ry.*, 17 Q. B. 127, 145; *Exp. Morgan, Re Simpson*, 2 Ch.D. 72; *Williams* v. *Stern*, 5 Q.B.D. 409; *Parker* v. *Briggs*, 37 Sol. J. 452). Whether they can also be *varied* seems still to be doubtful. In Leake, Contracts, 5th ed. 570, it is stated on the authority of *Steeds* v. *S.*, *sup.*, that since the Judicature Act, 1873, the equity rule prevails by which a valid parol agreement may be pleaded in answer to any proceeding upon the original deed. On the other hand, it has been held by Walton, J., that an oral variation of a contract under seal is bad (*Kellett* v. *Stockport*, 70 J.P.Rep. 154, where, however, these two authorities were not cited). Variations which are contemplated by the deed itself, may, however, be proved (*Williams* v. *Barmouth Council*, 77 L.T. 383; *Whitehouse* v. *Hugh*, 22 T.L.R. 679).

As to the discharge of *Bills* and *Notes*, which must now, unless the bill be delivered up, be in writing, see Bills of Exchange Act, 1882, ss. 62, 89, *Re George*, 44 Ch.D. 627, and *Edwards* v. *Walters*, 1896, 2 Ch. 157; and as to the parol revocation of *Wills*, see Wills Act, 1837, ss. 19, 20, and *ante*, 328, 333.

EXAMPLES.

(1) *Public Documents.*

Admissible.

A., a shipowner, brings an action for limitation of liability against B. and proves the ship's tonnage by the register. B. may call surveyors to show that the registered tonnage is incorrect (*The Recepta*, 14 P.D. 131: *cp.* Merchant Shipping Act, 1894, s. 82). So, the register kept under the London Hackney Carriage Act, 1843, is not conclusive, and evidence is admissible to show that the registered proprietor is not the owner (*Kemp* v. *Elisha*, 1918, 1 K.B. 228, C.A.)

As to the effect of misnomers, &c. in notices to the registrar and in marriage registers, see *Re Rutter*, 1907, 2 Ch. 592.

Inadmissible.

A resolution of a vestry meeting purported to allow Mr. D. "the sum of £50" —Held, that evidence of what was said by persons present at the meeting was inadmissible to explain the resolution, since any additional terms should have been included therein (*R.* v. *Pembridge*, C. & M. 157; but see *Re Pyle Works*, *post*, 592, where a resolution recorded in a company's books, was allowed to be supplemented by proof of a contemporaneous oral agreement). Under some statutes registers are conclusive, see *e.g. ante*, 363-4.

(2) *Private Documents: Informal, or Inter Alios.*

Informal. A. having been injured in a railway accident, compromises with the company and signs the following document: "Received of the G. N. Ry. Co. £190 in full discharge of all claims and legal and medical charges in respect of injuries sustained by me on March 16, 1899." Held: if the jury found that this was only intended to be a receipt, and not an agreement, it only applied to the facts then known and understood by the parties; and that in a subsequent action against the company A. could prove that he had sustained further injuries which neither he nor his doctors knew, or had reasonable

Informal. On the facts opposite, if the jury found that the receipt was intended to be an agreement, whereby A., in consideration of a sum of money paid by the Co. gave up all claims for past or future injuries sustained by him in respect of the accident; then, in a subsequent action against the company A. could not prove that he had sustained injuries not capable of being discovered at the time of the compromise (*Ellen* v. *G.N. Ry.*, 17 T.L.R. 453, *semble*, *per* C.A.).

Admissible.

grounds for suspecting, at the time. [*Ellen* v. *G. N. Ry.*, 17 T.L.R. 453, C.A.; *Lee* v. *L. & Y. Ry.*, 6 Ch. 527; *cp. Prosser* v. *Lancashire Co.*, 6 T.L.R. 285; *Oliver* v. *Nautilus Co.*, 1903, 2 K.B., 639; *Huckle* v. *L.C.C.*, 27 T.L.R. 112, C.A.]

A., the indorsee of a bill of lading, sues B., the owner of the ship, for short delivery. B. may prove that though the master of the ship signed the receipt for the goods, yet in fact they were never shipped thereby (*Bennett* v. *Bacon*, 2 Com. Cas. 102; *Smith* v. *Bedouin Co.*, 1896, A.C. 70; *Parsons* v. *N. Z. Co.*, 1901, 1 K.B. 548.)

Inter Alios. The question being whether A, a pauper, was settled in the parish of Cheadle, and a deed purporting to convey land to A. for valuable consideration and to which A. was a party, being produced;—the parish appealing against the order was allowed to call A. as witness to prove that no consideration passed (*R.* v. *Cheadle*, 3 B. & Ad. 833).

A. leaves a fund in trust to pay the income to B. until he should assign it, and then to C. Afterwards B. signs a document purporting to assign the income to D. In an action between the trustees and B.;—held, extrinsic evidence (including facts, letters and expressions of intent) was admissible to show that as between B. and D. the document, although on its face an assignment, was not intended as auch and that it would have been a fraud by D. to have so used it (*Re Sheward*, 1893, 3 Ch. 502; *cp. ante*, 580-2).

A. is charged with obtaining money from B. by false pretences. The money was obtained as a premium for executing a deed of partnership, which deed stated a consideration other than the one which constituted the false pretence. B. may give evidence of the false pretence, although he thereby contradicts the consideration stated in the deed (*R.* v. *Adamson*, 2 Moody, 286; Steph. art. 92).

Inadmissible.

Inter Alios. A. sues B. on a joint bond signed by B., as surety, and C., as principal debtor. In defence B. proves that A. released C. by deed, thereby discharging B. A. tenders evidence that C.'s release was with the knowledge and at the request of B., who orally agreed with A. at the time that it was not to discharge B. Held inadmissible, although B. was no party to the deed (*Cocks* v. *Nash*, 9 Bing p. 346; *Mercantile Bank of Sydney* v. *Taylor*, *post*, 599; in the latter case the point as to *inter alios* was not taken. See, however, as to the equity rule, *Wyke* v. *Rogers*, *ante*, 581, *post*, 599).

A., the wife of B., who is tenant of a house under C., the lease containing a covenant to repair by B., sues C. for injuries by the falling of a floor. Testimony by A. that, at the time of granting the lease, C. orally agreed to repair the floor, held inadmissible, since A.'s rights, springing out of the occupancy, were dependent on the lease, which, being conclusive against B., was also so against A. [*Wodock* v. *Robinson*, 24 Atl. Rep. (Am.) 73. In England, A., being no party to the lease, would have no cause of action against C. (*Cavalier* v. *Pope*, 1906, A.C. 428; *Maloney* v. *Laskey*, 23 T.L.R. 399, C.A.; *Cameron* v. *Young*, 1908, A.C. 176; *Ryall* v. *Kidwell*, 1913. 2 K.B. 123].

(3) *Private Formal Documents: Terms of Transaction.*

Additional Terms. A., orally agrees with a railway company that they should carry his cattle to King's Cross Station for a certain price. He at the same time signs, without noticing its contents, a consignment note for the carriage of the cattle to Nine Elms (an intermediate station), but does not fill in the price. Held, that both the further journey to King's Cross and the price agreed could be proved, since they were supplemental to, and not contradictory of, the document (*Malpas* v. *L. & S. W. Ry.*, L.R. 1 C.P. 336).

So, where A. wrote to B., a wharfinger and shipping agent, for through rates from

Additional Terms. A. orally agrees with B., "In ship, or ships, from Surinam to London";—a concurrent oral agreement to except a particular ship from the policy (*Weston* v. *Emes*, 1 Taunt. 115); or to show that the risk was only to begin from an intermediate port (*Kaines* v. *Knightly*, Skin. 54; *Leslie* v. *De la Torre*, *cited* 12 East, 583-4), is inadmissible.

A. sues B., a shipowner, for the loss of goods shipped under a charter-party providing for a voyage direct from Fiume to Dunkirk. The goods were lost during a deviation in the voyage to Glasgow. Evi-

Admissible.	*Inadmissible.*
London to Cork, and B. quoted a rate, A. then sending goods which were lost at sea, —Held that, the letters not forming a complete contract, proof was admissible of a previous course of dealing between them by which B.'s liability ended when the goods were put on board [*Pontifex* v. *Hartley*, 62 L.J.Q.B. 196; *ante*, 111].	dence that A. knew of and assented to the deviation, held inadmisible (*Leduc* v. *Ward*, 20 Q.B.D. 475, C.A.; see *post*, 616; and *cp. Glynn* v. *Margetson*, 1893, A.C. 351; and *Cato* v *Thompson*, cited *post*, 591).
A. agrees to sell B. a house, then in course of erection, and to supply certain fixtures thereto and complete it in a workmanlike manner. Afterwards A. executes a conveyance of the house to B. Held, that B. might, notwithstanding the conveyance, enforce the prior contract [*Saunders* v. *Cockrill*, 87 L.T. 30. In *Clarke* v. *Ramuz*, 1891, 2 Q.B. p. 461, Bowen, L.J., remarked that the conveyance only put an end to those contractual obligations which were intended to be satisfied thereby. Thus, a condition that compensation shall be paid for misdescription, &c., is not extinguished by a conveyance which omits such a covenant (*Palmer* v. *Johnson*, 13 Q.B.D. 351; *Mason* v. *Schuppisser*, 81 L.T. 147; though *alter* where there is no such condition, *Clayton* v. *Leech*, 41 Ch.D. 103; see 45 Sol. Jo. 374)].	So, a policy of marine insurance "on profit on cargo when loaded," cannot be extended by parol to include profit on cargo "before loaded" (*Halhead* v. *Young*, 25 L.J.Q.B. p. 293).
	And where A., under an agreement with B., was liable for expenses "*incurred as owner*" of a ship;—a prior informal agreement extending his liability to expenses not incurred as owner was rejected (*Chapman* v. *Callis*, 9 C.B. N.S. 769, reversing 2 F. & F. 161).
	A. sells lands to a railway company, the preliminary contract containing a proviso that he should have a right of access over such lands to others owned by him. Afterwards A. executes an absolute conveyance without any reservation. In an action by A. to restrain the company from obstructing such right,—Held, as A. did not claim rectification the right was extinguished and the preliminary contract inadmissible [*Teebay* v. *Manchester Ry.*, 24 Ch.D. 572; *Leggott* v. *Barrett*, 15 Ch.D. 306, cited *post*, 634; *Clayton* v. *Leech*, *opposite*. Prior negotiations, drafts, particulars and conditions of sale are also generally inadmissible to *construe* subsequent formal contracts, see *post*, 616, 633-5].
A. proposes to engage B. as manager of his business in a letter in which A. purports to specify "the exact terms of the hiring." The only terms named relate to B.'s salary and house rent. B. accepts the offer by letter. A. may prove an oral agreement, prior to the written one, by which B. was not to solicit A.'s customers, since the document did not purport to contain the whole of the contract (*Robb* v. *Green*, 1895, 2 Q.B. 1; *Appleby* v. *Johnson*, L.R. 9 C.P. 158, and *cp. Pearson* v. *P.*, *post* 594).	A. and B. agree in writing, on April 13th, that B. shall enter A.'s service as "foreman at a salary of £2 a week and a house to live in from April 19th." Before signing, B. asked if the engagement was to be for a year, and A. said 'Yes.' Held (1) that the hiring was a weekly one, and the document containing all the terms, oral evidence was not admissible to vary it; (2) if the contract was a yearly one it was void under the Statute of Frauds [*Evans* v. *Roe*, L. R. 7 C. P. 138. At the trial, Blackburn, J., had left the document and conversation to the jury, who found the hiring was yearly].
A., having contracted to purchase land from C., orally agrees with B. to assign the benefit of the contract to B. Afterwards, A., by writing, assigns the benefit of the contract to B., but upon less favourable terms than he received from C. Held, the writing not containing the complete contract, that B. might prove the whole of the terms, oral and written, agreed between himself and A. (*Jervis* v. *Berridge*, 6 Ch. App. 351).	A., a tenant, covenants to pay rent to B., his landlord, each quarter in advance. A prior parol agreement made between them, that the rent might be paid by a three months' bill,—held. inadmissible, (1) being inconsistent with the document, the word payment being unambiguous and implying *cash*; (2) not being collateral (*post*, 596); and (3) there being no claim for rectification on which the prior agreement might have been admissible (*Henderson* v. *Arthur*, 1907, 1 K.B. 10).
A. sues B. for goods sold, over the value of £10. B. had given a written order for the goods and *accepted* delivery of them with an invoice (so that, the Stat. of Frauds being satisfied, no writing was required), but neither the order nor invoice mentioned the price. Held, B. might prove	A. agrees in writing, sufficient under the Stat. of Frauds, to sell B. certain goods, the contract being silent as to the time of delivery. Oral evidence that B. was to

Admissible.

an oral agreement that he was to have six months' credit, since this was not inconsistent with the writing, but formed with it a complete contract (*Lockett* v. *Nicklin*, 2 Ex. 93; *cp. Allen* v. *Pink*, and *Jeffery* v. *Walton*, cited *ante*, 577).

A. agrees in writing "to lease B. a shop and premises, to be built by A. at a cost not exceeding £400, for £75 a year rent." A. expends £750. In an action by B. against A. for specific performance, A. may prove that it was orally agreed at the time of the contract that if A. spent more than the £400 the rent was to increase proportionately (*Williams* v. *Jones*, 36 W.R. 573; *cp. Swann* v. *Barber*, 42 L.T. 490).

A. borrows £200 from B. and orally agrees to sign four documents, one of which is to be a bill of sale, as security. He signs three of the documents then, and some time afterwards executes a bill of sale. In proceedings by A.'s trustee in bankruptcy to impeach the bill of sale, B. may prove the oral agreement in pursuance of which it was given (*Harris* v. *Rickett*, 4 H. & N. 1).

A bank advances money to a company on security of a promissory note signed

Inadmissible.

take them away immediately, is inadmissible (*Greaves* v. *Ashlin*, 3 Camp. 426).

So, with a contract of sale, silent as to time of payment, but which was construed by the Court to be a sale for cash on delivery,—evidence of a course of dealing by which B. was allowed six months' credit was held inadmissible. [*Ford* v. *Yates*, 2 M. & G. 549. In this case the Court assumed, erroneously, that the writing was sufficient under the Statute, but on that assumption the case was approved in *Lockett* v. *Nicklin*, *opposite*.]

So, where A. sold and delivered to B. certain flour, described in the sold note as "White's X.S.," oral evidence tendered by B. that the quality agreed was "White's X.S.S.," was rejected (*Harnor* v. *Groves*, 15 C.B. 667; *cp. Nichol* v. *Godts*, 10 Ex. 191, *Smith* v. *Jeffryes*, *post*, 638).

A. sues B. for the return of deposit paid by A. under express written agreement by which B. contracted to sell him certain houses and to make a marketable title thereto, but which title, by reason of certain restrictive covenants, B. was unable to make. B. cannot prove in defence that A. was aware of such covenants when they signed the contract [*Cato* v. *Thompson*, 9 Q.B.D. 616, C.A.; *cp. Page* v. *Midland Ry.* 1894, 1 Ch. 11; and *May* v. *Platt*, *post*, 568. The case is the same where the contract is an *open* one with no express, but only an implied, provision for a good title (*McGrory* v. *Alderdale Estate Co.* 1918 A.C. 503). *Aliter* if the action had been either for specific performance with compensation, or to reform the contract. As to the effect of the *knowledge* of the parties in construing contracts generally, see *post*, 616-7].

B. agrees in writing to take from A. "a furnished house and premises, with garden, pleasure grounds, and stabling." Evidence that they orally agreed that this was to include a meadow adjoining the premises, is inadmissible (*Minton* v. *Geiger*, 28 L.T. 449). So, where A. agreed in writing to purchase from B. the produce of a certain meadow, evidence of an oral agreement, made at the same time, that he was to have the produce of a second meadow, is inadmissible (*Meres* v. *Ansell*, 3 Wils. 275).

A. insures his life with the B. office, the policy containing clauses, (1) that the contract was completely set forth in the policy and application form; (2) that none of its terms could be modified or waived except by agreement signed by certain named officials; and (3) that payment should be made at maturity of certain sums calculable on s certain basis. A prior memo. signed by A. and C., an official other than those named, providing for payment of different sums calculable

Admissible.

by A. and B., two of the directors. By a minute in the company's books, following a statement of the above, it was resolved, "That A. and B. be indemnified in respect of such liability." At the same time it was orally agreed to give A. and B. a charge on the uncalled capital, and afterwards such a charge was executed. Held, in proceedings by the liquidator to upset the charge, that A. and B. might prove the oral agreement and thus validate the charge (*Re Pyle Works*, 1891, 1 Ch. 173, 184; *R.* v. *Pembridge, ante*, 588, and *Macdonald* v. *Whitfield, post*, 599).

A. sues B. on a bill of exchange drawn by A. and accepted by B. as executrix of C., deceased. B. may prove in defence a separate document signed by A. at the same time, as follows: "Received from B. an acceptance for £434, due August 4 next, which I promise to renew from time to time until sufficient effects are received from C.'s estate" (*Bowerbank* v. *Monteiro*, 4 Taunt. 844).

A. sues B. on a bill of exchange payable 6 months after date. B. may prove a written agreement, made contemporaneously with the bill, that A. would renew it "if circumstances prevent B. meeting it at maturity" [*Maillard* v. *Page*, L.R. 5 Ex. 312. *Aliter*, if the bill were sued on by an indorsee without notice of the agreement; or if the agreement were *oral*. The agreement would have been equally valid if it had been *indorsed* on the bill and stamped as an agreement (*id.*; *Leeds* v. *Lancashire*, 2 Camp. 205; and under the Bills of Ex. Act 1882, s. 16, a drawer or indorser may insert words negativing, or limiting his liability). Indorsed conditions, if merely directory, appear, however, to be imperative (Byles on Bills, 17th ed. 120-1; *Kirkwood* v. *Carroll*, 1903, 1 K.B. 531, C.A.).

Inadmissible.

on a different basis from the above,—Held, inadmissible, being, not "collateral" (*post*, 596), but inconsistent with clauses (1) and (3), and expressly excluded by clause (2) (*Horncastle* v. *Equitable Society*, 22 T.L.R. 534, 735, C.A.).

A. sues B. on a commission note, signed by the latter, which promised A. a commission on the flotation of a certain foreign loan introduced by A. to B., "if the loan goes through." A. may not prove an oral agreement that he was equally to earn his commission if the loan failed through B.'s own default (*Malcolm* v. *Armstrong*, 1896, Times, Jan. 30, C.A.).

A., a Loan Society, sues B. as surety for C., a debtor, on a joint and several note, by B. and C. At the time of signing the note, A. gives B. a copy of the printed rules of the Society which stated that notice would be given to sureties before proceedings taken. Held, that the rules were not admissible to vary the note as they did not purport to be an agreement between the parties and there was nothing in writing to connect them with the note (*Brown* v. *Langley*, 4 M. & G. 466).

A. sues B. on a promissory note payable on demand. Defence that by a contemporaneous written agreement between A. on the one part and B. and certain third persons on the other part, the note was not to become payable till C. was 25. Held, inadmissible (1) as the collateral agreement was without consideration; and (2) being with additional parties, it was not parcel of the same agreement as the note, so as to constitute one contract [*Salmon* v. *Webb*, 3 H.L.C. 510. It was also inoperative as a covenant not to sue, because for a limited time and with other parties. In this case A. had not signed the collateral agreement, but had kept it in his possession].

A., the indorsee of a bill of exchange, drawn by B., sues C., the acceptor. Evidence tendered by C. that at the time of accepting the bill it was orally agreed between B. and C. that if C. could not meet it at maturity, B. would renew it;—held, inadmissible, although A. took the bill with notice of the agreement [*New London Credit Syndicate* v. *Neale*, 1898, 2 Q.B. 487, C.A.; and the decision would have been the same had the action been by B. against C.] So, where the condition between B. and C. of which A. had no notice, was that the bills should not be presented till C. was 25 (*Orsman* v. *Robinson*, Times, App. 25, 1904). So, where A. as drawer and payee sued B. as acceptor, and the oral agreement was that A. would renew for 2 months, if B. had not received certain funds (*Young* v. *Austen*, L.R. 4 C.P. 553; *aliter* if the agreement had been in writing and part of the consideration).

Admissible.

Collateral Agreements and Warranties. A., as executor of B., agrees in writing to sell the goodwill of B.'s business to C. All the terms of the sale are expressed in the document. C. may prove a collateral oral agreement, made at the same time,

Inadmissible.

And where A. (payee) sued B. (drawer) on a bill payable 12 months after date, to which B.'s defence was that the bill was drawn by B. for the accommodation of C. (acceptor) and as surety for C., and that by oral agreement between A., B. and C., C. had deposited securities with A. which A. agreed should be realized before A. sued B.;—Held, that the agreement was not admissible to vary the terms of the bill (*Abrey* v. *Crux*, L.R. 5 C.P. 37; *Henry* v. *Smith*, 39 Sol. Jo. 559; but *cp.* *Heseltine* v. *Simmons*, *post*, 597).

A. sues B. on a promissory note payable 14 days after date. B. may not prove a contemporaneous oral agreement that the note was not to be enforced if A. obtained a verdict against certain other persons he was then suing [*Foster* v. *Jolly*, 1 C. M. & R. 703. Parke B., remarked that a defendant may contradict the presumption of consideration as between the original parties, but not the terms of payment, and that here the agreement went to the latter and not to the former].

A. sues B., a company, as maker, and C., its president, as indorsee and surety for B., on a P.N. given to A. for goods supplied to B. C. tenders evidence of an oral agreement between A. and himself that C. should not be liable if the goods were unequal to sample. Held that the agreement did not operate in suspension of the note, *i.e.* as an escrow (see *post* 599-601), since B. remained liable thereon; but only in defeasance, and so was inadmissible (*Hitchings* v. *Northern Leather Co.*, 1914 3 K.B. 907).

A. as executor of B. sues C. on a P.N. for £2000 payable on demand. B. and C. had dissolved partnership by written agreement under which C. was to pay B. £2000 within 3 years; and a month later, at B.'s request, C. had given B. the note under B.'s oral promise not to enforce it for the 3 years named in the agreement. Held, (1) that the oral promise was inadmissible; but that the note being given for the same debt as the dissolution agreement was without consideration (*Stott* v. *Fairlamb*, 52 L.J.Q.B. 420). So, where A. sued B. on a joint and several P.N. for £288, payable 3 months after date and given by B. and C. (C., being the executor of D., who owed A. £288); an oral agreement that A. was only to enforce payment out of D.'s assets,—Held not admissible to vary the note (*McDougall* v. *Field*, I.R. 6 C.L. 185).

Collateral Agreements, &c. A. contracted to buy B.'s pulp-mills for £90,000, the contract containing (1) an express warranty that water-power of not less than 1200 horse-power could be developed from neighbouring falls without resort to

Admissible.

by which C. was to be allowed to solicit B.'s old customers (*Pearson* v. *P.*, 27 Ch. D. 145, 149, C.A.; without such agreement C. would not be so entitled, *Trego* v. *Hunt*, 1896, A.C. 7).

A. and B. agree in writing that A. shall buy the goodwill, furniture, and fixtures of B.'s business; proof is admissible of a prior oral agreement by B. that, in consideration of A. signing the written agreement, he (B.) should settle an action then pending against A. [*Lindley* v. *Lacey*, 17 C.B. N.S. 578. The document in this case contained an authority to B. to settle the action out of the purchase-money].

A. (a railway company) contracts with B. (another railway company) for certain running and other powers over a new line to be built by B., the agreement containing no clause as to its duration or revocation. In order to rebut any presumption that the agreement was revocable at B.'s option, A. may prove a collateral parol agreement that he was to, and did, advance certain moneys to enable B. to build the line (*Llanelly Ry.* v. *L. & N.W. Ry.*, 8 Ch. App. at p. 953, *per* James, L.J., following *Erskine* v. *Adeane*, *inf.*; see *post*, 671).

A. grants a lease of a house and furniture to B. In an action for damages against A., B. in his declaration sets up a prior oral agreement whereby A. promised that if B. would sign the lease, A. would do certain repairs and send in more furniture. Demurrer that the alleged agreement was void because not in writing. Held that the agreement was independent of and 'collateral' to the lease in the sense that while the latter dealt with an interest in land" under the St. of Frauds, the former did not and so was valid though unwritten [*Angell* v. *Duke*, L.R. 10 Q.B. 174; 32 L.T. 25. This decision does not affect the question whether the agreement was 'collateral' in the evidential sense (see *Angell* v. *Duke*, *opposite*). The first mentioned case was followed in *Boston* v. *B.*, 89 L.T. 468, C.A., where an agreement by A. that if B. would buy a certain house she would make him a present of it, was held valid though unwritten; see also *Heseltine* v. *Simmons*, *post*, 597].

Inadmissible.

others; and (2) a statement that C. had a claim against B. which, if successful, would partially restrict B.'s rights and so entitle A. to compensation. In an action by A. for breach of contract,—Held, evidence of verbal warranties by B. at the time of the sale that (1) water-power of not less than 1200 horse-power and *not exceeding* 12 *dollars per horse-power* could be developed without resort to other falls; and (2) that there were *no contracts between B. and others* which would restrict A.'s free user and enjoyment of the property,—was inadmissible as enlarging the warranties expressed in the contract [*Lloyd* v. *Sturgeon Falls Co.*, 85 L.T. 162; *cp. Raymond* v. *R.*, 64 Mass. 134. Evidence was, however, received of several other verbal warranties as to which the contract was silent].

A. sues B., his master, for wages, and also for an allowance for cider-money. The wages were due under a written contract; but the allowance had been orally agreed at the same time. Held, evidence of the latter was inadmissible (*Jones* v. *Waslay*, 112 L.T.Jo. 480).

A., an actor, agrees in writing with B., a manager, to act and understudy on tour for twenty-five weeks. A. may not prove an oral promise by B. that A. should perform in certain parts during the tour (*Grimston* v. *Cuningham*, 1894, 1 Q.B. 125). Nor, where the written agreement was to "understudy C." is a collateral oral agreement admissible, that A. was to play C.'s part whenever C. could not (*Newman* v. *Gatti*, 24 T.L.R. 18, C.A. *Aliter*, *i.e.* the collateral oral agreement had formed part of the consideration for the main contract).

A. grants a lease of a house and furniture to B. In an action by B., held that he might not prove a prior oral promise that A. would send in more furniture and change some that was already there [*Angell* v. *Duke*, 32 L.T. 320, *per* Cockburn, C.J., because this conflicted with the lease; *per* Mellor, J., because it added a new term thereto; *per* Blackburn, J., because the lease expressed the whole of the terms; "the house and furniture were let at a certain rent, the oral agreement gave more furniture for the same rent; how was that collateral?" Mellor, J., remarked that the decision on demurrer (see *opposite*), to which both he and Cockburn, C.J., were parties, did not affect the present question. At the *trial* it was further proved that A. had repeated the above promise *after* the execution of the lease; but Blackburn, J., held this to be nugatory, there being no fresh consideration]. So, a prior promise by A. to pay B. £20 towards doing the repairs himself

Admissible.

A. grants a lease of land to B., reserving the sporting rights; B. may prove a prior oral agreement by which A. promised to keep down the rabbits if B. would sign the lease. *Morgan* v. *Griffith*, L.R. 6 Ex. 70. The Court remarked that the oral agreement, though it affected the enjoyment of the land, was entirely collateral to the lease, and did not conflict with its terms. In *Erskine* v. *Adeane*, 6 Ch. App. 756, a similar case, B. was allowed to prove that he signed the lease on A.'s verbal promise "to kill down the game and not let the shooting";—the Court remarking that this was not a parol variation, but a distinct collateral promise forming part of the consideration for taking the lease, which latter was not intended to form the whole of the bargain between the parties. An objection under s. 4 of the Statute of Frauds was also overruled, the Court holding that it was sufficient if either party performed the contract within a year, and that B. had done so by signing the lease].

A. lets a house to B., the lease containing a covenant by A. to do outside, and by B. to do inside, repairs, but not mentioning the drains. At the time of completion, B. had instructed his wife to refuse to hand over the counterpart executed by him unless A. guaranteed that the drains were in good order. A. thereupon stated that they were so, and B.'s wife handed over the counterpart. In a subsequent action by B., the drains having proved defective; Held, that evidence of A.'s representation was admissible (1) as amounting to a warranty which had induced the tenancy; (2) being collateral to the lease, *i.e.* entirely independent of what was going to happen during the tenancy, which was all that the lease dealt with; and (3) the lease not covering the whole contract between the parties (*De Lassalle* v. *Guildford*, 1901, 2 K.B. 215; followed in *Day* v. *May*, 1903, Times, Oct. 31; and *Graham* v. *Ramuz*, 1904, Times, Oct. 29).

A. grants a lease of a house to B. Held, that B. might prove a verbal promise by A. to put the house in a habitable condition and supply a new lavatory (*Mann* v. *Nunn*, 43 L.J. C.P. 241; doubted by Blackburn, J., in *Angell* v. *Duke*, 32 L.T. 320).

A. lets a house to B., who covenants to do repairs and pay all outgoings. A. having been compelled by a local authority to repair the drains, sues B. under his covenant. Held, B. might prove a prior oral agreement, by which A. undertook to repair the drains if B. would pay an increased rent (*Henman* v. *Berliner*, 1918, 2 K.B. 236; *semble*, the lease might have been rectified to include these terms).

A. lets a house to B., the lease containing a covenant that B. shall not use it for trade purposes;—B. may prove a prior

Inadmissible.

(*Seago* v. *Deane*, 4 Bing. 459), or to put the drains right, is inadmissible (*Burstall* v. *Bianchi*, 65 L.T. 678; *Gale* v. *Harvey*, 95 L.T.Jo. 82, where the Divl. Court remarked: "There cannot be a collateral agreement dealing with the present condition of the subject-matter of the principal contract"; see, however, *De Lassalle* v. *Guildford*, *opposite*). And an oral agreement, that in consideration of B. accepting a 21 years' lease, A. orally promised "that the house was well built," — was held inadmissible, as not amounting to a warranty and being so intimately connected with the subject-matter of the contract that it ought to have formed part of the lease, and that to give effect to it would be to add a new term to the lease (*Kennard* v. *Ashman*, 10 T.L.R. 213, *per* Wills, J.; affd. C.A., *id.* 499).

So, also, an assurance that "the house was dry," given by the landlord to the tenant's wife on her handing him the counterpart signed by the latter, she having no authority to exact such, was held no warranty, but a mere innocent representation on which no action could lie [*Green* v. *Symons*, 13 T.L.R. 301, C.A. See *Carter* v. *Salmon*, 43 L.T. 490, *post*, 600, where James, L.J., in approving of *Angell* v. *Duke*, 32 L.T. 320, doubted whether "evidence of a prior agreement that no rent should be paid till certain acts were done by the landlord, could be proved where there was a written agreement of tenancy reserving rent at stated intervals."—For a case in which a statement, in the particulars of sale at an auction, as to the sanitary condition of the premises, alleged to constitute a warranty, was held to be merged in the subsequent conveyance, see *Greswold-Williams* v. *Barneby*, 17 T.L.R. 110, following *Leggott* v. *Barrett*, *post* 634. So, on a conveyance of land in lease, a parol contemporaneous agreement to apportion the rent is inadmissible (*Flinn* v. *Calow*, 1 M. & G. 589).

A., who is under a restrictive covenant not to use his house for business purposes, sub-lets part of it to B., who has no notice of the covenant. In an action by B. against A. for breach of warranty, B. tenders evidence that A. orally agreed that B. might use the premises for business purposes. Held, that as this agreement related to the subject-matter of the sub-lease, it must be found within it (*Jones* v. *Lavington*, 1903. 1 K.B. 253. C.A.)

A. lets B. a rink, the lease being silent as to dancing. The head-lease under which A. held disallowed dancing except with the consent of the Corporation, which had not been obtained. In an action by A. against B. for permitting dancing, B. proved that A. offered him the rink for dancing; knew B. wanted it for that pur-

Admissible.

oral agreement by which A. undertook not to let the adjoining houses for trade purposes (*Martin* v. *Spicer*, 34 Ch.D. 1, C.A.; affirmed on other grounds, *Spicer* v. *Martin*, 14 App. Cas. 12).

A., in writing, lets the top floor of his house to B., a photographer,—B. was allowed to prove a parol agreement that he might affix a signboard on the outside wall (*Carlisle Co.* v. *Muse*, 42 Sol. Jo. 67, *per* Byrne, J.).

Inadmissible.

pose; and knew that B. would not have taken it except for dancing. Held, that B. had failed to prove a collateral warranty; and that even if he had proved it, it would have been inadmissible on the authority of *Jones* v. *Lavington*, *sup.*, because "as it related to the same subject matter as the lease it should have been found in it." *Aliter* if (as suggested by Williams, L.J., in *Newman* v. *Gatti*, 24 T.L.R. 18, cited *ante*, 579, 594) B. had told A. he would not enter into the main contract unless A. entered into the collateral one [*Crawford* v. *White City Rink*, 57 Sol. Jo. 357; 29 T.L.R. 318 (less fully); *per* Eve J.].

A., in writing, lets "rooms on the first and second floors" of certain premises to B. In an action by B. against A.,—Held, that these words, as a matter of construction, included the external walls of the rooms facing the street; that B. might advertise thereon; and that an oral statement by A., prior to the agreement, that it was out of his power to let B. the front wall, was inadmissible [*Goldfoot* v. *Welch*, 1914. 1 Ch. 213, *per* Eve J. The statement was tendered on three grounds (1) as a collateral agreement that the outside wall should not be included; (2) as an express parol reservation of the front walls from the demise; and (3) as a parol identification of the parcels, the agreement being ambiguous].

A. covenants to pay his rent quarterly and in advance. A contemporaneous oral agreement that he might pay it by a three months' bill, is not admissible as collateral (*Henderson* v. *Arthur*, cited more fully *ante*, 590).

A. contracts in writing to hire a tug from B., the contract containing no warranty as to the efficiency of the tug's machinery. Held, that A. could not prove a collateral oral undertaking by B. that the machinery was to be efficient (*Robertson* v. *Amazon Tug Co.*, 46 L.T. 146, 148-149, C.A.).

For a prior memorandum held not "collateral" to a contract of life insurance, see *Horncastle* v. *Equitable Soc.*, *ante*, 592.

A. having mortgaged his land, settles half the land on his son B. and B.'s wife by a marriage settlement. A. having become bankrupt, C., his assignee, pays the mortgage off out of the other half of the land and sues B.'s wife, to whom B. had conveyed his share, for contribution, alleging an oral agreement between A. and B. at the time of the settlement, that B. should be liable for half the mortgage debt. Held, the collateral agreement was inadmissible, as the other parties to the settlement were not parties to the oral agreement and had no knowledge of it

Admissible.

A. buys land at an auction;—he may prove that the auctioneer, at the time of sale, orally represented that there was a certain right of way to the land which was not mentioned in the conditions of sale or the draft conveyance (*Brett* v. *Clowser*, 5 C.P.D. 376, 385-386, *per* Denman, J.; see *Ramsbottom* v. *Tunbridge*, and *Ramsbottom* v. *Mortley*, cited *ante*, 572). So, in an action for specific performance, evidence was received that the auctioneer verbally corrected a misdescription in the particulars, although the purchaser did not hear the correction (*Re Hare*, 1901, 1 Ch. 93; and see generally as to Declarations by Auctioneers, 110 L.T.Jo. 419).

A. agrees in writing to sell land to B. An oral agreement made at the time that B. might set off a debt owed him by A. against the purchase-money is (probably) admissible (*Re Taylor*, 1910, 1 K.B. 562, pp. 572, 581, C.A.)

A. executes a Bill of Sale to B., for money advanced, containing an assignment of chattels and a covenant to repay the loan by instalments. A collateral oral agreement made between them at the time that B. should not enforce the document until certain other securities deposited by A. with B., had been realised,—Held admissible since (1) It did not operate as a 'defeazance,' but only as a condition regulating the order of realising the securities: (2) that it was not inconsistent with the B.S. and (3) It was not required by statute to be in writing, and even if it were, it would probably be fraudulent to enforce it after the whole contract had been partly performed by executing the Bill of Sale on its faith (*cp. Morgan* v. *Griffith*, *Angell* v. *Duke*, *&c.*, *ante*, 594-6) [*Heseltine* v. *Simmons*, 1892, 2 Q.B. 247, 253-5. C.A.; *cp.*, however, *Abrey* v. *Crux*, *ante*, 593].

A. charters a vessel from B., the owner. A representation made by C., B.'s agent, to A., during the negotiations, that the vessel had carried a certain quantity of cargo,—Held. admissible as a collateral verbal warranty, although the charter-party made no reference thereto (*Hassan* v. *Runciman*, 91 L.T. 808).

A. advances B., the owner of certain mining options, £200 on the terms, contained in writing, that A. may dispose of the property on any conditions he likes, provided B. is recouped for his actual expenditure and given a certain further interest in the proceeds of the transaction. A. may prove that it was verbally agreed at the same time that in consideration of the advance B. would repay him certain prior advances if A. should succeed in selling the property to a company (*Monarch Syndicate* v. *Pollock*, 1897, Times, November 26, *per* Lord Russell, C.J.)

Inadmissible.

[*Hollinshed* v. *Devane*, 49 Ir. L.T.R. 87 (1914); *cp. Salmon* v. *Webb*, *&c.*, *ante*, 592].

A. buys timber at an auction, the conditions of sale signed by the auctioneer describing the number and kind only;—A. may not prove that the auctioneer at the time of sale orally warranted the timber to be of a certain weight (*Powell* v. *Edmunds*, 12 East, 6; *Shelton* v. *Livius*, 2 Cr. & J. 411).

A. (the agent of a firm about to bring out a rubber and produce company), being asked by B., over the phone,—"I understand that you are about to bring out a rubber company?" replied, "We are." B. then applied for, and later was allotted, shares. In an action by B. against A. the jury found that A. had warranted the company to be a rubber company. Held that there was no evidence on which they could so find, as the conversation did not amount to a contract [*Heilbut* v. *Buckleton*, 1913 A.C. 30, cited *ante*, 579. This case was followed in *Wolf* v. *Halford*, Times, March 17, 1914, C.A., where A., a jeweller, in selling a ring to B., a customer, stated it was "thoroughly good value at the price." Held, a mere puff and no contract of warranty].

A., the publisher of a trade paper, agrees to insert B.'s advertisements and accept in payment goods manufactured by B. and invoiced at his lowest prices and discounts. Afterwards B. refuses to deliver the goods unless A. undertakes not to sell them in the United Kingdom. In an action by A. for non-delivery;—held, that B. could not prove, as a collateral agreement, that A.'s agent had orally represented that A. only required the goods for shipment abroad or to the colonies (*Mercantile Agency* v. *Flitwick Co.*, 14 T.L.R. 90, H.L.).

(4) *True Nature of Transaction and Relation of Parties.*

Admissible.

Trusts. A. executes an absolute assignment to B. of a house and stables. In an action by A. to restrain B. from ejecting him from the stables, A. may prove an oral agreement at the time of the transaction whereby, in consideration of A. accepting a reduced price, B. undertook to hold the stables in trust for A. (*Booth* v. *Turle*, L.R. 16 Eq. 182).

So, where B. purchased an estate from A. and took an absolute conveyance thereof to himself, letters between A. and B. before and after the conveyance, as well as the oral testimony of both parties, were admitted to show whether B. did, or did not, buy the estate in trust for A. (*Rochefoucauld* v. *Boustead*, 1897, 1 Ch. 196, C.A.).

A., by his will, bequeaths £500 to B. and C., "relying, *but not by way of trust*, on their applying it to the objects privately communicated to them." In an action by B. and C. against A.'s executors for the money, the latter may, in spite of the will, give evidence that the money was left to B. and C. on a secret trust and that its objects were illegal (*Re Spencer's Will*, 57 L.T. 519, C.A.; *cp. Strode* v. *Winchester*, *ante* 286). [As to evidence to rebut resulting trusts arising by construction or presumption, see *post*, 565-6. Resulting Trusts, and Exor's right to residue.]

A., by will, leaves B. "£4000 for the charitable purpose agreed on between us." Held, that an affidavit by B. stating what were the particular purposes agreed on, was admissible (*Re Huxtable* 1902, 1 Ch. 214; *id.* 2 Ch. 793, C.A., cited *post*, 640). And the trust will, if assented to by the trustee, be binding upon the latter although not communicated to him until *after* the execution of the will (*Re Gardner*, 55 L.Jo. 296, C.A., reversing Eve, J, *ante*, 580).

Suretyship. Bills and Notes. The directors of a company borrow money from a bank, giving as security promissory notes of the company indorsed by themselves. In an action *inter se* for contribution;—Held, evidence was admissible that at the time of the loan they mutually agreed to become sureties for the com-

Inadmissible.

Trusts A. bequeathed the residue of his property "to his executors to apply the same as they should think fit. After the execution of the will one of the executors asked A. how he would like the residue spent. The testator then named certain persons whom he wished to benefit and others whom he wished to exclude. On an application by the former that this conversation created a secret trust in their favour;—Held, that the executors took on an implied trust for the next-of-kin, which could not be varied by such conversation; and that the doctrine of secret trust had no application (*Balfe* v. *Halpenny* 1904, 1 I.R. 486).

A. devises property to B. and C. jointly and absolutely. A declaration made by B., deceased, thirty years afterwards, that the property was held by him and C. in trust for certain secret purposes,—is not admissible to prove the trust against C., although the statement was against B.'s interest (*Turner* v. *A.-G.*, *ante*, 286).—So, testimony by a witness that A. told her he had communicated his wishes to B. and C. is inadmissible as hearsay (*Re Downing*, 60 L.T. 140; *cp. ante*, 325; in this case both B. and C. had died before the question arose).

A. leaves B. "£4000 for the charitable purposes agreed on between us." Held, evidence by B. (1) that no purposes had been agreed on; or (2) that the income only, and not the capital, of the £4000 was to be so devoted,—was not admissible, since this contradicted the will (*Re Huxtable*, *opposite*).

A., by will, leaves his property to B. for life, and empowers B. to dispose of it "in accordance with my wishes verbally expressed to her." Held, that B. took a life estate only, and that evidence was not admissible to show what A.'s verbal wishes were, since there being no secret trust or existing document incorporated by reference, the case was similar to that of a total blank (*Re Hetley*, 1902, 2 Ch. 866; as to blanks, see *post*, 613). So, where A. left a legacy to trustees to devote proceeds to purposes set out in a certain memo. which was "not to form part of my will," and which was not communicated to the trustees till after A.'s death;—Held that the memo. was inadmissible (*Re Louis*, 32 T.L.R. 313).

Suretyship.—In an action by a bank against A., one of two joint and several sureties to the bank for a debt, A. proved in defence that the bank had, subsequently, in consideration of B., the other surety, assigning it certain securities, released B. in writing "from all debts due by him to the bank at this date." Held, that the

Admissible.

pany, and so were liable to equal contribution and not merely to indemnify each other successively according to priority of signature (*Macdonald* v. *Whitfield*, 8 App. Cas. 733; *Goodsell* v. *Lloyd*, 27 T.L.R. 383; *cp. Re Pyle Works*, *ante*, 592).

A., as debtor, and B., as surety, sign a joint bond to C., a creditor of A. Afterwards C. takes a promissory note from A. extending the time of payment. In an action by C. against B. on the bond,—held, that C. might prove that, when taking the note from A., it was agreed between them that C.'s remedies against B. on the bond were to be reserved (*Wyke* v. *Rogers*, 21 L.J.Ch. 611; *Exp. Harvey*, 23 L.J.Bky. 26).

A bank agreed to lend A. £2000 for six months if his mother would guarantee the advance. A.'s mother thereupon signed a guarantee, and the manager made the advance explaining to her that it was to be for six months. After the transaction, but during the same interview, A. was asked to sign the following application form, "Be good enough to allow me an advance of £2000 to be repaid in six months *or on demand* at your discretion." Before signing it A. asked if that meant the bank could call in the loan at any time, and the manager replied, "Certainly not." In an action by A. against the bank for calling in the loan before the six months, held that as the bank had relied on the signing of the application, A. might prove the conversation since it did not vary the original contract, which was already concluded, but only explained the form which was no part of the contract (*Bank of Australasia* v. *Palmer*, 1897, A.C. 540).

Inadmissible.

bank could not prove in qualification of the document (1) a prior oral agreement with B. by which its remedies against A. were reserved, since the evidence showed that the whole terms of the contract of release between the bank and B. were embodied in the document; nor (2) conversations between B. and the bank's manager showing that "all debts" meant all B.'s private debts to the bank, and not his suretyship debt (*Mercantile Bank of Sydney* v. *Taylor*, 1893, A.C. 17; *cp.* as to the last point, *Brunning* v. *Odhams*, *post*, 636; and *Exp. Kirk*, 5 Ch.D. 800, *post*, 637).

Joint, Common or Several Interest. A. and B. were tenants in common of an interest in the New River Co. The dividends were paid to them separately, but no formal partition was effected, and an agreement between them, relating to other property of which they were tenants in common, recited that they had agreed not to partition the New River interest. A. having devised all his unpartitioned property to B.,—held, that the above interest had been partitioned, and so did not pass under A.'s will, and that the recital was not admissible to show A.'s intent as to the devise (*Re Trimmer*, 91 L.T. 26).

So, where A. & B. had made a joint proposal to buy property, their subsequent *declarations* were excluded to show that they intended to take it as tenants in common and not as joint tenants (*Harrison* v. *Barton*, 30 L.J.Ch. 213. *Aliter* as to their subsequent *acts*; see Course of Dealing, *post*, 664).

(5) *Conditional Instruments* (*Escrows*). *Fraud. Mistake. Consideration.*

Conditional Instruments. A. sues B. on a deed. B. may prove that he only signed the deed on condition that C. also executed it, and that A. knew this [*Luke* v. *South Kensington Co.*, 11 Ch.D. 121. 125; *Evans* v. *Brembridge*, 8 De G. M. & G. 100; *Fitzgerald* v. *McCowan*, 1898, 2 I.R. 1; *West Riding Bank* v. *Elmore*, 1904, Times, July 22; *Cade* v. *Daly*, 1910, 1 I.R. 306; *Re A Debtor*, 43 Ir.L.T.R. 213. C.A. In *Bew* v. *Reed*, 1869, W.N. 110, the agreement being ambiguous on its face, prior correspondence between the parties was admitted to show that one of them signed only on the faith of the general body of creditors of the other doing so].

A. sues B. on a promissory note. B. may prove that he delivered the note to A. on condition that it was only to operate if he should procure B. to be restored to a certain office and that B. was not so restored (*Jefferies* v. *Austin*, 1725, 1 Stra. 674). So, where the note was given to

Conditional Instruments. Five contractors being jointly interested in an undertaking, one dies leaving three executors. Before probate of his will, the four survivors enter into an agreement as to their rights in the undertaking, adding, as fifth parties, "the executors of the deceased." After probate two only of the executors sign the agreement, the third, a wealthy man, disclaiming,—held, in an action by the four contractors to set aside the agreement, that it was valid and that evidence that they only executed it conditionally on all the executors signing and becoming liable, was inadmissible [*McClean* v. *Kennard*, 9 Ch. App. 336. And see *Anglo-Californian Bank* v. *London &c. Insurance Co.*, 10 Comm. Cas. 1; 20 T.L.R. 665; where evidence of a similar condition was rejected as inconsistent with a recital in the agreement].

A. makes a proposal to an insurance company, who, having accepted it, sign

Admissible.

A. on a parol condition that it was only to be enforced if a balance of account was found due from B. to A. and that none was found due (*Kearns* v. *Durrell*, 6 C.B. 596). And where B., the holder of a bill, indorsed it in blank and handed it to A., a banker, on condition that A. should forthwith retire certain other bills therewith, which A. had not done;—this was held admissible in support of a traverse of the indorsement by B. [*Bell* v. *Ingestre*, 12 Q.B. 317; *cp. Seligman* v. *Huth*, 37 L.T.N.S 488. And if A. had sued the acceptor, the other might have set up the *jus tertii* (*Chalmers on Bills*, 7th ed. 60)]. The executors of A. sue B., A.'s son-in-law, on a bond. B. may prove that at the time B. signed the bond, A. gave him a written undertaking, or covering letter, that it should not be enforced, except to the extent of monies bequeathed to B. by B.'s wife *absolutely*, there being also other monies which she had bequeathed to B. *for life* only (*Evans* v. *Nevill*, Times, Feb. 11, 1908, C.A.).

A. agrees in writing to buy B.'s interest in a certain patent. In an action by B. to enforce the agreement, A. may prove that it was orally agreed at the time that no sale was to take place unless A.'s engineer approved the patent, and that he did not approve (*Pym* v. *Campbell*, 6 E. & B. 370).

B. signs an agreement in writing to take a lease of A.'s house. A. afterwards signs the agreement, but hands it to his solicitor with instructions not to part with it until B. obtains a responsible person to join her in the lease. In an action against A., he may prove these facts to show that there was no concluded contract between them (*Pattle* v. *Hornibrook*, 1897, 1 Ch. 25). A. lets premises to B., one of the terms of the lease being that B. is to pay £100 for the fixtures. In an action against A., he may prove that B. being unable to pay more than £50 down, it was orally agreed that he should be let into possession as a yearly tenant until the £100 was paid, and that the lease should in the meantime be retained by A. (*Gudgen* v. *Besset*, 6 E. & B. 986; *Murray* v. *Stair*, 2 B. & C. 82). So, a written contract by A. to transfer land to B. may be proved orally to be conditional upon A.'s obtaining his landlord's license to assign within a certain time, since this evidence operated in suspension, and not in defeasance, of the agreement (*Wallis* v. *Littell*, 11 C.B. N.S. 369; *Rogers* v. *Hadley*, 32 L.J.Ex. 241).

So, where A. orally agreed to take a lease of a house from B. if B. did certain repairs, and a lease was accordingly signed and A. let into possession, the date of the lease being left blank and only to be filled in when the repairs were done—these facts

Inadmissible.

and seal a policy which they retain in their own possession until the premium is paid. The policy recites that the premium has been paid, but contains a proviso that no policy shall be valid until this is done. A loss having occurred.—Held, in an action on the policy, that there was a concluded, and not merely a conditional agreement; and that evidence to contradict the recital of payment was inadmissible, since the company had waived the condition as to repayment [*Roberts* v. *Security Co.*, 1897, 1 Q.B. 111, C.A.; *cp. Xenos* v. *Wickham*, L.R. 2 H.L. 323: and *Pearl Co.* v. *Johnson*, 78 L.J.K.B. 777. So, also, in *Cope* v. *Miller*, 1 Comm. Cas. 296, the policy was held binding even though not signed or delivered]. In *Equitable Office* v. *Ching*, 76 L.J. P.C. 31, however, an opposite result was reached, it being held (1) that even the delivery of the policy to the assured created no waiver, the document itself containing a clause, and so operating as notice, that no concluded contract existed until the premium was paid; and (2) that non-payment of the premium might be proved by extrinsic evidence, notwithstanding a recital to the contrary in the deed and that no estoppel arose.

In *Carter* v. *Salmon*, *ante*, 595, it was doubted whether under a written agreement of tenancy, reserving rent at stated intervals, the tenant could prove a prior oral agreement not to pay rent till certain acts were done by the landlord.

Admissible.

were allowed to be proved by A. in an action for illegal distress against B. [*Davis* v. *Jones*, 17 C.B. 625. The evidence was admitted both on the ground: (1) That the lease, not containing the date of commencement of the tenancy, parol evidence as to this was receivable; and (2) that the lease having no date was not intended to operate from delivery, but only on the fulfilment of the parol condition (see, also, as to this point, *Mechelin* v. *Wallace*, 7 A. & E. 54)].

A. sues B. on a cheque drawn by B. on a sheet of paper, across which B. wrote "to be retained." B. swears it was orally agreed that the cheque was not to be presented till a certain document was approved by his solicitors. A. denies this and swears B. promised to send a formal cheque next day in exchange for the informal one, but did not do so. Held that, as regards the *bank* the cheque was an unconditional order to pay; and that as between A. and B. the latter had not proved the alleged condition [*Robert* v. *Marsh*, 1915. 1 K.B. 42 C.A.; *cp. Kirkwood* v. *Carroll*, 1903, 1 K.B. 531, C.A., where a statement on a P.N. given by B. and C. to A. that time given to B. or C. should not prejudice A. was held inoperative and the note to be unconditional].

Fraud. A. sues C. on a promissory note signed by C. in favour of B. and indorsed by B. to A.—C. may prove that B. fraudulently induced him to sign the note by pretending that he was merely witnessing a deed, although A. is a *bona fide* holder for value (*Lewis* v. *Clay*, 67 L.J. Q.B. 224).

Mistake. A bank, on advancing money to A., takes as security a promissory note signed by A., and B., his wife, the latter having no separate property. On A.'s death insolvent, B. gives a new note in her own name in renewal thereof. In an action by B. for the delivery up of this note, B. may prove that she gave the new note under a mistake of law that she was liable on the old one (*Coward* v. *Hughes*, 1 K. & J. 443).

A. contracts to sell B. a policy on the life of C., both believing C. to be alive. Afterwards A. hears C. had died before the date of the contract, but he does not tell this to B., and a formal assignment of the policy is duly made. Held, that the transaction must be set aside notwithstanding the assignment (*Scott* v. *Coulson*, 1903, 2 Ch. 249).

A. sues B. for specific performance of a written contract by which B. sold land to him for £1250. B., in defence, may prove that by mistake, though unknown to A., he named £1250 instead of £2250, the true price (*Webster* v. *Cecil*, 30 Beav. 62; *Bray* v. *Briggs*, 20 W.R. 962; *Van Praagh* v. *Everidge*, 1903, 1 Ch. 434).

Inadmissible.

Mistake. A. devised "all his real estates in the county of Limerick and city of Limerick" to trustees. He had no real estates in the county of Limerick, but had some in the county of Clare and City of Limerick. Held, evidence that the words "of Clare" had by mistake been erased from the draft, and so omitted from the will, was inadmissible [*Miller* v. *Travers*, 8 Bing. 244. Words inserted without the knowledge of the testator may be struck out, but omitted ones may not be supplied, *ante*, 327-8, 332. Extrinsic evidence was also held inadmissible in aid of construction, since the case was neither one of equivocation nor misdescription, *post*, 655].

A. being entitled under an agreement to certain lands coloured red on an annexed plan, agreed in writing to convey and afterwards did convey to B. "all his interest under the agreement in the lands so coloured." A. had some time before parted with a portion of the land to readjust the boundaries. In an action by B. for damages for breach of covenant for title, A. pleaded both (1) mutual mistake, alleging that B.'s agent knew of the deficiency before conveyance: and (2) alter-

Admissible.

In an action by A. for work done, which A. by letter had agreed to do for 30*s.* *a cwt.* and B. had accepted, B. counterclaimed for rectification on the ground, and tendered evidence, that he had meant 30*s.* *a ton*;—Held, (1) that A., not having misled B., was entitled to recover; and (2) that the above being the only contract between the parties, there was *no prior agreement* by which it could be rectified [*Ewing* v. *Hanbury*, 16 T.L.R. 140. In *Lovell* v. *Wall*, 104 L.T. 85; 27 T.L.R. 236, C.A. the Court remarked that in order to rectify an instrument there must be a prior concluded agreement, not mere negotiations, by which to rectify it].

A. lets B. a house misdescribed as "38" Broad Street. In an action by B. against A. for excessive distress B., to prove the correct rent, produces the agreement, in which 38 has been altered (without A.'s knowledge, though it is not shown by whom) to 35. Held, (1) that parol evidence was admissible to show that 38 was a mistake for 35, *i.e.*, that 35 was the only house owned by A. or let by him to B.; (2) that the alteration did not invalidate the agreement; and (3) that even had it been void for the purpose of B. taking an interest or maintaining an action, it would still have been admissible to prove a collateral fact such as the amount of the rent [*Hutchins* v. *Scott*, 2 M. & W. 809. *Cp. Hitchin* v. *Groom*, and *Cowen* v. *Truefitt*, *post*, 654].

A. gives B. a promissory note dated "Jan. 1st, 1854," and payable "two months after date," but across the face of which is written "due 4th March, 1855." Evidence that the note was in fact given in January, 1855, and that the memo. was made before its issue;—Held, admissible and that, construing the whole words together, the memo. operated to correct the date (*Fitch* v. *Jones*, 5 E. & B. 238).

A., the drawer of bills accepted by B. and indorsed by C., sues C. thereon. Evidence having been given (1) that C. had agreed to guarantee the payment by B. of goods supplied to him by A.; (2) that B. and C. had signed the bills in blank, authorizing A. to fill them in and discount them, and (3) that A., instead of drawing them to bearer had, by mistake, drawn them to his own order and indorsed them, thus disentitling him to sue C. thereon;—Held, that C., by his agreement, was estopped from setting up the irregularity and was liable to A. on the bills, which were treated as having been indorsed by A. to C. without value, and re-indorsed by C. to A. for value [*Glenie* v. *Bruce Smith*, 1908, 1 K.B. 262, C.A.; *ante*, 586].

Inadmissible.

natively unilateral mistake; and (3) counterclaimed for rectification. Held, that the contract to convey and the conveyance being in accord, and the descriptive words unambiguous, evidence of a prior oral agreement differing from both was inadmissible after completion, either (1) in defence, as it afforded no answer to the action (see *Cato* v. *Thompson*, *ante*, 591); or (2) to support the counterclaim, for this would amount to claiming specific performance of a written contract with a parol variation, in the absence of fraud [*May* v. *Platt*, 1900, 1 Ch. 616; followed, but not approved, in *Thompson* v. *Hickman*, 1907, 1 Ch. 550. *Semble*, that A.'s remedy was rescission. But see *ante*, 585; and *cp. Fiorgione* v. *Lewis*, 1920, 2 Ch. 326].

A., in writing, lets B. a house at "*Thirty-six pounds, ten shillings a* year," reserving a *right of re-entry* upon non-payment of "£6 12*s.* 6*d.* a quarter." Afterwards, B. being in arrear for a quarter, A. *distrains* for £9 2*s.* 6*d.* In an action by B. for excessive distress (in which he made no application to recitfy)—Held, evidence of conversations between A. and B. showing that the rent agreed was £26 10*s.* and not £36 10*s.*; and that the rent of adjoining house was £26 10*s.*;—was inadmissible [*Villiers* v. *Skelton*, 49 Sol. Jo. 204; since (1) the document disclosed no evidence that the rent was not £36 10*s.*; (2) A. relied on the right to distrain, not the right to re-enter; and (3) the latter clause, though inconsistent with, did not affect, the clause defining the rent. *Cp. post*, 613-4, 654].

A. sues B. on a bill of exchange accepted by the latter, the amount in figures in the margin being £245, but in words in the body of the bill, "Two hundred pounds." Evidence that the bill was given in payment for goods of £245; that B. intended to accept for that amount; and that he had been applied to three times for the "bill of £245 left with him for acceptance,"—held, inadmissible, the ambiguity being a patent one, and that A. could only recover £200 [*Saunderson* v. *Piper*, 5 Bing. N.C. 425; *cp. post*, 613-4, 654].

Admissible.

A. by will directs his "debts to be paid, including one of £300 owing to my daughter B." Evidence was admitted that A. owed B. only £150. Held, there being no intention expressed by A. to confer a bounty, B. could only take the smaller sum [*Wilson* v. *Morley*, 5 Ch.D. 776; *aliter* if there had been such intent, *Re Rowe, Pyke* v. *Hamlyn*, 1898, 1 Ch. 153; *Re Kelsey*, 1905, 2 Ch. 465; *Re Segelcke*, 1906, 2 Ch. 301; *cp. post*, 657, 668-9, 671-2].

Consideration. A., the indorsee of a bill, sues B., the drawer and indorser. B. may prove that though A. gave value for the bill, it was under an agreement that A. should only sue C., the acceptor, and not B. [*Pike* v. *Street*, 2 Moo. and Malk. 226. In *Foster* v. *Jolly*, 1 C. M. & R. 703, Parke, B., remarked that the above agreement was only admissible because it negatived any consideration between A. and B. In *Young* v. *Austen*, L.R. 4 C.P. 553, a similar agreement was admitted because pleaded as part of the consideration; otherwise it would be inadmissible, see *Abrey* v. *Crux, &c., ante*, 593].

Inadmissible.

A. by will directed that certain sums, which he mentioned had been advanced by him to his sons, were to be brought into hotchpot. Held, the sons were bound by this recital, and evidence to show that less had been advanced was inadmissible [*Re Wood, Ward* v. *Wood*, 32 Ch.D. 517. North, J., remarked, "the legatees must take the gifts as they find them; if the testator had intended to deduct sums actually advanced, he would, I think, have referred to them as such. If there has been a mistake, so much the worse for the legatee." *Cp. Quihampton* v. *Going*, 24 W.R. 917; *Re Aird*, 12 Ch.D. 291; *Re Taylor*, 22 *id.* 495; *Burrowes* v. *Clonbrock*, 27 L.R.I. 538; and see *post*, chap. xlvii. Ademption, 668-9, 671-2].

(6) *Subsequent Rescission or Variation of Transaction.*

A. agrees in writing to buy, and B. to sell, 100 tons of iron, to be delivered at the rate of 25 tons a month. Before delivery of the last 25 tons, A. orally requests B. to let this delivery stand over, and B. does so, applying, however, to A. from time to time to take delivery. In an action by B. for non-acceptance of the last 25 tons, A., in defence, relies on this arrangement as a parol contract to enlarge the time. Held, that there was no agreement, but only a postponement for the convenience of A. who had broken the original contract by failure to take delivery at the end of the last month, and that A. was liable (*Hickman* v. *Haynes*, L.R. 10 C.P. 598).

A. having in Sept., 1914, agreed in writing to sell, and B. to buy, 500 pieces of cloth, sues B. for £888, the price of 223 pieces delivered. B. admits the claim, but counterclaims for non-delivery of the balance. A previous action had been commenced by A. for the same cause which was orally compromised on the terms of the following letter sent by B. to A. in April, 1915: "Both to withdraw legal proceedings and each to pay own costs. You to allow £30 incurred through not fulfilling orders. Account to be left over for 3 months to give us opportunity of selling the goods. We to have option to take balance." Held, that the substantial inconsistency of the old and the new terms showed an intention by the parties to *rescind* and not merely to *vary* the original contract, and that the oral agreement though itself unenforceable, was valid for that purpose [*Morris* v.

A., on the 16th May, agrees in writing to buy and B. to sell, goods over the value of £10 to be delivered by B. on 20th to 22nd May. On the 17th May they orally agree to extend the time of delivery till 24th May. In an action by A. for non-delivery on 24th May. Held, the oral agreement was inadmissible to vary the written contract [*Stead* v. *Dawber*, 10 A. E. 57. In *Noble* v. *Ward*, L.R. 1 Ex. 117, 122, Bramwell, B., remarked: "The cases of *Goss* v. *Nugent*, *Stead* v. *Dawber*, &c., only show that the new contract cannot be enforced, not that the old one is gone. I think it was not."]. So, where the goods were to be delivered by a certain ship on her *first* arrival and this was varied by parol to a *subsequent* arrival (*Marshall* v. *Lynn*, 6 M. & W. 117).

A. agrees in writing to sell B. several lots of land and to make a good title thereto, and B. pays a deposit. Afterwards A. finds he cannot make a good title to one of the lots, whereupon B. verbally agrees to waive such defect and accepts a conveyance of the whole. Held, in an action by A. for the balance of purchase-money, to which B.'s defence was the objection to the title, that proof of the parol waiver was inadmissible under the Statute of Frauds, s. 4; and as A. was suing on a new contract, consisting partly of writing and partly of parol, the action failed [*Goss* v. *Nugent*, 5 B. & Ad. 58; *aliter* if writing had not been required by law].

A. agrees in writing on Aug. 12 to sell B. certain goods and deliver them by a

Admissible.

Baron, 1918, A.C. 1. Some of the Lords thought that, apart from rescission, there was a good accord and satisfaction, after breach of the material causes of action].

A. agrees in writing to employ B. as his manager for five years at a progressive salary. Afterwards, A. sells his business to a company of which he becomes managing director, and thereupon B. orally agrees with A. to continue as manager at half his original salary until the company's profits reach a certain amount and then to accept a proportionate rise. Held, distinguishing *Noble* v. *Ward*, *opposite*, that as the oral agreement was inconsistent with the original written one, it operated as a rescission of the latter, although not itself enforceable [*Macpherson* v. *Warner*, 9 T.L.R. 397; affirmed C.A., see 9 Law Quart. Rev. 370; also *Todd* v *Johnson*, cited *id.*].

A., a debtor, gives B., a creditor, a bill of sale containing a covenant to pay the debt in two instalments in 3 and 6 months. Afterwards they orally agree that A. shall pay the debt in instalments of 10s. a week and make his business purchases exclusively from B. In an action by A. for a declaration that the bill of sale was void because the oral agreement was a defeasance which should have been embodied in the document under the Bills of Sale Act, 1878, s. 10:—Held, that the oral agreement being subsequent to, and not contemporaneous with, the bill, was not a defeasance under s. 10 which avoided it; and that as the oral agreement had not been fulfilled the instalments under the bill were due (*Lester* v. *Hickling*, 1916, 2 K.B. 302).

Inadmissible.

specified date. On August 18, A. agrees in writing to sell B. certain other goods and deliver same at a later date. Afterwards A. orally agrees with B. (1) to rescind the first contract, and (2) to extend the time for delivery under the second by a fortnight. In an action by A. for non-acceptance of the goods under the second contract, to which B.'s defence was rescission by the third contract. Held: That the third contract being unwritten was by the St. Frauds. s. 17, not enforceable *per se;* that it was also inoperative to vary the second contract; that although A. and B. might validly have agreed by parol wholly to rescind the second contract, as they had the first, yet as their intention clearly was merely to *vary* and *not to rescind* it, the third contract did not operate as a rescission and the second remained in force [*Noble* v. *Ward*, L.R. 1 Ex. 117; *affd.* L.R. 2 Ex. 135, explained in *Morris* v. *Baron*, *sup.*; *Vezey* v. *Rashleigh*, 1904, 1 Ch. 634.]

A., a workman, agrees with B., a Ry. Co., to work at certain wages for 3 years for 54 hours a week of 6 days. War supervening, the men rather than be discharged orally agreed to reduce their hours to 48 per week of 5 days. A. having worked the 3 years, sues B. for the difference between the time worked and the time contracted. The County Court judge decided for A. on the grounds (1) that he never agreed to accept the reduction except under protest, and (2) that there was no consideration for it. Held, following *Morris* v. *Baron*, *sup.*, that as it was only intended to vary, and not to rescind the original contract, the parol variation was inoperative; that there was no accord and satisfaction as A. only accepted the reduction under protest; and that B. was entitled to the original terms [*Cutts* v. *Taltal Ry.* (1918) 62 Sol. Jo. 423. As to seamen's contracts for wages under the Merchant Shipping Act 1894, ss. 113-4, see *Thompson* v. *Nelson*, 82 L.J. K.B. 657].

A. lends B. money on a bill of sale, to be repaid by instalments. B. being unable to pay one of the instalments, A. orally agrees to give him a week's grace, but on the third day seizes and sells the goods. In an action by B. for wrongful seizure, Held, that the verbal agreement, being without consideration, was inoperative to waive the default, and that B. was liable on the original contract [*Williams* v. *Stern*, 5 Q.B.D. 409, C.A.; disapproving *Albert* v. *Grosvenor Co.*, L.R. 3 Q.B. 123. *Aliter* if the verbal agreement had been made for valuable consideration].

CHAPTER XLVI.

ADMISSION OF EXTRINSIC EVIDENCE IN AID OF INTERPRETATION.

Where the language of a document is clear and applies without difficulty to the facts of the case, extrinsic evidence is not admissible to affect its interpretation; but where the language is peculiar, or its application to the facts is ambiguous or inaccurate, extrinsic evidence may, subject to the qualifications hereinafter stated, be given in explanation.

[*Shore* v. *Wilson,* 9 C. & F. 355, 565; *Higgins* v. *Dawson,* 1902, A.C. 1; *Charrington* v. *Wooder,* 1914, A.C. 71, 77; *G. W. Ry.* v. *Bristol Corp.,* 87 L.J.Ch. (H.L.), 414. Tay. ss. 1158-1231; Ros. N.P. 27-33; Steph. art. 91; Norton, Deeds, chaps. 3, 4, 6; Wigram, Extrinsic Evidence in aid of Wills; Jarman, Wills, 6th ed. 484-53. Hawkins, Wills, 9-13; Underhill and Strahan, Interpn. of Wills 1-40; Hawkins, 2 Jud. Soc. Pap. 298; Nichols, *id.* 351, Elphinstone, Introd. to Conveyg. 7th ed. 19-40; *id.* 3 Jud. Soc. Pap. 253; Thayer Pr. Tr. Ev. 410-483; Wigmore, Ev. ss. 2458-78; Graves, 28 Am. L. Rev. 321; and see a detailed examination of this topic by the present writer in 20 Law Quart. Rev. 245-271.]

Definition. By Interpretation is meant ascertaining the meaning of the language of a document, or its application to the facts of the case. The terms Interpretation and Construction are in practice often used interchangeably (Steph. art. 91; Leake, Contracts, 5th ed. 142; Thayer Pr. Tr. Ev. 411); sometimes, however, Interpretation is considered to refer to the *sense* in which words have been used, and Construction to the *application of the rules of law* to the instrument after that sense has been ascertained (Tay. s. 1201); and sometimes the former word is included in the latter (*Chatenay* v. *Brazilian Co.,* 1891, 1 Q.B. 79, 85, where Lindley, L.J., remarked that "construction" included first the meaning of the words, and secondly their legal effect, the former being a question of fact and the latter a question of law). As to the functions of judge and jury on this subject, see *ante,* 14-15; and as to the distinction between rules of construction and rules of presumption, *post,* 666.

(1) **Interpretation,—a question of Substantive Law, Evidence, or Logic?**—Prof. Wigmore considers that all rules of interpretation belong, without exception, to the substantive law (Evid. s. 5; Greenleaf, 16th ed. p. 458 *n*). Prof. Thayer takes the same view (Pr. Tr. Ev. 504-5), allowing, however, one, but only one, exception, *i.e.* the rule which excludes direct statements of intention in cases other than equivocation,—since though, in talking generally of the use of intention in aid of construction, we are talking of a question

of construction and not of evidence, yet when we talk of direct statements of intention, we are talking of a *particular kind of evidence* of intention, and so of an excluding rule of evidence and of a special exception to that rule (*id.* 414, 444-5) Both these views, however, appear too narrow. At all events, though the admission of extrinsic facts in the present connection is determined to some extent by rules of substantive law and construction, it is determined to a much greater extent by rules of evidence pure and simple. Thus, in addition to (1) the rule as to direct statements of intention mentioned above, with its exception in cases of equivocation; (2) the rules regulating what facts are material as surrounding circumstances are also rules of evidence, being determinable in general solely by relevancy in its legal sense (Wigram, Prop V. s. 98; *ante,* 49-53). So, (3) the various special rules admitting or excluding reputation, opinion, usage, contemporaneous exposition, course of dealing, and expert testimony in the interpretation of documents belong to the same category, since they all satisfy Prof. Thayer's test of dealing with a "particular kind of evidence." It is these three classes of rules, however, that form the bulk of the rules regulating interpretative evidence. On the other hand, taking a somewhat broader view, Sir H. Elphinstone maintains that rules of interpretation belong neither to Substantive Law, nor Evidence, but to Logic exclusively. Being, he argues, based on the principle of causality, such rules have an existence altogether independent of jurisprudence, so that while rules of law may vary in different countries, true rules of interpretation must everywhere be identical (3 Jur. Soc. Pap. 253, 270; 1 Law Quart. Rev. 466). But to this it may be answered that though *true* rules of interpretation may everywhere be the same, yet *applied* rules will probably always differ, not only in different countries, but even in the same countries at different periods or with respect to different classes of documents; while, even if "true" rules were anywhere to prevail, they would still owe their force to law and not to logic (*cp. ante,* 52). There remains, therefore, only the original question, attempted to be answered above, whether as legal rules, they belong to the substantive, or to the adjective or evidential, class [20 Law Quart. Rev. 246-7].

(2) **Object and Limits of Interpretation,—the Meaning of the Words, or the Intention of the Writer?**—Two opposing theories are maintained as to the object of interpretation. The first and by far the most widely held asserts that the question is, not what the writer meant, but simply what is the meaning of his words (Wigram, ss. 9, 104, 124; *Rickman* v. *Carstairs,* 5 B. & Ad. p. 663, *per* Denman, C.J.; *Grey* v. *Pearson,* 6 H.L.C. p. 106, *per* Ld. Wensleydale; *Grant* v. *G.,* L.R. 5 C.P. p. 734, *per* Blackburn, J.; *G. W. Ry.* v. *Bristol Corp,* 87 L.J.Ch. (H.L.) pp. 419, 424, 428; *Lovell* v. *Wall,* 104 L.T. 85, C.A.; Holmes, 12 Harv. L. Rev. 417-18). The second regards the intention of the writer as the chief object of concern, and the mere grammatical and lexicographical meaning of the words as not strictly interpretation at all, since it is only (it is said) *after* the meaning of the words has been ascertained and has failed to explain the meaning of the writer, that interpretation properly so called begins,—*i.e.* that the gap left by the partial failure of language to express the intention has to be filled by an inquiry into other indications thereof (Hawkins, 2 Jur. Soc. Pap. 301-310, 330; Thayer, Pr. Tr. Ev. 405). This, in effect, is the old controversy between the

Proculians and the Sabinians, between the logical, inferential, or liberal school of interpreters, and the grammatical or literal; and, as often happens, the correct view appears to lie between the extremes. Indeed, that the object cannot be to ascertain the meaning of the words, simply, seems reasonably clear, since this may vary with circumstances, the same word being often used in different senses by different people, or by the same person on different occasions, and the same thing being often expressed differently by different people or by the same person at different times; so that, in considering any given document, what we want to arrive at is the meaning of the language as used by the writer (*infra,* 609). In *Doe* v. *Hiscocks,* 5 M. & W. 363, the Court remarked: "The object in all cases is to discover the intention of the testator. The first and most obvious mode of doing this is to read his will as he has written it, and collect his intention from his words. But as his words refer to facts and circumstances respecting his property and his family, and others whom he names or describes in his will, it is evident that the meaning and application of his words cannot be ascertained without evidence of all those facts and circumstances." Similarly, in *River Weir Commrs.* v. *Adamson,* 2 App. Cas. 743, 763, Ld. Blackburn, observed, "In all cases the object is to see what is the intention expressed by the words used. But, from the imperfection of language, it is impossible to know what that intention is without enquiring farther, and seeing what the circumstances were with reference to which the words were used, and what was the object appearing from these circumstances which the person using them had in view; for the meaning of the words varies according to the circumstances with respect to which they were used." This dictum has been held no authority for the reception of extrinsic evidence in cases where the words are clear and their application unambiguous (*G. W. Ry.* v. *Bristol Corp.,* cited *ante,* 605); but it obviously is an authority for a modification of the view that the sole object of interpretation is the meaning of the words irrespective of the meaning of the writer. More generally, however, the exponents of this view claim that, even in cases of ambiguity, we still stop short of any attempt to ascertain the writer's *intention,* since the true inquiry is "not what this man meant, but merely what these words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used" (Holmes, 12 Harv. L. Rev. 417-418; *Homer* v. *H.,* 8 Ch.D. 758, 776, *per* James, L.J.). But the difficulty with this test is, that though it may often suffice, it will not always do so. Take the not uncommon case of misnomer in *Charter* v. *C.,* L.R. 7 H.L. 364, where a testator, having only two sons, William Forster Charter and Charles Charter, appointed as his executor "my son Forster Charter." To ask what the normal Englishman would mean by such a name, used under such circumstances, is futile; and had this been the only criterion permissible the will must have failed for uncertainty. But in practice such a result does not happen, for other and more special standards or tests may also be invoked. Thus, in the case referred to, the Court admitted evidence not only (1) of the testator's individual standards or habits of speech, *i.e.* that he usually called the first son "William" or "Willie," and not "Forster"; but also (2) of his individual treatment of, and relations with, each son respectively, *i.e.* that William had quarrelled with his father and left the house, while Charles had continued

to live amicably at home and help the testator in his business, the Court finding in the result that by "Forster" the testator meant "Charles." But habits of speech and treatment have invariably been held by the Courts to constitute evidence of intention (*post,* 610*n*), so that, judged by the facts actually receivable in such cases, the inquiry is by no means limited to what the normal speaker would mean.* As Sir J. Stephen remarks "If the question is, what did the testator *say*" (*i.e.*, what is the meaning of his mere words), "why should the Court look at the circumstances that he lived with Charles and was on bad terms with William? How can any amount of evidence that he intended to write Charles, show that what he did write *means* Charles?" On the other hand, "If the question is, what did the testator *wish*" (*i.e.* intend), why should the Court refuse to look at his declarations of intention?" [Dig. Note xxxiii.]. The latter question had also exercised Ld. Selborne: Why, he enquires, these declarations should be admitted in cases of equivocation, but excluded in those of misdescription, "I am not sure that I clearly understand; but it has been conclusively so settled by a series of authorities to which we are bound to adhere" (*Charter* v. *C., sup.*). The reasons usually given for their exclusion are (1) that the law, by requiring the instrument to be in writing, in effect makes it the only legitimate evidence of the writer's intent (*Doe* v. *Hiscocks,* 5 M. & W. 363, 369; Wigmore, s. 9); and (2) that such declarations tend to supersede the document and to make a new deed or will for the writer (*Doe* v. *Hubbard,* 15 Q.B. 227, 241, 243; *Whitaker* v. *Tatham,* 7 Bing, 637). These reasons, however, are not very helpful, since, as to (1), declarations of intention are equally rejected whether writing be required by law, or voluntarily adopted by the parties; and as to (2), the objection is not really confined to declarations, but has in fact, been applied to exclude circumstantial evidence of intent as well as direct (*Higgins* v. *Dawson,* 1902, A.C. 1, 6). It also, however, wholly mistakes the function and purpose of such evidence, which is not the competitive one of giving to the oral words some independent or hostile dispositive effect, but the purely subordinate and auxiliary one of giving to the written text some meaning it can properly bear. It is, of course, common ground that one cannot set up an oral will in competition with a written one, nor contradict the latter by parol. But where nothing of the kind is attempted, where the declarations are neither tendered with those objects nor, if admitted, would have those effects, the present objection is wholly inapplicable. We must look elsewhere, therefore, for the true reasons for excluding *this particular form* of extrinsic evidence as contrasted with *all other forms.* On principle, it has been well said, such declarations are properly receivable in aid of interpretation simply because no evidence logically probative of intention should

* Cases of *Contract* differ, of course, from those of *Wills,* in that with the former it is the joint and not the individual intent that has to be regarded. Hence, when the contract is ambiguous, evidence may be given of the facts and objects in their joint contemplation (*Bank of N. Zealand* v. *Simpson,* 1900, A.C. 182; *G. W. Ry.* v. *Bristol Corp.,* 87 L.J. Ch. 429-30, H.L.; *post,* 616), and of the sense in which both, but not one only, of the parties, have acted thereon (*post* 630). In questions involving the *factum* of wills and contracts, however, intent plays a much larger part than in their *construction* (*ante* 325-6). Indeed, on an enquiry as to the formation of a contract, and where the document is ambiguous, the Court will not necessarily construe it at all, but places the onus upon the plaintiff of showing that the proposal made by him and accepted by the defendant was so clear and unambiguous that the latter is estopped from saying that he misunderstood it (*Falck* v. *Williams,* 1900, A.C. 176; *Miles* v. *Haselhurst,* 23 T.L.R. 142; *Weigall* v. *Runciman,* 85 L.J.K.B. 1187).

be shut out. The Roman law in fact received them without scruple; so, in doubtful cases, did early English Equity Courts; while even down to the present day the *preamble of a statute* has been admitted in all jurisdictions in aid of its interpretation, whether considered as part of the Act or not (*G. W. Ry.* v. *Bristol Corp.* 87 L.J.Ch. 414, 418, H.L.). On the other hand, Common Law Courts, having to deal with juries, were necessarily stricter in matters of evidence, and so, uniformly rejected parol declarations of intent except in cases of equivocation where, alone, it was said "the averment could stand with the words" (*post,* 613, 627-9). Later on, the Common Law rule began to prevail more generally, until, about the beginning of the nineteenth century, the use of such declarations had become restricted in all courts to the one case mentioned. Practical reasons, no doubt, aided this result, for the ease with which such declarations may be fabricated, retracted, or misreported, and the aspect of rivalry they seem to bear to the written document, engendered mistrust even in Courts of Equity — a mistrust which was, of course, greatly intensified in jury trials. Parol declarations of intention are excluded then, not because they constitute "evidence of intention," or do not logically aid in elucidating the text, but because certain precautionary, but wholly arbitrary, reasons have caused them gradually and generally to be shut out in all courts alike [20 Law Quart. Rev. 252-4; Hawkins, 2 Jur. Soc. Pap. 313-7; 320-3; Nichols, 3 *id.* 358-60; Thayer, Pr. Tr. Ev. 414-44, 480; *infra;* and see *post,* 611, 627-9].

The subject of the present heading has been well summarized as follows: "What is it that the judicial expositor seeks to ascertain; is it the meaning of the words, or the meaning of the writer? The question is frequently put in this way, as if the disjunction were complete and the answer must be one or the other. We answer, neither. Not the meaning of the words alone, nor the meaning of the writer alone, but the meaning of the words as used by the writer. It is not the meaning of the words in the abstract, for the meaning of the words varies according to the circumstances under which they were used; and not the meaning of the writer apart from his words, for the question is one of interpretation, and what he meant to say, but did not, is foreign to the inquiry. We must seek the meaning of the writer, but we must find it in his words; and we must seek the meaning of the words, but they must be his words, the words as he has used them, the meaning which they have in his mouth" (Graves, 28 Am. L. Rev. p. 323; see, also, Elphinstone, Introd. to Conveyancing, 5th ed. 19-25; *id.* 3 Jurid. Soc. Pap. 256-7; *id.* Interp. of Deeds, 36-8; Underhill & Strahan, Interp. of Wills, 1.]

With regard to the *limits* of interpretation, it is to be remembered that the function of the Court is merely declaratory of what is *in* the document, not speculative as to what was probably intended to be there (Wigram, s. 6; *River Weir Commrs.* v. *Adamson,* 2 App. Cas. 743, 764, *per* Ld. Blackburn; *Higgins* v. *Dawson,* 1902, A.C. 1, 6, *per* Ld. Halsbury). Moreover, the meaning imputed must be one which the words are reasonably adequate to convey: "All latitude of construction shall submit to this restriction, that *the words may bear the sense* which by construction is put upon them. If we step beyond this line, we no longer construe men's deeds, but make deeds for them" (*Gibson* v. *Minet,* 1 H.Bl. 615, *per* Eyre, C.B.).

(3) **Explanatory Evidence and Evidence of Intention.** Adopting the theory that the object of interpretation is to ascertain the meaning of the words and not the intention of the writer, Sir J. Wigram divides extrinsic evidence into two main classes, *i.e.* (1) Such as is "explanatory of the words themselves," and (2) Such as is "applied to prove intention itself as an independent fact"; and he lays down the general rule that the former, *i.e.* explanatory evidence, is always admissible, but that the latter, *i.e.* evidence of intention, is never so except in cases of equivocation (Extr. Ev. ss. 9-10, 212-215). Although, however, this Classification and Rule are still very widely accepted (*e.g. Higgins* v. *Dawson,* 1902, A.C. p. 10; *Re Rayner,* 1904, 1 Ch. p. 188; *Re Glassington,* 1906, 2 Ch. p. 314; *Re Ofner,* 1909, 1 Ch. p. 67), they are, it is submitted, untenable, as will be seen from the following analysis.

Explanatory Evidence. Under this head Wigram includes two classes of facts,—those which show the meaning of the words *in the abstract, i.e.* expert testimony, dictionaries and usage (Prop. IV. ss. 56-9), and those which show their meaning *in the document* by tending to identify the persons or things referred to, to determine the quantity of interest given, or otherwise to aid in its right interpretation (Prop. V. ss. 59-60), under which latter class it will be found that he refers to the knowledge and surrounding circumstances of the writer (ss. 73-4, 79, 103), his treatment of, and dealing with, persons and property (ss. 55, 69), and his habits of speech (s. 65), all of which facts he considers to be of an intrinsically different nature from evidence of intention and wholly collateral thereto (ss. 9-10, 70, 76, 103, 159). With regard to his Classification, however, it will be seen not only that Wigram's "explanatory" facts have all repeatedly been held by the Courts to be "evidence of intention" * but that they are even frequently so referred to by himself in other parts of his treatise (see Evidence of Intention, *infra*). While, with regard to his Rule, it is not true that explanatory evidence is always admissible, there are several important exceptions (*post,* 615); and, indeed, since the admission of extrinsic facts depends on a variety of different principles, some of which belong to substantive law, some to construction, and some to the law of evidence simply, it would be surprising if any single general rule could be framed to cover all possible cases. Wigram himself found that seven distinct propositions or rules were needed in order to treat the subject successfully; and although these propositions purport merely to illustrate and enforce his main Classification and Rule, a brief examination will show that they can be supported independently of either and frequently conflict with both. On the other hand, subject to the modifications indicated *post,* 615, 621-2, his Seven Propositions, as distinct from his Classification and

* *E.g. Knowledge and Surrounding Circumstances* were held to be evidence of intention in *Doe* v. *Langton,* 2 B. & Ald. 692-3; *Maybank* v. *Brooks,* 1 Bro. C.C. 84; *Neale* v. *N.,* 79 L.T. 629, C.A.; and *Higgins* v. *Dawson,* 1902, A.C. 1, 9-10, where Rigby, L.J. (in C.A.), and Lord Davey, in rejecting surrounding circumstances as evidence of intention, purport scrupulously to adopt Wigram's classification, forgetting that the latter had already declared such facts to be strictly explanatory and wholly unconnected with the question of intention (s. 103). *Treatment and Dealing* were held to be evidence of intention in *Gill* v. *Shelley,* 2 Rus. & Myl. p. 342; *Hobson* v. *Blackburn,* 1 Myl. & K. p. 579; *Sherratt* v. *Mountford,* 8 Ch. App. 928, 930; *Homer* v. *H.,* 8 Ch.D. 774-5; and *Re Fish,* 1894, 2 Ch. p. 86. *Habits of Speech* were held to be evidence of intention in *Doe* v. *Hiscocks,* 5 M. & W. p. 368; Re *Fish,* and *Homer* v. *H., sup.* [See 20 Law Quart. Rev. 256-262].

Rule, still embody the most accurate and exhaustive statement of the law that we possess.

Evidence of Intention. When, in the second branch of his General Rule, Wigram lays it down that evidence of intention is never admissible except in cases of equivocation, it is unfortunately not clear what precisely he means by "evidence of intention," for the phrase is nowhere defined in his book. Some writers suppose that he refers only and always to *direct declarations* of intention (Thayer, Pr. Tr. Ev. 448*n*); others that he includes *circumstantial* evidence of intention as well as *direct* (Hawkins, 2 Jur. Soc. Pap. 317; Graves, 28 Am. L. Rev. 353-4; and *cp. Higgins* v. *Dawson,* 1902, A.C. p. 10). The point is of importance, since, if the former interpretation be correct, the difficulty arises that although his Rule would thus, in cases other than equivocation, exclude direct declarations alone, his examples show that, in many cases, circumstantial evidence is also shut out, though he formulates no principle upon which it can be excluded (see *e.g.,* s. 25 *n,* citing *Cartwright* v. *Vawdry,* 5 Ves. 530, and *Godfrey* v. *Davis,* 6 *id.* 43; s. 28 *n,* citing *Radcliffe* v. *Buckley,* 10 *id.* 195; s. 34, citing *Doe* v. *Chichester,* 4 Dow, 65; and s. 36, citing *Mounsey* v. *Blamire,* M.S. Rep.). While, if the latter meaning be accepted, then, although his Rule would thus, in cases other than equivocation, exclude all circumstantial evidence of intention, yet his examples show that the particular classes of fact shut out happen to be precisely those which he elsewhere (*ante,* 610) declares to be always admissible as "explanatory evidence"—viz., in *Godfrey* v. *Davis,* and *Radcliffe* v. *Buckley, sup.,* the testator's *knowledge* of the legatee's family; and in *Cartwright* v. *Vawdry, Mounsey* v. *Blamire,* and *Doe* v. *Chichester, sup.,* the testator's *treatment* and *habits of speech.* In other words, the two divisions of "explanatory evidence" and circumstantial "evidence of intention" are not, as Wigram supposes, essentially different, but substantially the same.

Summary. To avoid confusion, therefore, Wigram's Classification and General Rule must be wholly discarded, and his Seven Propositions, with certain necessary modifications, mainly relied on as a guide to the admissibility of extrinsic evidence in aid of interpretation. Indeed, the only general rule that can be formulated on this subject is, that while *direct statements of intention* by the writer are, at all events in the case of wills, never admissible except to solve an equivocation, *all relevant facts other than these* (whether termed explanatory evidence or circumstantial evidence of intention) may in general be received in explanation of a document, subject to the various qualifications enumerated *post,* 615-30.

Forms of Extrinsic Evidence. General Forms. Declarations of Intention. The following are some of the chief forms in which extrinsic evidence may be tendered for the purpose of interpreting a document: (1) General evidence of **Surrounding Circumstances** (*post,* 615-20, 630-41), (2) **Treatment of, and Dealings with, persons and property** (*post,* 615, 621, 624), (3) **The writer's Habits of Speech** (*post,* 620-4, 641-9). If the words of a document taken in their ordinary sense do not properly apply to the facts, evidence may be given that the writer habitually (or even on a single occasion, *Re Ofner, post,* 650), used them in a peculiar sense, which explains such words in the same way as if they were written in cypher or a foreign language (*Doe*

v. *Hiscocks,* 5 M. & W. 368; *Abbot* v. *Massie,* 3 Ves. 148; *Lee* v. *Pain,* 4 Hare, p. 251; *Ricketts* v. *Turquand,* 1 H.L.C. 472; *Doe* v. *Hubbard,* 15 Q.B. 227). But if the words in their ordinary sense apply properly and without difficulty to the facts, evidence that the writer either habitually or upon the particular occasion used them in a different sense is not admissible, since it contradicts the document (*Doe* v. *Chichester,* 4 Dow, 65; *Ricketts* v. *Turquand, sup., per* Cottenham, L.C.; *Millard* v. *Bailey,* 1 Eq. 378; *Re Fish,* 1894, 2 Ch. 83, per Kay, L.J.). (4) **Usage** which is admissible both to explain the meaning of terms and to construe the document (*post,* 629, 661-4). (5) **Course of dealing between the parties** (*post,* 630, 664). (6) **Reputation** (*post,* 655-6). Thus, family repute is admissible to identify a legatee (*Re Gregory,* 34 Beav. 600), and local repute the subject-matter of a devise or statute (*Anstee* v. *Nelms,* 1 H. & N. 25; *Re Steel,* 1903, 1 Ch. 135; *Assheton-Smith* v. *Owen,* 75 L.J.Ch. 181). (7) **Opinions both of experts and non-experts** are admissible as to the meaning of words, but not as to the construction of documents (*ante,* 387-8, 399; *post,* 630, 665). (8) **Documents—Similar, Connected, or Incorporated.** Thus, prior wills may be received to show a testator's habit of misdescription (*Camoys* v. *Blundell,* 1 H.L.C. 778; *Re Feltham,* 1 K. & J. 528; *Re Smith,* 20 T.L.R. 287), or his knowledge of, though not his intentions regarding, a particular legatee (*Re Waller, White* v. *Scoles,* 80 L.T. 701; *Flood* v. *F.* 1902, 1 I.R. 538). So, when the words of a libel are ambiguous, similar libels have been considered admissible to show the sense in which the words were used (*Bolton* v. *O'Brien, ante,* 176), and former patents may be referred to to explain the technical terms in, though not the meaning of, the patent in question (*Clark* v. *Adie,* 2 App. Cas. pp. 434, 437; *post,* 620). Prior, but not subsequent, statutes are also sometimes received to interpret a public statute (*post,* 619). A subsequent deed, not reciting nor referring to a prior deed, has, however, been rejected to explain an ambiguous expression in the latter (*Shore* v. *Wilson,* 9 C. & F. 355; and *cp. Peek* v. *North Staffordshire Ry.,* and *Lewis* v. *G.W. Ry.,* cited, *post,* 638); as also has a prior document to correct a recital thereof in a subsequent deed (*Re Carter,* I.R. 3 Eq. 495). But where several documents are *connected* as parts of one transaction, all must be construed together, and one may be read to explain the others (Norton, Deeds, 78-80; Leake, Contracts, 5th ed. 148); *e.g.* Lease and Counterpart (*Burchell* v. *Clark, ante,* 536, where a clerical mistake in one was corrected by the other; though material variances between two parts of an indenture will avoid the deed, *Wynnes' Case,* 8 Ch. App. 1002); Lease and Release (*Barker* v. *Keat,* 2 Mod. p. 252); Fine, Recovery, and Deed to lead the Uses (Norton, Deeds 78); Bond and Condition (*Coles* v. *Hulme,* 8 B. & C. 568); Bill of Sale and Collateral Contract (*Edwards* v. *Marcus,* 1894, 1 Q.B. 587; *Counsell* v. *London Co.,* 19 Q.B.D. 912); Promissory Note and Memo. of Deposit (*Hartland* v. *Jukes,* 1 H. & C. 667); Policy and Slip (*Lower Rhine Assn.* v. *Sedgwick,* 4 Com. Cas. 14; see further *ante,* 536, and *post,* 633); bill of lading and Charter-party (where these conflicted the former was held to prevail, *Crossfield* v. *Kyle,* 1916, 2 K.B. 885, C.A.; *Hogarth Co.* v. *Blythe,* 1917, 2 K.B. 534, C.A.; *ante,* 147; though where the Bill incorporated a statute, a clause in the former which conflicted with the latter was held void, *Hordern* v. *Commonwealth Line,* 1917, 2 K.B. 420);

Will and Codicil (*Re Haseldine,* 31 Ch.D. 511; *Re Venn,* 1904, 2 Ch. 52; *Re Smith,* 1916, 2 Ch. 368, C.A.); Will and Probate (*Re Harrison,* 30 Ch.D. 390; *Re Battie-Wrightson, post,* 661; Memo. and Articles of Association (*Re Capital Assocn.,* 21 *id.* p. 212; *Re Anderson,* 7 *id.* p. 99; if these conflict, or are ambiguous, the former prevails, *Hill* v. *Star Theatre,* 39 Ir.L.T.Jo. 143); but not Prospectus and subsequent circular (*Smith* v. *Chadwick,* 20 Ch.D. 27). (9) **Declarations of Intention.** There is, as we have seen (*ante,* 606-9, 611), one class of extrinsic evidence which the law, as a general rule, rigidly excludes for purposes of interpretation, *i.e.* declarations of intention by the writer of the document. The reasons and history of the exclusion have already been indicated (*id.*) The only exception to this general rule arises in the case of Equivocations, as to which see fully, *post,* 626-9. In cases *other* than interpretation, such evidence is, however, frequently admissible, *e.g.* to establish the factum of the instrument (*ante,* 325-8), or to rebut presumptions affecting its operation (*post,* Chap. xlvii.).

Ambiguities. Blanks. Equivocations. Inaccuracies. *Ambiguities patent and latent.* Lord Bacon classes ambiguities as either patent or latent: a patent ambiguity being "that which appears to be ambiguous upon the deed or instrument," a latent "that which seemeth certain and without ambiguity for anything that appeareth upon the deed or instrument, but there is some collateral matter out of the deed that breedeth the ambiguity." He adds that "*ambiguitas patens* is never holpen by averment, and the reason is because the law will not mingle matter of specialty, which is of higher account, with matter of averment, which is of inferior account in law; for that were to make all deeds hollow and subject to averments, and so, in effect, that to pass without deed which the law appointeth shall not pass but by deed . . . But if it be *ambiguitas latens* it is otherwise." In the latter case, therefore, the ambiguity may be holpen by averment, and his maxim *Ambiguitas verborum latens verificatione suppletur; nam quod ex facto oritur verificatione facti tollitur* accordingly applies [Maxims, Reg. 23 (in some editions 25]. Bacon's rule as to ambiguities had, it should be noticed, reference merely to pleading, although it was afterwards erroneously propounded as a rule of evidence by Bathurst in his Theory of Evidence (1761), and has so descended to the present day (Thayer, Pr. Tr. Ev. 422-6; Cas. Ev. 2nd ed. 922-5). This rule cannot, however, be relied on as a test of the admissibility of evidence; for though it is still commonly said that parol evidence may not be given to explain a patent ambiguity (Ros. 18th ed. N.P. 32; Powell, 9th ed. 555; Anson, Contracts, 14th ed. 320; Beale on Interpretation, 83, 135), yet this is not generally true (*Watcham* v. *A.-G.* 1919, A.C. 533; *Re Atlay,* cited *post,* 656). Indeed, the only patent ambiguities that are not open to explanation by extrinsic evidence appear to be those which, in the nature of things, are incapable of explanation (*Colpoys* v. *C.,* Jacob 451, 463-4; *G.W. Ry.* v. *Bristol Corp.* 87 L.J.Ch. H.L. 414, 429; Thayer, *sup.*); as, for example, where the name of a legatee is left wholly blank (*Baylis* v. *A.-G.* Atk. 239), or a bill names one sum in words and a different one in figures (*Saunderson* v. *Piper,* 5 Bing. N.C. 425, cited *infra,* 614). But this does not apply to other patent ambiguities, *e.g.,* partial blanks (*Harrhy* v. *Wall, post,* 632; *Re DeRosaz,* 2 P.D. 66; *Re Hubbuck,* 1905, P. 129); nor to that of a legatee referred to merely by a term of endearment or an initial (*Sullivan* v. *S.,* I.R. 4 Eq. 457; *Abbot* v.

Massie, 3 Ves. 148; though *cp. Clayton* v. *Nugent,* 13 M. & W. 200); nor where the amount of a legacy is expressed by a cypher (*Kell* v. *Charmer,* 23 Beav. 195); nor where property is conveyed by inconsistent descriptions (*Booth* v. *Ratte,* 15 App. Cas. 188, cited, *post,* 655; *Watcham* v. *A.-G., sup.,* where, however, some of the cases referred to as *patent* ambiguities, appear to be merely *latent*); nor where a document beginning "I, A.," is signed "B." (*Summers* v. *Moorehouse,* 13 Q.B.D. 388; *R.* v. *Wooldale,* 6 Q.B. 549); nor where a legacy is left to "one of the children of A. by her late husband B.," since it might be proved that A. had, to the knowledge of the testator, only one son by B. (Wigram, s. 79); nor, where a gift is made to "my nephew John or Thomas," for the evidence might show that the nephew was known to the testator by both these names (Elphinstone, Deeds, 104.) The supposed rule is sometimes stated thus: "when the ambiguity is *patent,* all declarations of the writer's intention will be uniformly excluded" (Tay. s. 1213; *Sullivan* v. *S., sup*); but as such declarations are also uniformly excluded in *all* cases of ambiguity other than equivocation, this statement does not assist. The second branch of Bacon's rule is, however, more helpful than the first; for here in analogy to the old canon of pleading, the law is that, in the case of *latent* ambiguities, extrinsic evidence having raised the doubt, may also be received to remove it (*G. W. Ry.* v. *Bristol Corp. sup.*).

Inaccuracies are strictly speaking, distinguishable from ambiguities, for language may be inaccurate without being ambiguous—*e.g.* where a testator, having only one house, a leasehold, devises it as his "freehold house"; or it may be ambiguous without being inaccurate, as in the above case of a legacy to his "niece Jane," where he had two nieces of that name; or it may be both ambiguous and inaccurate, as where a testator, having only two nephews, John Smith and James Smith, leaves a legacy to his nephew William Smith." The term latent ambiguity, however, is now generally employed to designate all cases of doubtful meaning raised by extrinsic evidence, whether from the words being so *vague or general* as to be susceptible of a wide or narrow sense (Rule I.), or from their being *inaccurate* (Rules II. and III.), or *equivocal* (Rule IV.), or from their bearing some *peculiar* signification, whether individual, local, or foreign (Rules I. and V.). Where, but only where, ambiguities, whether patent or latent, cannot be cured by evidence, construction, or election, the document will be void for uncertainty (Rule VI.).

[Tay. ss. 1212-4; Ros. N.P. 32; Wigram, ss. 80, 196-210; Jarman, Wills, 5th ed. 400-401; Nichols, 2 Jur. Soc. Pap. 378-84; Thayer, *sup.;* Graves, 28 Am. L. Rev. 348-352].

Print. Writing. Figures. Punctuation. Marginal Notes. Where printed forms are filled in with written words and an ambiguity arises in the meaning, it is a rule of construction that greater effect is to be given to the written matter, as being the immediate language selected by the parties, than to the printed, which is intended for general application (*Glynn* v. *Margetson,* 1893, A.C. 351; *The Nifa,* 1892, P. 411; *Scrutton* v. *Childs,* 36 L.T. 212; *Hadjipateras* v. *Weigall,* 34 L.T.R. 360). So, as to wills (*Re Harrison,* 30 Ch.D. 390; *Re Spencer,* 34 W.R. 527; *Re Bacon,* 31 Ch.D. 460; Tay. s. 1130). And where there is a discrepancy between sums expressed in words and figures the former will prevail (Bills of Ex. Act, 1882, s. 9, sub-s. 2; *Saunderson* v. *Piper,* 5 Bing. N.C. 525; *cp. Villiers* v. *Skellon, ante,* 602). So the punctuation of

a document may be looked at, to assist in its construction (*Houston* v. *Burns*, 1918, A.C. 337), as also the Preamble or Marginal Notes of a Statute (*ante*, 609; Maxwell, Statutes, 68-82).

RULES AS TO EXTRINSIC EVIDENCE.

Extrinsic evidence to interpret documents may be given in accordance with the following rules, which, except where otherwise expressed, apply equally to wills and documents *inter vivos*. [*Shore* v. *Wilson*, 9 C. & F. 355, 565; *G. W. Ry.* v. *Bristol Corp.* 87 L.J.Ch. (H.L.), 414, 418-9, 425; Tay. s. 1131*n*].

RULE I. (*Surrounding Circumstances to show identity or extent of subject-matter, or meaning of terms.*) In order to ascertain the identity or extent of the subjects referred to in a document, or the sense in which particular terms have been used, or to clear up any other doubt that may arise in applying the document to the case, evidence not only of the circumstances surrounding the writer, but of his knowledge, treatment and habits of speech with reference thereto (though not of his direct declarations of intention) may in general be received. Such evidence, however, is not admissible (1) where the words are unambiguous, or the difficulty is merely a grammatical one (*Higgins* v. *Dawson*, 1902, A.C. 1; *N. E. Ry.* v. *Hastings*, 1900, A.C. 260; *G. W. Ry.* v. *Bristol Corp.* 87 L.J.Ch. (H.L.), 418-20, 424, 429); nor (2) where the language is so vague or imperfect that to admit extrinsic evidence would be not to interpret the document, but virtually to make a new one (*Re De Rosaz*, 2 P.D. 66; *King* v. *Badeley*, 3 Myl. & K. 417; *Re Hetley*, 1902, 2 Ch. 866); nor (3) where the meaning or application sought to be proved would conflict with some rule of law or construction.

[Tay. ss. 1194-1200; Steph. art. 91 (4); 20 Law Quart. Rev. 267-8. Wigram's Proposition V. (originally I.) is as follows:—

"For the purpose of determining the object of a testator's bounty, or the subject of disposition, or the quantity of interest intended to be given by his will, a Court may inquire into every *material* fact relating to the person who claims to be interested under the will, and to the property which is claimed as the subject of disposition, and to the circumstances of the testator, and of his family and affairs, for the purpose of enabling the Court to identify the person or thing intended by the testator, or to determine the quantity of interest he has given by his will.—The same (it is conceived) is true of every other disputed point, respecting which it can be shown that a knowledge of extrinsic facts can, in any way, be made ancillary to the right interpretation of a testator's words." The limitation to *material* facts, he explains, is imposed by the general law of evidence and not by anything peculiar to the present subject (s. 98; 20 L.Q. Rev. 267-8).

Wigram's proposition, however, must be read with the three-fold qualification indicated above; and the author's statement that 'No fact, as a general proposition, can be material which is not coincident in point of time with the will' is now much too narrow, being generally inapplicable to property and often to persons (*post*, 517-8; *Re Vaughan*, *post*, 651; *British Home* v. *Royal Hospital*, *post*, 653; Jarman, Wills, 7th ed. 541-3)].

Principle. The principle is that, as most documents refer expressly or impliedly to the circumstances under which they were written, the Court, when called upon to interpret them, should be placed as nearly as possible in the same situation as the writer (Wigram, Extr. Ev. ss. 76-7, 94, 96; *Charter*

v. *C., L.R.* 7 H.L. 364, *per* Ld. Cairns, L.C.; *Allgood* v. *Blake,* L.R. 8 Ex. p. 162, *per* Blackburn, J.). While, with regard to the *degree* of particularity required, the maxim is *Id certum est quod certum reddi potest* (*cp.* Broom's Legal Maxims, 8th ed. 478).

Contracts. Subject, where applicable, to the requirements of the St. Frauds, evidence of surrounding circumstances may be given to ascertain (1) who and what *The Parties* to a written contract are, and their legal relation to each other. So, to identify (2) *The Subject-matter* of the contract, the existence of any specific property or thing answering the written description may, on the same principle, be proved. Thus, evidence of surrounding circumstances has been admitted to identify land sold (*Parrott* v. *Watts,* 47 L.J. C.P. 79; *Plant* v. *Bourne,* 1897, 2 Ch. 281), furniture assigned by a deed to which no schedule was attached (*England* v. *Downs,* 2 Beav. 522), the amount of a debt left blank in a deed of release (*Harrhy* v. *Wall,* 1 B. & Ald. 103), the locality over which an agent had been employed to travel (*Mumford* v. *Gething,* 7 C.B.N.S. 305), or the identity of a document referred to in a written contract (*Shortrede* v. *Cheek,* 1 A. & E. 57; *Janson* v. *Poole,* 31 T.L.R. 336; but see *ante,* 525-6). And the *extent,* as well as the *identity,* of the subject-matter may be similarly shown. Thus, although prior conversations, negotiations, conditions of sale, draft agreements, and deleted clauses cannot be proved directly to enlarge or restrict a concluded contract, since they are presumed to be superseded thereby (*Inglis* v. *Buttery,* 3 App. Cas. 552, 577; *Lee* v. *Alexander,* 8 *id.* p. 872; *National Bank* v. *Falkingham,* 1902, A.C. 585, 591; *Wheeldon* v. *Burrows,* 12 Ch. D. 31, 45, 60; *Birmingham Co.* v. *Ross,* 38 *id.* 291, 311; *G. W. Ry.* v. *Bristol Corp.* 87 L. J. Ch. (H.L.) 414, 428; *Lovell* v. *Wall,* 104 L.T. 85, C.A.; *ante,* 574, *post,* 633-4; for cases in which preliminary contracts are not wholly extinguished by a subsequent conveyance, see *ante,* 590, *post,* 633-4), yet where the language of the contract is vague or general, the state of facts in the knowledge and contemplation of the parties at the time, and about which they were negotiating, may be proved by their conversations or correspondence, as circumstantial evidence, in order to apply the words and to show whether their narrower or wider meaning was intended (*Bank of N. Zealand* v. *Simpson,* 1900, A.C. 182; *Charrington* v. *Wooder,* 1914, A.C. 71, 77; *Waterpark* v. *Fennell,* 7 H.L.C. 650, 678; *The Curfew,* 1891, I. 131). Thus, the *knowledge* of the parties at the time, has been received to determine the scope of a release (*Lyall* v. *Edwards* and *Turner* v. *T., post,* 637-8; *cp.,* however, *Ellen* v. *G.N.R., ante,* 588-9), a carrier's forwarding note (*Lewis* v. *G. W. Ry., post,* 638, 664), a policy of insurance (*Youill* v. *Scott-Robson, post,* 662), a patent licence (*Roden* v. *London Small Arms Co., post,* 637), and the implied obligations in a lease (*Lyttleton Times Co.* v. *Warners,* 1907, A.C., 476, *post,* 635); though it will be rejected to *vary* the contract (*Leduc* v. *Ward, ante,* 590); *Cato* v. *Thompson, ante,* 591). In the case of a charter-party, however, knowledge is imputed to each contractor of matters within his own province, *e.g.* to the shipowner as to the state of his ship (*Stanton* v. *Richardson,* 33 L.T. 193, H.L.), and the charterer as to facilities at ports of loading and discharge (*Hudson* v. *Eve,* L.R. 2 Q.B. 566); and unless he has protected himself by express words, the contract will be construed against him on these points irrespective of the knowledge of his opponent (*Stanton* v. *Richardson,*

sup.; Postlethwaite v. *Freeland,* 5 App. Cas. 599, 617). Again, where an agreement is ambiguous, the *object* of the parties is generally relevant to determine its scope (*Hart* v. *Standard Co.,* 22 Q.B.D. 499), and, if not expressed in the document, may be proved extrinsically (*Charrington* v. *Wooder,* 1914 A.C. 71, 80; *G. W. Ry.* v. *Bristol Corporation,* 87 L.J.Ch. (H.L.) 414, 429-430; *Graves* v. *Legg,* 9 Ex. 709; *Behn* v. *Burness,* 3 B. & S. 751; *Krell* v. *Henry,* 1903, 2 K.B. 740, 753-4; *cp. Chandler* v. *Webster,* 1904, 1 K.B. 492). Whether evidence of *adequacy of consideration* is receivable for the same purpose, however, seems doubtful; it was received in *Allen* v. *Cameron,* 1 Cr. & M. 832, but see *contra, Inglis* v. *Buttery,* 3 App. Cas. 552, 557, and Sugden, V. & P., 14th ed., 170. Where the agreement is founded on a mutual *mistake* as to any fact and no question of avoidance or rectification arises, but one of construction only, the surrounding circumstances are admissible to show whether it was intended to take effect absolutely (*Roden* v. *London Sm. Arms Co., sup.; Barker* v. *Jansen,* L.R. 3 C.P. 303), or only as conditional on being true. Subject to the foregoing, evidence of surrounding circumstances is admissible to show the extent of the subject-matter of a contract, *e.g.,* what is parcel or no parcel of land conveyed under a general description (*Waterpark* v. *Fennell, ante,* 616; as to specific descriptions, see *post,* Rules II. and III.); or whether a guarantee, couched in vague and ambiguous terms, was intended to be continuing or specific (*Heffield* v. *Meadows,* L.R. 4 C.P. 595), applicable to joint or personal liabilities (*Leathley* v. *Spyer,* L.R. 5 C. P. 595), or to future debts only, or past ones as well (*Morrell* v. *Cowan,* 7 Ch. D. 151; *Brunning* v. *Odhams,* 75 L.T. 602, H.L.); as also to determine the scope of general words in a contract to sell property (*Macdonald* v. *Longbottom,* 1 E. & E. 977), to execute work (*Bk. of N. Zealand* v. *Simpson,* 1900, A.C. 122; *Chadwick* v. *Burnley,* 12 W.R. 1077), to insure or charter ships (*Birrell* v. *Dryer,* 9 App. Cas. 345; *The Curfew,* 1891, P. 131), or to release debts (*Lyall* v. *Edwards, &c., post,* 637). And the same principle applies to show the meaning attached by the parties to (3) *Particular Terms* or phrases (*Birch* v. *Depeyster,* 1 Stark. R. 210; *Sarl* v. *Bourdillon,* 1 C.B. N.S. 188; *McCowan* v. *Baine,* 1891, A.C. 401, 408); or to explain (4) *Other Ambiguities* in a written contract, *e.g.* whether a representation was intended to operate as a warranty or a condition (*Behn* v. *Burness,* 3 B. & S. 751; *Graves* v. *Legg,* 9 Ex. 709, 717; *cp. Sale of Goods Act,* 1893, ss. 10-12, 55).

Wills. In the case of wills, the ambit of surrounding circumstances is necessarily wider than in that of contracts, for in the former the testator is dealing not with a single transaction, but with the whole of his affairs, and the state of facts at various periods and with regard to different persons may, therefore, become material; on the other hand, the rule excluding direct declarations of intention is perhaps more strictly enforced here than in cases of contract (*post,* 633-9).

Subject to this, the following facts will usually be relevant as surrounding circumstances: (1) *Persons.* In order to ascertain the object of the testator's bounty, the condition of his family both at the time of his will and death, the fact of the legitimacy or otherwise of any of its members, and the names and circumstances of his beneficiaries, with his respective knowledge of and relations towards each, may where necessary be proved. In gifts to individuals by name, title, or description, the date of the will determines the

admissibility of such evidence (*Stringer* v. *Gardner,* 4 De G. & J. 468; *Re Whorwood,* 34 Ch. D. 446; *Re Caley,* 38 L. Jo. 235, C.A.; *Amyot* v. *Dwarris,* 20 T.L.R 268, P.C.); in gifts to the holder of an official position (*Re Laffan,* 1897, 1 I.R. 469), or to a class, that of death or some later period (*Re Loveland,* 1906, 1 Ch. 542; *Re Knapp,* 1895, 1 Ch. 91, 96); while, in applying the rule against perpetuities, the date of death (*Southern* v. *Woolaston,* 16 Beav. 276; *Re Dawson, Johnston* v. *Hill,* 39 Ch. D. 155), but not the incapacity for issue (*Re Dawson, sup.; Re Sayer,* L.R. 6 Eq. 219), is relevant. Where a legatee dies in the lifetime of the testator, and the bequest is not to a descendant (Wills Act, 1837, s. 33), nor intended to discharge an obligation (*Stevens* v. *King,* 1904, 2 Ch. 30; *cp. Browne* v. *Hope,* L.R. 14 Eq. 343), it will in general lapse, and even a contrary intent declared in the will, if unaccompanied by a substitutional gift, will not prevail (*Re Greenwood,* 1912, 1 Ch. 392); *à fortiori,* no extrinsic evidence of such intent is admissible (*Maybank* v. *Brooks,* 1 Bro. C.C. 84; *Doe* v. *Kett,* 4 T. R. 601; *Re Whorwood, sup.; cp. post,* 623). (2) *Subject-matter.* So, to ascertain the identity or extent of the property devised, all facts known to the testator as to his possession of and mode of acquiring it, together with its local situation and distribution, may, where the words are ambiguous, be proved (*Doe* v. *Martin,* 4 B. & Ad. 771, 785), as also his habitual mode of describing it, as distinguished from his specific declarations at the time of the will (*Doe* v. *Hubbard,* 15 Q.B. 227). Since, however, the will, unless otherwise expressed, speaks as to property from death (Wills Act, 1837, s. 24), the value of the estate at the time of execution is usually irrelevant (*Higgins* v. *Dawson,* 1902, A.C. 1; *Re Pinney,* 46 Sol. Jo. 552; *Daly* v. *Carroll,* 39 Ir. L.T.R. 156; *Re Glassington,* 1906, 2 Ch. 305; *Singleton* v. *Tomlinson,* 3 App. Cas. 404, 425; *Nightingall* v. *Smith,* 1 Ex. 879). In cases of parcel or no parcel (*Stanley* v. *S.,* 2 J. & H. 491), or where the testator was expressly estimating the adequacy of his estate to the charges upon it (*Barksdaile* v. *Gilliatt,* 1 Sw. 565; *Colpoys* v. *C.,* Jac. 451), or probably had that adequacy in view (*Doe* v. *Gillard,* 5 B. & Ald. 785; *Cuthbert* v. *Robinson,* 30 W.R. 366; *cp. Abbott* v. *Middleton,* 7 H.L.C. 68, 82, 94), such evidence has, however, frequently been received; and for cases of its admission since *Higgins* v. *Dawson, sup.,* see *Re Gibbs,* 1907, 1 Ch. 465; *Re Layard,* 32 T.L.R. 122, affd. on other grounds, *id.* 517; *Re Skillen,* 1916, 1 Ch. 518, holding such evidence admissible as surrounding circumstances though not to show intent; *Grealey* v. *Sampson,* 1917, 1 I.R. 286, C.A.; *Re Mackenzie,* 1917, 2 Ch. 58. Questions of evidence also sometimes arise as to the execution of powers of appointment by testamentary gifts. Thus, a general gift now executes a general power unless a contrary intent appears by the will (Wills Act, s. 27); but to show such contrary intent the circumstances existing at the date of the will alone may be considered, and not those happening afterwards (*Boyes* v. *Cook,* 14 Ch. D. 53; *Re Clark, id.* 422; as to Foreign Wills, see *Re Scholefield,* 93 L.T. 122). A general gift, however, will not *per se* execute a special power, and evidence of the state of the property at the time of the will or death cannot be received to show such intent (*Re Huddleston,* 1894, 3 Ch. 595; *Re Williams,* 42 Ch. D. 93; *Re Mills,* 34 *id.* 186; *Re Ackerley,* 1913, 1 Ch. 510, 514; *contra Re Mackenzie,* 1917, 2 Ch. 58, where a general bequest was held to execute a special power on evidence that a testatrix had little or no property but that comprised in

the power). On the other hand, if the gift be specific, evidence that the testator had no other property at the date of his will except that subject to the power (*id.; Re Wait,* 30 Ch. D. 617; *Re Gratwick,* 1 Eq. 177), or no power except that in question (*Re Milner,* 1899, 1 Ch. 563; *Re Mayhew,* 1901, 1 Ch. 677), will be admissible to show his intent. Moreover, as personal estate is still the primary fund for payment of debts and can only be exempted by express words or necessary implication (*Re Banks,* 1905, 1 Ch. 547), no evidence of the relative amount of the personalty and charges, or of the personalty and realty, is receivable (Jarman, 5th ed. 1463-1464; *Inchiquin* v. *French,* Amb. 33, 40; *Stephenson* v. *Heathcote,* 1 Eden, 38). (3) *Meaning of terms and other ambiguities.* Subject to the provisions of Rule II., *post,* evidence of surrounding circumstances is admissible to show the meaning of, or what was intended to be included in, particular terms used in a will, *e.g.* "money" (*Re Cadogan,* 25 Ch.D. 154; *Re Bramley,* 1902, P. 106), "securities" (*Re Rayner,* 1904, 1 Ch. 179), "widowhood" (*Re Hammond,* 1911, 2 Ch. 342, cited *post,* 642). So, the fact that the will was drawn by a layman is relevant to rebut the presumption of a technical user of terms (*Hall* v. *H.,* 1892, 1 Ch. 361; *Hamilton* v. *Ritchie,* 1894, A.C. 310, 313); though it has been doubted whether this fact can be proved extrinsically (*Richards* v. *Davies,* 13 C.B.N.S. 69, 86; *sed qu.*). Proof that the will was executed for valuable consideration may also be given, and will influence a construction favourably to the party giving it (Underhill, Wills, 42; *cp. Stevens* v. *King, ante,* 618). Where the will is founded on an erroneous assumption of fact, the surrounding circumstances are receivable to show whether the gift was intended to be absolute (*Crosthwaite* v. *Dean,* 5 Eq. 245; *Re Churchill,* 1917, 1 Ch. 206; *cp. Nickall* v. *Fawkes,* 50 Sol. Jo. 126), or conditional upon the assumption being true (*Thomas* v. *Howell,* 18 Eq. 198; *Campbell* v. *French,* 3 Ves. 321; Jarman, 6th ed. 188-90). As to erroneous recitals of fact, see *ante,* 603.

Statutes. When the meaning of an Act is ambiguous, but not when it is clear, the following extrinsic matters may be referred to as surrounding circumstances to construe the Act:—The state of the law prior thereto (especially in construing a codifying statute, *Wallis* v. *Russell,* 1902, 2 I.R. 585); the mischiefs unprovided for; the facts giving rise to the Act; and any reports by commissioners on the subject (*R.* v. *London (Bp.),* 24 Q.B.D. 213, 224; *Eastman* v. *Compt. of Patents,* 1898, A.C., 571, 573; *Powell* v. *Kempton Park Co.,* 1899, A.C. 143, 157; *Taff Vale Ry.* v. *Amalgamated Soc.,* 1901, A.C. 426); but not the speeches of members, the journals of either House, nor alterations made in Committee (*Lyons* v. *Wilkins,* 1899, 1 Ch. 255, 264; *R.* v. *Hertford Coll.,* 3 Q.B.D. 693, 707; *contra, R.* v. *Oxford (Bp.),* 4 Q.B.D. p. 535, was disapproved in *S. E. Ry.* v. *Ry. Commrs.,* 50 L.J.Q.B. 201, 203, H.L.). Prior, but not subsequent statutes, *in pari materiâ,* may also be consulted (*Macassey* v. *Thompson,* 36 Ir. L.T.R. 162, 164, H.L.; *Re Bolton,* 88 L.T. 851, *per* Joyce, J.); as well as Usage, under which term is included previous judicial decisions, the practice of conveyancers, and contemporaneous exposition (*Leverson* v. *R.,* L.R. 4 Q.B. 394, 406; Maxwell, Statutes, 39; see fully *post,* 629, 661-5); but not expert testimony (*post,* 630, 665). In construing Private Acts, the Court may consider not only the circumstances under which the Act was passed, but the position of the parties, the

practice as to *locus standi*, and at whose instance and for what reasons a particular clause was inserted (*Taff Vale Ry.* v. *Davis*, 1894, 1 Q.B. 43, C.A., approved in *Davis* v. *Taff Vale Ry*, 1895, A.C. 542, 547); but not the negotiations leading up to the Act (*id., per* C.A., p. 54), nor any decisions of the Committee not embodied therein (*Poole Harbour Commrs.* v. *Pike*, 110 L.T. Jo. 358). As to Preambles and Marginal Notes, see *ante*, 609, 615.

Libels and Threats. *Reference to Plaintiff.* Where the plaintiff is not expressly named, evidence of surrounding circumstances, *eg.* the relation of the parties, the cause and occasion of publication, and any other matters pointing the allusion to him, may be proved, as well as the opinion of friends, or reputation in the community, to the same effect (Odgers, Libel, 4th ed. 634; *ante*, 384, 399). And it is no defence that the defendant had no intention to refer to the plaintiff or to libel him (*Hulton* v. *Jones*, 1910, A.C. 20). *Meaning of words.* Where words are incapable of a defamatory meaning, no evidence may, of course, be given to establish such; but where the language is only *primâ facie* innocent, the plaintiff may, provided suitable innuendoes have been pleaded, show that it bears a secondary and defamatory sense. For this purpose, the relationship of the parties, the time and manner of the publication of the libel, and any facts mutually known to writer and recipient which would reasonably lead the latter to understand the words in such sense, may be proved as surrounding circumstances (*Capital & Counties Bank* v. *Henty*, 7 App. Cas 741; *Churchill* v. *Gedney*, 53 J.P. 471; *Ruel* v. *Tatnell*, 29 W.R. 172; Odgers, Libel, 4th ed. 124, 128, 632-4). The witness may also, as we have seen, after this foundation, be asked directly, "What did you understand by the words?" (*ante*, 399). Since, however, the test in such cases is not what the writer meant, but what the readers understood by the words, transactions unknown to the latter and not referred to by the former at the time, are inadmissible (*Capital, &c., Bank* v. *Henty, sup.; Martin* v. *Loei*, 2 F. & F. 654; Odgers, 117; citing *Hankinson* v. *Bilby*, 16 M. & W. 442). So, though other articles in the same newspaper may be referred to to show the sense in which the libellous words were used, yet articles in prior or subsequent issues may not (*id.; Bolton* v. *O'Brien*, 16 L.R. I. 97); though it is otherwise to show malice or deliberation (*ante*, 151, 156, 175).

Similar rules apply to ambiguous expressions in a threatening letter; thus, after proof of the surrounding circumstances, direct evidence may be given by the prosecutor, as to what he understood by such letter (*R.* v. *Hendy, ante*, 399), and perhaps by the defendant as to what he meant thereby (*R.* v. *Tucker*, Moo. C.C. 134; but *cp. R.* v. *Syme*, 27 T.L.R. 562, and *Hulton* v. *Jones, supra*).

Patents and Trade-Marks. In order to construe a patent, evidence of the state of manufacture and condition of knowledge as to its subject-matter existing at the time, is admissible as surrounding circumstances; and to show these, as well as to explain the terms of art employed, prior specifications, although not otherwise admissible as a guide to its meaning, may be referred to (*Clark* v. *Adie, ante*, 393, 612). So, to explain an ambiguous trade-mark in an invoice of goods sold, declarations by the vendor at the time of the sale have been received (*Cameron* v. *Wiggins*, 1901, 1 K.B. 1, cited *post*, 638).

RULE II. (*Primary and Secondary Meanings. Correct and less correct Names and Descriptions.*) (*a*) When the words of a document, in their prim-

ary or ordinary sense, are applicable to the facts, and are not modified by the context, extrinsic evidence cannot be given to show that they were not used in that sense: (*b*) But where it is clear either from the context or the facts, that such meaning cannot have been intended, extrinsic evidence (including surrounding circumstances, treatment and habits of speech, but *not* direct declarations of intention) may be given to show that they were used in some secondary or less ordinary sense, provided it is one which the words can properly bear.

[Tay. ss. 1165, 1202-1203; Steph. art, 91 (2) and (5) Norton, Deeds, 177-80, 214-27; Elphinstone, Convey. 5th ed. 26; Theobald, Wills, 7th ed. 138-9; Underhill, Interp. 3. Sections (*a*) and (*b*) of the above rule correspond respectively with Wigram's Props. II. and III. His Proposition II. is as follows:

"Where there is nothing in the context of a will from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, and where his words so interpreted are *sensible with reference to extrinsic circumstances*, it is an inflexible rule of construction that the words of the will shall be interpreted in their strict and primary sense, and in no other, although they may be capable of some popular or secondary interpretation, and although the most conclusive evidence of intention to use them in such popular or secondary sense be tendered."

By 'sensible with reference to extrinsic circumstances' is not meant that the extrinsic circumstances make it more or less reasonable or probable that the primary meaning is what the writer should have intended; it is enough if those circumstances do not exclude it, that is deprive it of all reasonable application according to such primary meaning (*Shore* v. *Wilson*, 9 C. & F. 355, 526, *per* Coleridge, J.). So, also, *per* Blackburn, J., 'The general rule is to give the words their natural meaning unless, when applied to the subject matter, . . they produce . . . an absurdity or inconvenience so great as to convince the Court that the words could not have been used in their proper signification' (*Allgood* v. *Blake*, L.R. 8 Ex. 160, 163). Although Wigram asserts that the above rule is 'inflexible,' this is denied by Prof. Thayer and Mr. F. M. Nichols, who contend that, unless the primary meaning is fixed by law, a preponderance of probability is sufficient to justify the adoption of the secondary meaning (Pr. Tr. Ev. 446-8, 461, 469-71, 481; 2 Jur. Soc. Pap. 367-75; see fully 20 L.Q. Rev. 264-6). Some slight relaxation in this direction is certainly countenanced by *The National Society &c.* v. *The Scottish National Society &c.*, 1915, A.C. 207, where Ld. Loreburn remarked that it had been advanced as a general proposition that, when once the grantee was accurately named, there was a rigid rule which forbade any enquiry with regard to the person to take the legacy. I am not prepared to accept so wide a proposition as that . . . extreme danger is apt to lurk in broad rules of that description . . But the accurate use of a name in a bequest affords a strong presumption against any rival who is not possessed of the name mentioned in the will . . what a man had said ought to be acted on unless it is clearly proved that he meant something different." Wigram's Proposition III. is as follows:

"Where there is nothing in the context of a will from which it is apparent that the testator has used the words in any other than their strict and primary sense, but his words, so interpreted, are *insensible with reference to existing circumstances*, a Court of law may look into the existing circumstances of the case, to see whether the meaning of the words be sensible in any popular or secondary sense of which, *with reference to these circumstances*, they are capable."

This is the converse of Prop. II.; but the line between 'sensible,' and 'insensible' is in practice often very difficult to draw. Regarded as a rule of evidence, however, Prop. III. is too narrow. Thus, the statement that when primary meanings are insensible, the Court may look into extrinsic circumstances as a basis for some secondary sense, carries the enquiry little, if any, further than Prop. II., under which extrinsic circumstances may equally be looked into for a primary sense. Prop. III., indeed, appears to imply that when once some possible, though incorrectly described, subject is shown to exist, the function of extrinsic evidence is ended and the Court itself must do the rest (ss. 64, 67). Elsewhere, however, Wigram appears to recognize that this view is too restricted, and that extrinsic evidence (excluding of course direct declarations of intent) is admissible not merely to show (1) the *existence* of such an object, but also (2) that the testator actually *intended to refer to it,* for he intimates that a secondary sense may be put upon the words 'provided the circumstances be such as to satisfy a Court that the testator intended that which is ascribed to him,' (Prop. V. s. 100); while, still later he concedes that evidence is receivable to prove 'that the circumstances of the case are such as to *admit* of, or *require,* the secondary interpretation (ss. 212-4). This conclusion, however, might have been more explicitly stated, as also assigned to its proper place under Prop. III., instead of being left for the reader to abstract from a number of scattered and sometimes inconsistent passages, and always in the teeth of the author's protest that 'in such cases . . . intention never comes in question except as expressed in the will, (ss. 70, 76, 78), and that 'evidence of intention' is never admissible except in cases of equivocation (ss. 9-10; 194-215). It is here that Wigram's *bête-noire* of actual intention plays its most baffling part, and that his phraseology becomes the most provokingly ambiguous. What he, in fact, means by Prop. III., as amplified by ss. 100, 212-14, is that circumstantial evidence of intention (which he is here constrained to call 'Explanatory Evidence,' see *ante,* 610-1), is admissible in support of secondary meanings, but that direct declarations of intent (called by him 'Evidence of Intention') are not. The difficulty with his treatise throughout, however, is that he neither defines, nor adheres to the same meaning of, 'Evidence of intention,' but sometimes means and excludes thereby only direct declarations of intent, and at other times means and excludes thereby circumstantial as well as direct evidence of intent [*ante,* 611; 20 L.Q. Rev. 266-7].

Scope. Rule I. included cases where the words, being vague or general, were equally capable of a wide or narrow meaning. The present rule deals with words having a proper and also a less proper sense or application. The admissibility of extrinsic evidence here may depend not only upon the context of the document, but upon the nature of the words themselves, as well as the circumstances under which they were used, and is to some extent a matter of degree. Thus, no evidence at all is receivable to explain ordinary words used in a modern statute (*Camden* v. *Inland Rev. Commrs.* 1914, 1 K.B. 641, 645-50, C.A.), or words which have a fixed meaning and so are not susceptible of explanation (*Bank of N. Zealand* v. *Simpson,* 1900, A.C. p. 189), *e.g.* statutory words of weight, measure, time, or quantity (*Smith* v. *Wilson,* 3 B. & Ad. 728, 731; *O'Donnell* v. *O'D.,* 13 L.R.I. 226; *Bruner* v. *Moore,* 1904, 1 Ch. 305; *Wilkins* v. *M'Ginity,* 1907, 2 I.R. 660); while, where

evidence is admissible, less is generally needed to divert words from their appropriate meaning in the case of wills than of deeds, in the case of popular than of legal terms, and in the case of legal terms affecting personalty than of those affecting realty (Underhill & Strahan, Interp. 4-5). *Persons.* In the case of persons, words of relationship *primâ facie* import legitimate relationship; if, therefore, legitimate members exist, evidence cannot in general be given that illegitimates were intended (*Hill* v. *Crook,* L.R. 6 H.L. 265; *Re Fish,* 1894, 2 Ch. 83, C.A.; *Re Pearce,* 1914, 1 Ch. 254, C.A.); but, if none do, or can, exist (*Hill* v. *Crook, sup., Dorin* v. *D.,* L.R. 7 H.L. 568; *Re Pearce, sup.*), or if, though some exist, the context may include the latter (*id.*), such evidence will be receivable. Again, if a given person, known to the testator, accurately fulfils the words in the will, and there is no one else in competition, evidence cannot be given to show that such person was not intended (*Sherratt* v. *Mountford,* L.R. 8 Ch. 928; *Re Wolverton,* 7 Ch.D. 197, 199; *McHugh* v. *McH.,* 1908, 1 I.R. 155, 158). And, if one of two claimants accurately fulfils the words and the other does not, evidence in favour of the latter will, save in very exceptional circumstances, be rejected (*National Society &c.* v. *Scottish National Society,* 1915, A.C. 207; *Re Peel,* L.R. 2 P. & D. 46; *Re Parker,* 17 Ch. D. 262; *Re Chenoweth,* 45 Sol.Jo. 520; *Holmes* v. *Custance,* 12 Ves. 279; *Delemare* v. *Robella,* 1 *id.* 412). Cases involving competition between nearer and more remote members of a class, or correct and slightly less correct names or descriptions are, however, sometimes treated as equivocations and the evidence admitted (*Grant* v. *G.,* L.R. 5 C.P. 727; *Re Wolverton, sup.; post,* 626-9). Where there are two objects suggested, one correctly described, but known to the testator to be non-existent, and one incorrectly described but existing, extrinsic evidence in favour of the latter will be received, but in favour of the former rejected (*Stringer* v. *Gardiner,* 4 De G. & J. 468; *Re Offner,* 1909, 1 Ch. 60, 63; *Re Halston,* 1912, 1 Ch. 435, disapproving *Re Ely,* 65 L.T. 452, *contra*); but this does not apply, where the correctly described object is not known to the testator to be non-existent (*Re Ovey,* 29 Ch.D. 560, 564; *Makeowen* v. *Ardagh,* I.R. 10 Eq. 445). *Cp. supra, ante,* 618.

Property. In the case of *property,* where proof has been given of a subject-matter satisfying all the terms of a written description, the maxim *non accipi debent verba in demonstrationem falsam quæ competunt in limitationem veram* applies, and extrinsic evidence cannot be given to show that something more or less extensive was intended (*Horwood* v. *Griffith,* 4 De G. M. & G. 700, 708; *Hardwick* v. *H.,* 16 Eq. 168, 175; *Re Seal,* 1894, 1 Ch. 316; Norton, Deeds, 212-219). This applies not only to descriptions in the deed itself, but to those in a map or schedule referred to therein (*Lyle* v. *Richards,* L.R. 1 H.L. 222; *Barton* v. *Dawes,* 10 C.B. 261; *Llewellyn* v. *Jersey,* 11 M. & W. 183; *Boyle* v. *Mulholland,* 10 Ir. C.L. 150); though it is otherwise where such map is clearly erroneous (*Lyle* v. *Richards, sup.; Re Boulter,* 4 Ch.D. 241; *post,* Rule III.), or on too small a scale to be effective (*Taylor* v. *Parry,* 1 Scott, N.R. 576; *St. Leonards* v. *Ashburner,* 21 L.T. 595), or where, though attached to the deed, it is not referred to therein (*id.; Wyse* v. *Leahy,* I.R. 9 C.L. 384; *Re Otway,* 13 Ir. Ch. R. pp. 233-4). So, with regard to personal property; thus, where there is a specific bequest and proof of property correctly answering the description, evidence is not

admissible to extend it to other property (*Horwood* v. *Griffith,* 4 De G. M. & G. 700, 708). Where, however, general words of assignment are followed by a particular enumeration, either in a schedule, plan, or otherwise, it is often a question of difficulty whether such enumeration is restrictive under the present rule, or whether it may be disregarded under Rule III. *inf.;* (for examples of the former construction, see *Wood* v. *Rowcliffe,* 20 L.J. Ex. 285; *Mee* v. *Parren,* 15 L.T. 320; *Re Craig,* I.R. 4 Eq. 158; and of the latter, *Baker* v. *Richardson,* 6 W.R. 663; *Exp. Jardine, Re McManus,* 10 Ch. App. 322; *King* v. *George,* 5 Ch.D. 637; *Re Fleetwood,* 15 *id.* 594; *Lloyd* v. *Sturgeon Co.,* 85 L.T. 162; *Stapleton* v. *D'Alton,* 49 Ir. L.T.R. 62). Where there is a variance between the description in the deed and the map or plan annexed, there is no general rule as to which is to be preferred, but the whole facts must be considered (*Eastwood* v. *Ashton,* 1915 A.C. 900; *Watcham* v. *A.-G.,* 1919 A.C. 533). In the first of these cases, the plan was held to prevail; while in *Horne* v. *Struben,* 1902 A.C. 454, and *Mellor* v. *Walmesley,* 1905, 2 Ch. 164, an opposite decision was reached. Where, however, land belonging to A. was conveyed, part to B. and part to C., in an action by B. against C., the plan on C.'s conveyance was rejected to explain an ambiguity in B.'s (*Parsons* v. *Mitchell,* 118 L.T.Jo. 411). As to the use of Ordnance Maps to explain Conveyances, see 56 Sol. Jo. 608, *per* Sir W. H. Elphinstone; and *cp. ante,* 360.

RULE III. (*Incorrect Names and Descriptions*). When the words of a document apply in part correctly and in part incorrectly to some single subject-matter, extrinsic evidence (including surrounding circumstances, treatment, and habits of speech, but *not* direct declarations of intention) may be given to show whether they were, or were not, intended by the writer to apply thereto; and when the words apply partly to one subject-matter and partly to another, but correctly to neither, similar evidence may be given to show which of the two was intended.

[Tay. ss. 1218-1223; Steph. art. 91 (7); Norton, Deeds, 96-111, 177-80; Theobald, Wills, 7th ed. 140-7, 265-300; Wigram Prop. III, explained, *ante,* 621-2. As to the exclusion of direct declarations of intent, under the present rule, see *Doe* v. *Hiscocks, Charter* v. *C., &c., post,* 652; and as to mistake, see further *ante,* 327-8, 332, 584-6, 601-3].

Principle. The principle of the rule is expressed in the maxims—*veritas nominis tollit errorem demonstrationem; nihil facit error nominis cum de corpore constat; falsa demonstratio non nocet cum de corpore constat.* Apart, of course, from the present rule, mistakes in deeds and wills may sometimes be corrected (*Greenwood* v. *G.,* 5 Ch. D. 954; *Re Northen's Estate,* 28 Ch.D. 153), blanks filled (*Mourmand* v. *Le Clair,* 88 L.T. 738; *Re Harrison,* 30 Ch.D. 390; *Re Macduff,* 1896, 2 Ch. 451; *Chamberlain* v. *Young,* 1893, 2 Q.B. 206), or words supplied (*Tolhurst* v. *Associated, &c., Manfrs.,* 1903, A.C. 414), by construction, without resort to evidence.

Where a single subject-matter only is involved, the inquiry, in cases of incorrect description, will often be confined to the mere sufficiency of the expression. Thus, when the name of a legatee is correct, but the description incorrect, and there is no one answering the description, the person answering the name will take, and *vice versâ* (Theobald, Wills, 7th ed. 268).). So, a devise of "freeholds" will carry leaseholds, if that is all the testator had

(*Day* v. *Trig*, 1 P. Wms. 286); or a bequest of "shares" in a company, debenture stock therein, provided he held no shares (*Re Weeding*, 1896, 2 Ch. 364; *Re Bodman*, 1891, 3 Ch. 135); or of monies on 'current account,' those on deposit, if that was the only account open (*Re Vear*, 62 Sol.Jo. 159). Where, however, the identity or extent of the subject-matter is in question, evidence of the restricted kind mentioned in the Rule (*sup.*). becomes admissible, not merely that a person or thing exists to which the document might refer, but also that such person or thing was in fact intended by the writer; and this applies whether a single subject-matter only is involved (*Makeown* v. *Ardagh*, I.R. 10 Eq. 445; *Re Vaughan*, 17 T.L.R. 278; *Re Jameson*, 1908, 2 Ch. 111), or whether there are several in competition, *e.g.* two legatees answering different parts of the same name or description, or one answering the name and the other the description (*Charter* v. *C.*, L.R. 7 H.L. 364; *Cloak* v. *Hammond*, 34 Ch.D. 255).

Misnomer or Misdescription of Persons. Persons executing, or referred to in, deeds or wills may be named or described in any way the parties select, there being no need to give a Christian name, a surname, or in fact any particular name. An error in name or description, or both, will not therefore invalidate the instrument, and extrinsic evidence, other than direct declarations of intent, is admissible to identify and ascertain the persons intended. [*Simmonds* v. *Woodward*, 1892, A.C. 100, 105-6; *Wray* v. *W.*, 1905, 2 Ch. 349; *Maughan* v. *Sharpe*, 17 C.B.N.S. 443; Norton, Deeds, 177-80; Theobald, Wills, 7th ed. 265-83; *cp. ante*, 325-8, 332, 515, 523, *post*, 627. As to persons referred to in Libels, see *ante*, 620].

Erroneous enumeration of Class. When there is a gift to a class, but an erroneous enumeration of its members, extrinsic evidence is admissible to show who were the individuals intended; but if this cannot be ascertained either from the context or circumstances, the Court will reject the enumeration on the presumption of mistake, and all the members will take (*Newman* v. *Piercey*, 4 Ch.D. 41; *Re Stephenson, Donaldson* v. *Bamber*, 1897, 1 Ch. 75, 82; *Re Sharp*, 1908, 2 Ch. 190). It has been held that this presumption applies only to legitimate children (*Re Mayo*, 1901, 1 Ch. 404); and that direct declarations of intention are not admissible to identify the individuals [*Re Mayo, sup.*; *Doe* v. *Hiscocks*, 5 M. & W. p. 371, disapproving *Hampshire* v. *Peirce*, 2 Ves. Sr. 216; the dictum of Palles, C.B., in *Andrews* v. *A.*, 15 L.R.I. 199, 216, that where a *less* number than the true one is stated there is an equivocation, caused by the existence of several separate groups each consisting of the named number, and that declarations of intention are then admissible, seems untenable. Indeed, in *Matthews* v. *Foulshaw*, 12 W. R. 1141, all evidence beyond such as showed the mere state of the family was rejected for this purpose; though in *Newman* v. *Piercey, Re Mayo, sup.*, and *Yeats* v. *Y.*, 16 Beav. 170, a slightly wider scope appears to have been countenanced].

Misdescription of Property. Specific Legacies. Election. In cases of misdescription, the test of whether words amount to a limitation under Rule II., or to a false demonstration which may be disregarded under the present rule, has been stated as follows:—"If all the terms of description fit some particular property, you cannot enlarge them by extrinsic evidence. But if they do not fit with accuracy, the whole thing must be looked at

fairly to see what are the leading words of description, and what is the subordinate matter, and for this purpose extrinsic evidence is admissible" (*Hardwick* v. *H.*, 16 Eq. 168, 175, *per* Ld. Selborne; *cp. Whitfield* v. *Langdale*, 1 Ch.D. 61,74; *Travers* v. *Blundell*, 6 *id.* 436; *Re Bright-Smith*, 31 *id.* 314; *Slingsby* v. *Grainger*, 7 H.L.C. 273, 292; Norton, Deeds, 214-27; Theobald, Wills, 7th ed. 137-47). The proof here may consist of circumstantial evidence of intention, but not of direct declarations of what the writer intended to include in the subject-matter. As to where general words are controlled by particular descriptions, or the latter are inconsistent, see *ante*, p. 624. Where a testator gives a *specific legacy* of property which he had, but had parted with prior to the date of the will, extrinsic evidence is admissible to show how the mistake arose, but not that he intended some other misdescribed object, and the specific legacy may then be construed as a general one (*Selwood* v. *Mildmay*, 3 Ves. 306; *Lindgren* v. *L.*, 9 Beav. 358; *Goodlad* v. *Burnett*, 1 K. & J. 341; *Findlater* v. *Lowe*, 1904, 1 I.R. 519; *Re Smith*, 20 T.L.R. 287; *Re Jameson*, 1908, 2 Ch. 111). Cases of *mistake* must, however, be distinguished from those of *misdescription*, for in the latter the legatee takes the substituted subject-matter, and in the former he does not (Jarman, 6th ed. 1102, 1275).—Where the subject-matter of the specific legacy has *changed*, so that its description has become inaccurate at the date of death, evidence is admissible to show the nature and extent of the change and the knowledge of the testator and his dealings with such subject-matter (*Re Jameson, sup.; Re Atlay*, 56 Sol.Jo. 444); and if the subject, although altered in number or form, remains substantially the same, the legatee will take (*Re Slater*, 1907, 1 Ch. 665, 672; *Re Clifford*, 1912, 1 Ch. 29, 32; *Re Leeming, id.* 828), while, if it has become substantially different, he will not, but the legacy will be adeemed (*Re Gibson*, L.R. 2 Eq. 669; *Re Gray*, 36 Ch.D. 205; *Re Atlay, sup.; post*, Ch. xlvii, Ademption). Where the will directed that changes should be deemed substitutionary if memoranda showed the particulars, it was held that these were admissible to show what was intended to be included in the specific legacy (*Townsend* v. *T.*, 1 L.R.I. 80). In cases of *Election*, the intent of the testator to dispose of property not belonging to him must appear by the will, and extrinsic evidence that he mistakenly believed it to be his, or that he so treated it, is not admissible [Jarman,Wills, 6th ed., 541-3; *Doe* v. *Chichester*, 4 Dow, pp. 76, 89-90; *Clementson* v. *Gandy*, 1 Keen 309; *Dummer* v. *Pitcher*, 2 Myl. & K. p. 268; *Galvin* v. *Devereux*, 1903, 1 I.R. 185; *Re Harris*, 1909, 2 Ch. 206, 209; *contra, Pickersgill* v. *Rodger*, 5 Ch.D. 163, 170-1, is not sustainable].

RULE IV. (*Equivocations.*) When the language of a document, though intended to apply to one person or thing only, is equally applicable in all its parts to two or more, and it is impossible to gather from the context which was intended, an *equivocation* arises, and in addition to the evidence admissible under former rules, direct declarations of the writer's intention may be given to solve the ambiguity.

[Tay. ss. 1206-1214; Steph. art. 91 (8); Norton, Deeds, 96-107; Theobald, Wills, 7th ed., 131-4; Wigram gives the rule as follows:

"Where the object of a testator's bounty, or the subject of disposition (i.e. the person or thing intended), is described in terms which are applicable indifferently to more than one person or thing, evidence is admissible to prove which of the persons or things so described was intended by the testator." (Prop. VII.; see 20 L.Q. Rev. 268-71).

What are equivocations. As equivocation has been held to arise where the same name or description (1) fits two persons or things accurately; or (2) fits one accurately and the other popularly but less accurately, *e.g.* the same name borne by father and son (*Jones* v. *Newman,* 1 W. Bl. 60; *ante,* 523, *post,* 640), or by one accurately and the other in a transposed order (*Henderson* v. *H.,* 1905, 1 I.R. 353, 362), or by one person bearing the given name solely, and the other bearing additional names (*Bennett* v. *Marshall,* 2 K. J. 740, approved in *Webber* v. *Corbett,* 16 Eq. 515; and *cp. Re Wolverton,* 7 Ch.D. 197; but see *National Society &c.,* v. *Scottish National Society, &c., infra*); or, perhaps, in the case of a nephew or niece, where one is related by blood, and the other by marriage (*Grant* v. *G.,* L. R. 5 C. P. 727, as to which, however, see *post,* 660), the distinction between such cases and those falling under Rule II. being very slight; or (3) where it fits two objects equally but subject to a common inaccuracy, provided that the inaccuracy be a mere blank, or applicable to no other person or thing, for then the Court can reject the inaccuracy as *falsa demonstratio* and the residue will form a true equivocation (*Doe* v. *Hiscocks,* 5 M. & W. 363, 370; *Re Hubbuck,* 1905, P. 129, 135; *Re Ray,* 1916, 1 Ch. 461; Wigram, s. 186).

What are not Equivocations. On the other hand, there is no equivocation where (1) Two institutions bear the same name, but one is a mere local branch of the other (*Re Raven,* 1916, 1 Ch. 673); nor (2) where one answers fully to the verbal description, and the other has an additional name (*National Society &c.* v. *Scottish National Society &c.,* 1915, A.C. 207; *post,* 646, 658); nor (3) where part of a name or description applied to one subject and the remainder to another (*Doe* v. *Hiscocks, sup.;* for the case then falls under Rule III.); nor (4) in respect of legitimate and illegitimate relations of the same degree (*Re Fish,* 1894, 2 Ch. 83; *ante,* Rule II.; though *cp. Re Ashton, post* 645); nor (5) where, in cases of erroneous enumeration of a class, there are distinct groups of persons containing common units (*ante,* 625).

Declarations of Intention. The admission of declarations of intention in cases of equivocation, as an exception to the general rule, is, as we have seen, a survival of the old practice of allowing an averment of intent in such cases because, as "the general intent includes both the special," here alone "it could stand with the words" [Bacon, Maxims, Reg. 23; *cp. ante,* 608-9] The modern reasons for the exception have been expressed as follows: "Although the words do not *ascertain* the subject intended, they do *describe* it. The person held entitled has answered the description in the will. The effect of the evidence has only been to confine the language within one of its natural meanings. The Court has merely rejected, and the intention which it has ascribed to the testator (sufficiently expressed) remain *in* the will . . . or perhaps the more simple explanation is that the evidence only determines *what subject was known to the testator* by the name or other description he has used" (Wigram, s. 152). "The words of the will do describe the subject intended; and the evidence has not the effect of varying the will in any way whatsoever; it only enables the Court to reject one of the subjects . . . and to determine which of the two the devisor understood to be signified by the description" (*Doe* v. *Needs,* 2 M. & W. 129, 140, *per* Parke, B.). "The intention shows what the writer meant to do, and when you know that you

immediately perceive that he has done it by the general words he has used which, in their ordinary sense, may properly bear that construction" (*Doe* v. *Hiscocks,* 5 M. & W. 363, 369, *per* Ld. Abinger). These reasons have been acutely criticised by Mr. Vaughan Hawkins, who supplies what Prof. Thayer considers a conclusive answer thereto, based upon Wigram's own words. The latter remarks that it is difficult to understand how the statute can be satisfied by a written description which is insufficient to determine the identity of the person intended; adding that "to define that which is indefinite is to make a material addition to the will" (s. 158). Mr. Hawkins contends that this is precisely what happens in the case of equivocations; and that the case of two persons or places bearing the same name is a case where language is imperfect, like the chalk mark put upon the door in the "Forty Thieves," which Morgiana rendered useless by chalking all the other doors in a similar manner, so that to distinguish any one door some additional mark was required. "It is not true," he contends, "to say with Ld. Abinger that when you know what the writer has said you immediately perceive that he has done it; on the contrary, you perceive that the intention has been defeated unless some new and additional mark be supplied which will distinguish the intended object from all others similarly marked." In other words, he asserts that what happens in cases of equivocation is only that which happens in all cases of interpretation, viz., a defining of that which was indefinite and so the making of a material addition to the document; and that it is only an historical anomaly that the special evidence admissible in cases of equivocation is not admissible generally (2 Jur. Soc. Pap. 319-24; Thayer, Pr. Tr. Ev. 442-3; *ante,* 608-9). On the other hand, Mr. Justice O. W. Holmes considers that the exceptional practice in cases of equivocation rests upon a distinct, but theoretically correct basis, since, while other words may mean different things, a proper name means one person or thing and no other, so that although two names may be the same in sound and even in spelling, they are still different words and can never mean the same person or thing. In such a case, he remarks, we let in evidence of intention not to help out what theory recognizes as an uncertainty of speech, and to read what the writer meant into what he has tried but failed to say; but, recognizing that he has spoken with theoretic certainty, we inquire what he meant in order to find out what he said. It is on this ground that there is no contract when a proper name, used by one party, means one ship, and that used by the other another (*Raffles* v. *Wichelhaus, post,* 657). The mere difference of intent is immaterial; the parties have said different things. He accordingly argues that if a donor, instead of saying "Blackacre" has said "My gold watch," owning more than one, then, "inasmuch as the words, though singular, purport to describe any such watch belonging to the speaker, I suppose that no evidence" (*i.e.* direct statements) "of intention would be admitted" (12 Harv. Law Rev. 418-9). In England, however, this explanation of the anomaly would not suffice, since the Courts make no distinction between proper and common names, or persons and things (*Charter* v. *C.,* L.R. 7 H.L. 364, 377, *per* Cairns, L.C.; *post,* 657-8 [20 Law Quart. Rev. 269-71].

The intention to be established is, it must be remembered, that existing at the *time* of the execution (*Whitaker* v. *Tatham,* 7 Bing. 628; *cp. ante,* 63-4, *post,* 668, 670, 674); but subject to this, the declarations themselves may have been made either *before, at,* or *after* the execution of the

document, although contemporaneous declarations will, of course, be entitled to the most weight (*ante*, 324; *Doe* v. *Hiscocks*, 5 M. & W. p. 368; *Doe* v. *Allen*, *inf.*; *Charter* v. *C.*, *sup.*; *Cloak* v. *Hammond*, *Re Taylor*, 34 Ch.D. 255, 258, *per* Cotton, L.J.; Tay. s. 1209). As to the admission of direct statements of intention to establish or impeach the factum of the instrument, see *ante*, chap. xxviii.; and to rebut presumptions, see *post*, chap. xlvii.

Declarations of intention have been considered not receivable when the equivocation can be solved either by the context alone (*Doe* v. *Westlake*, 4 B. & Ald. 57; *Castledon* v. *Turner*, 3 Atk. 257; though *cp. Doe* v. *Allen*, 12 A. & E. 451), or perhaps by the surrounding circumstances without recourse to the declarations (*Healy* v. *H.*, 9 I.R. Eq. 418; Elph. Deeds, Rule 25; Jarman, 5th ed. 404-405; Wigram, Props. vi., vii.; Thayer, Pr. Tr. Ev. 455-456; *contra*, *Phelan* v. *Slattery*, 19 L.R.I. 177; Prof. Graves, 28 Am. L. Rev. 342 *n*); and they are probably only receivable to show *which* of the subjects was intended and not that *both or all* were, since this would vary the document (*Richardson* v. *Watson*, 4 B. & Ad. 787; *cp. Re Stephenson*, *Donaldson* v. *Bamber*, 1897, 1 Ch. 75). Where no evdence is forthcoming to solve the equivocation, the document will, subject to the provisions of Rule VI., *infra*, be void for uncertainty (*Re Stephenson*, *sup.*).

RULE V. (*Custom and Usage. Contemporanea expositio. Course of dealing. Expert Testimony. Dictionaries.*)—*Usage.* When the words of a document are used in relation to places or people where, or amongst whom, established usages prevail, proof of such usages may be given to construe the document although the words themselves are unambiguous (*Dashwood* v. *Magniac*, 1891, 3 Ch. 306; *Myers* v. *Sarl*, 3 E. & E. 306); and, where particular terms have a double meaning, the one common and the other local or peculiar, similar evidence may be given to explain such terms, although their ordinary meaning might also apply. Evidence of usage, however, cannot be given to vary the statutory meaning of words (*Smith* v. *Wilson*, 3 B. & Ad. 728; *O'Donnell* v. *O'D.*, 13 L.R.I. 226); nor where it is expressly excluded by, or is inconsistent with, the terms of the document (*ante*, 105-7, 579); nor where there is nothing in the context or surrounding circumstances pointing to a peculiar use of the words (*Holt* v. *Collyer*, 15 Ch.D. 718; *Malcomson* v. *Morton*, 11 Ir.L.R. 230; *Abbott* v. *Bates*, 33 L.T. 490).

Such usages, when not judicially noticed, are provable by witnesses; but they raise an inference for the jury merely, and not a conclusion of law that the parties used the words in the conventional sense (Tay. s. 1160).

Contemporanea Expositio. Under this head is usually placed the rule that an order to explain, but not to contradict, ancient documents whose meaning is doubtful, *the acts of the parties*, even *before* the execution of the instrument (though not their declarations), or the *mode in which property has since been held and enjoyed* thereunder, as well as constant modern user may be given in evidence (*A.-G.* v. *Vandeleur*, 1907, AC. 369; *Sadlier* v. *Biggs*, 4 H.L.C. 435; *Van Dieman's Land Co.* v. *Table Cape Board*, 1906, A.C. 92; Tay. ss. 1204-1205). Such evidence, however, seems now admissible not only in the case of ancient, but of modern documents, and whether the ambiguity be patent or latent (*Van Dieman's Land Co.* v. *Table Cape Board*, *sup.*; *Watcham* v. *A.-G.*, 1, 87, L.J.P.C. 481; *contra*, *Assheton-Smith* v. *Owen*, 75 L.J.Ch. 181, 200, *per* Cozens-Hardy, L.J. is not sustainable). On the other hand, where

the meaning of the words is unambiguous, the subsequent acts of the parties are not admissible to construe it, whether the document be ancient or modern (*N.E. Ry.* v. *Hastings,* 1900, A.C. 260; *Clyde Navigation* v. *Laird,* 8 App. Cas. 658, 670, 673; *Winstanley* v. *N. Manchester Overseas,* 1910, A.C. 7, 18; *Lord Advocate* v. *Walker's Trustees,* 1912, A.C. 95, 102-3).

Course of Dealing.—Where the meaning of a document is doubtful (*Bourne* v. *Gatliff,* 11 C. & F. 45; *Forbes* v. *Watt,* L.R. 2 Sc. & D. 214; *Harrison* v. *Barton,* 30 L.J.Ch. 213; *Royal Exchange Corp.* v. *Tod,* 8 T.L.R. 669), but not when it is clear (*N.E.Ry.* v. *Hastings, sup.*; *Marshall* v. *Berridge,* 19 Ch.D. 233), the sense in which *both,* but not *one only,* of the parties, have acted on it, is admissible in explanation.

Expert Testimony. Dictionaries. The testimony of experts may be given to explain the meaning of technical, local, obsolete, or foreign terms, or of those which are abbreviated, imperfectly legible, or written in cypher (*ante,* 387-8, 390, 393, 612; *post,* 665; Wigram's Prop. IV.), but not of ordinary words used in modern Statutes, of which the Court, aided where necessary by dictionaries and other literary authorities, will take judicial notice (*Camden* v. *Inland Rev. Commrs.* 1914, 1 K.B. 641, 645-50, C.A.) As to the function of experts in relation to foreign documents, see *Chatenay* v. *Brazilian Co., ante,* 15, 390; and as to *Dictionaries,* see *ante,* 379).

RULE VI. (*Documents Void for Uncertainty.*) Where the language of a document, aided as above by extrinsic evidence, is insufficient to determine the writer's meaning, the document will, unless the defect can be cured by construction or election, be void for uncertainty [Steph. art. 91 (3); Elph., Deeds, 105].

EXAMPLES.

RULE I.—*Surrounding Circumstances.*

(*Contracts.*)

Admissible.	*Inadmissible.*
Parties. A. agrees in writing to buy land from B., stating that he is buying on behalf of the *proprietor,* or the *owner,* or the *mortgagee.* In an action for specific performance, parol evidence is admissible to show who each of these persons is, the description being sufficient under the Statute of Frauds, since it is a statement of fact as to which there can be perfect certainty (*Rossiter* v. *Miller,* 3 App. Cas. 1124; *Pattle* v. *Anstruther,* 69 L.T. 175; *Sheers* v. *Thimbleby, ante,* 528; *cp. Carr* v. *Lynch, infra*). (As to incorrect descriptions, see *post,* Rule III.)	*Parties.* A. agrees in writing to buy land from B., stating that he is buying on behalf of the *vendor,* or the *proposing lender,* or his *principal* or his *client,* or his *friend,* or *those whom it may concern.* In an action for specific performance, parol evidence is not admissible to show who each of these persons is, although B. may in fact know, the description being insufficient under the Statute of Frauds, since it is one that might lead to a conflict of evidence (*Jarrett* v. *Hunter,* 34 Ch.D. 182; *Rossiter* v. *Miller,* &c., *opposite. Cp. ante,* 581-2).
C., as traveller for B., books the following order in A.'s ledger: "Mr. A., 32 sacks culasses at 39*s.* June 8. C." In an action by A. for non-delivery, B.'s defence being no note in writing showing who was buyer and who seller;—held, evidence that A. was a baker and B. a dealer in flour which A. would require for his trade, was admissible to solve the ambiguity, and that the note was suffici-	A. sues B. on the following written contract:—"B. agrees to buy the whole of the lots of marble *purchased by A.* and now lying at L., at 1*s.* a foot.—B." Held, the note being insufficient under the statute as not mentioning A.'s name as seller, A. could not show by parol that he was in fact the seller (*Vandenbergh* v. *Spooner,* L.R. 1 Ex. 316).

Admissible.	*Inadmissible.*

ent under the statute (*Newell* v. *Radford*, L.R. 3 C.P. 52).

A. signs and hands B. a memo. that "In consideration of *your having this day paid me* £50, I agree to grant you a *further lease* of 24 years of the Warden Arms." In an action by B. for specific performance, to which A.'s defence is that B.'s description is insufficient under the statute;—held, evidence that B. paid A. £50 on the date named, and was the existing lessee of the Warden Arms, was admissible, and the description sufficient [*Carr* v. *Lynch*, 1900, 1 Ch. 613, *Aliter*, perhaps, if the words "further lease" had stood alone, since they might have referred either to an existing or reversionary lease].

A. being employed by B. (in writing) for three years at a certain salary, but no *capacity being* stated, is dismissed by B. for disobeying an order. In an action by A. for wrongful dismissal, he may prove that he acted as lace-buyer to B. and that the order was outside the scope of the employment (*Price* v. *Mouat*, 11 C.B. N.S. 508).

Subject-matter (*Identity*). A. sues B. for trespass. To show that the land is his, A. may prove that he bought it from C. (deceased), who at the time of the sale took him over the land, and, pointing out the boundaries, said, "This is the land named in the conveyance" (*Parrott* v. *Watts*, 37 L.T. p. 757; *ante*, 72, 284; *cp. Paddock* v. *Fradley, &c.*, *post*, 633; and *Re Boulter*, *post*, 655).

A. having written to her solicitor, "I have closed with B. for *this place*,"—in an action for specific performance by B. against A., evidence that A. wrote from a house called T., which she owned and had recently advertised for sale, held, admissible and sufficient under the statute (*Waldron* v. *Jacob*, I.R. 5 Eq. 131). So, where B. wrote to A.'s solicitors agreeing to buy "Mr. A.'s house for £14.000, A. was allowed to prove that he owned a house in G. Square which he had put up for auction but bought in; and his auctioneer to prove that after the auction B. discussed with him the terms of purchase and read the conditions of sale (*Ogilvie* v. *Foljambe*, 3 Mer. 53). And where B. contracted to buy from A., "The Mill property, including houses, in E. village for £11,000,"—A. was allowed to prove interviews and letters between B. and himself, both before and after the contract, as well as abstracts and requisitions relating thereto, for the purpose of identification (*McMurray* v. *Spicer*, 5 Eq. 527).

A. agrees in writing to sell B. "24 acres of land, freehold, at T. in the parish of D. in the county of S., for £5000." In an action by A., held, that to identify the

Admissible.	*Inadmissible.*
subject-matter of the sale, A. might prove that he owned an estate of a little over 24 acres at T.; and that B. was well acquainted with the land and desirous of purchasing it, and had, by appointment, gone over and examined it with A. some hours before signing the agreement;—this evidence rendering the description sufficiently certain under the St. of Frauds (*Plant* v. *Bourne*, 1897, 2 Ch. 281, C.A.; see *Shardlow* v. *Cotterell*, 20 Ch.D. 90, C.A.). So, parol evidence, though it is not stated of what kind, has been admitted to identify "4 golfing subjects" in an infringement case (*Savory* v. *The World of Golf*, 1914, 2 Ch. 566, 573-4).	
A. sues B. for debt. B. proves a release by deed executed by A. of "B.'s debt," the amount being left blank. B. may prove the amount orally, though he could not have filled it in in writing after execution (*Harrhy* v. *Wall*, 1 B. & Ald. 103; *Fazakerly* v. *M'Knight*, 6 E. & B. 795; *cp.* Blanks, *ante*, 530).	A. gives B. a bill of sale to secure £70 and interest at 1*s.* in the £ per month, agreeing to repay principal and interest "by monthly instalments of seven ——." Held, extrinsic evidence was not admissible to fill the blank, but that "pounds" could be supplied by construction (*Mourmand* v. *Le Clair*, 88 L.T. 738).
B. assigned to A. by deed "all the household goods and effects of her, B., the particulars whereof to be more fully set forth in an inventory signed by B. and hereunto annexed." No inventory had been signed by B. or annexed. In an action by A., held, that parol evidence, including B.'s admissions in the action, was admissible to identify the goods (*England* v. *Downs*, 2 Beav. 522). So, where a deed assigned "all goods in" a certain house, "the chief of which are enumerated in a schedule annexed," but no schedule was signed or annexed till afterwards, parol evidence was admitted in identification, the deed being sensible in itself as enumerating all articles in a certain house (*Dyer* v. *Green*, 1 Ex. 71; *cp. Hordern* v. *Commercial Union*, 56 L.J.C.P. 78; and see now Bills of Sale Act, 1878).	B. assigned to A. by deed "The whole of his mechanical pieces as per schedule annexed." No schedule was signed or annexed till afterwards. Held, parol evidence to identify the goods was inadmissible, and that the deed was void for uncertainty [*Weeks* v. *Maillardet*, 14 East, 568. Here the deed was insensible without the schedule, being a conveyance of a certain number of uncertain articles, see *Dyer* v. *Green*, *opposite;* and Norton, Deeds, 36].
A. sues B. for breach of a contract to "get the lease and everything for A. for £60." A. may prove that they were negotiating about a public-house and may put in evidence a memo. of fixtures, &c., which B. had previously prepared (*Horsey* v. *Graham*, L.R. 5 C.P. 9). So, where part of the purchase was to be paid by A. in "frechold equities," a list of these, signed by A., and given to B. before the sale, was admitted in identification, though the list was not referred to in the contract (*Roots* v. *Snelling*, 48 L.T. 216; *cp.* Incorporation, *ante*, 525-8). And where A. agreed to buy B.'s house with the furniture "in your list," A. was allowed to testify that he had only one such list, though it had not been signed or seen by B., and B. admitting on cross-examination that this was the one meant,—held, a sufficient identification (*Morris* v. *Watson*, 5 Jur. N.S. 168).	In *Cave* v. *Hastings*, cited *ante*, 527, Field, J., regarded the admissions of a party that he did, or did not, intend in the instrument to refer to an extraneous document, as inadmissible.

Admissible.	*Inadmissible.*
A. sues B. on the following guarantee, —"If you will withdraw *the promissory note*, you shall receive the amount of it at Christmas, together with the memo. of my son, making £45." A. may testify that the only note held by him was one by B.'s son for £35; that this was the one referred to; and that he drew it in consequence of getting B.'s guarantee [*Shortrede* v. *Cheek*, 1 A. & E. 57, *cp. Brown* v. *Dean*, 5 B. & Ad. 848; and *Bacon* v. *Kavanagh*, 124 L.T.Jo. 589. In the first case it was doubted whether the evidence would have been receivable had there been *two* notes in question, and this criticism is supported by Wigram, Extr. Ev., 4th ed. 133-4 *n;* but see *Hodges* v. *Horsfall*, and *Naylor* v. *Goodall*, *post*, 658].	
So, where a policy of re-insurance was "subject to the same terms as the original policy or policies," the broker's *slip* was received to show what policies were referred to (*Lower Rhine Association* v. *Sedgwick*, 4 Com. Cas. 14, C.A.); the slip, plaintiff's books, and defendant's evidence have also been admitted for the same purpose (*Janson* v. *Poole*, 31 T.L.R. 336); and a prior written proposal has been held admissible to identify the goods covered by a fire-policy (*Hordern* v. *Commercial Union*, 56 L.J.C.P. 78).	*In Griffith* v. *Fleming*, 1909, 1 K.B. 805, 817, C.A., it was stated that prior written proposals were not admissible to construe a policy, though *aliter* to rectify it.
A. sues B. for breach of an agreement "not to travel for any other house *over the same ground* as A.'s." A., in explanation, may prove a prior oral agreement by which B. was to travel for him in the Midland district (*Mumford* v. *Gething*, 7 C.B. N.S. 305).	
Subject-matter (*Extent*). A. sues B. for trespass. B. produces an agreement whereby A. surrendered to C., B.'s predecessor, "**all those brick-works at S., now** in possession of A." Held, these words being ambiguous, B. might call C. to prove declarations made by A. at the time of the agreement defining the land B. was to hold thereunder, which included the *locus in quo* (*Paddock* v. *Fradley*, 1 Cr. & J. 90; *Parrott* v. *Watts*, *ante*, 631; *Chambers* v. *Kelly*, I.R. 7 C.L. 231). So, in ejectment by A. against B., both claiming under C., who had conveyed a plot of "20 rods *more or less*" to A.'s predecessor and afterwards an adjoining plot of "15 rods *more or less*" to B.'s predecessor;—testimony by C. that "when he sold A.'s plot he (C.) staked out what he sold and what he retained," held, admissible to show that the *locus in quo* was not included in A.'s land (*Jervey* v. *Styring*, 29 L.T. 847; and *cp. Henniker* v. *Wigg*, &c., *post*, 636). [Note. The declarations of intent in *Parrott* v. *Watts*, *sup.* were admitted as part of the *res gesta* (*ante* 72). But generally in this connection, direct declarations are inadmissible	*Subject-matter* (*Extent*). A. having conveyed to B. by deed "all that messuage, formerly used as a workhouse, but now in the occupation of C., with the appurtenances thereto belonging," afterwards brings ejectment against B. for a garden adjoining the messuage, which B. claims is appurtenant to the workhouse. Held, that (1) although evidence tendered by B. that the garden had always been occupied with the work house, was admissible; yet that evidence tendered by A. (2) that the Conditions of Sale signed by B., expressly excepted the garden; and (3) that B. after the sale had admitted that he had not purchased the garden, was inadmissible as contradicting and not merely applying the document [*Doe* v. *Webster*, 12 A. & E. 442. The Conditions of Sale are not ordinarily admissible to show what is included in the subsequent conveyance, *Greville* v. *Hemingway*, 87 L.T. 443, *post*, 633. Nor is the preliminary contract, *Williams* v. *Morgan*, 15 Q.B. 782, though the Court remarked that it might be for collateral purposes, *e.g.* to show that the reason a leaseholder did not continue to pay rent was that in equity he had

Admissible.

(*Watcham* v. *A.-G.*, 1919, A.C. 533, 540, *per* Ld. Atkinson). As to usage to show the precise extent of '*more or less*,' or '*about*' see *post*, 663-4].

Where a deed was expressed to pass "all that was known or reputed parcel" of the premises, the conditions of sale were admitted, not to vary the deed, but to show what was "known or reputed parcel" at the time of sale (*Murly* v. *McDermott*, 8 A. & E. 138). So, if the particulars of sale are *referred to* in the subsequent deed (*Eastwood* v. *Ashton*, 1915 A.C. 900, *per* Ld. Atkinson).

In an action of trespass by A. against B., to show that certain lands demised by an old lease in 1704 by C. to A.'s predecessor as "the village of S., containing by estimation 148 acres," included an adjacent mountain of 1700 acres on which the trespass was committed,—held, the word "village" not being clear and unambiguous, evidence of acts of ownership by A.'s predecessors on other parts of the mountain was admissible [*Waterpark* v. *Fennell*, 7 H.L.C. 650. So, evidence of acts of user even *before* a grant, have been received to show its identity and extent, *Van Dieman's Land Co.* v. *Table Cape Board*, 1906, A.C. 92; *ante*, 629].

A. grants land to B. in 1872, with all easements now or "heretofore" enjoyed. Under this grant B. claims to use a private way over adjoining land belonging to A.—Evidence that though prior to 1852, there had been such a right of way, yet that in that year the then tenant had built a wall blocking it up, held, admissible as surrounding circumstances to rebut the grammatical sense of the word "heretofore," and to restrict B.'s right [*Roe* v. *Siddons*, 22 Q.B.D. 224, C.A.; *cp. Devonshire* v. *Pattinson*, 20 *id.* 263, cited *post*, 675].

A., in 1905, lets premises to B., who covenants to keep them insured against "*loss or damage by fire* in the X., or other approved, office." B. insures in the Y. office, with which the X. had been amalgamated, the policy excepting fire caused by a foreign enemy." This policy A. accepted until 1915, when he required, but B. refused, also to insure against enemy aircraft. In an action by A. for breach of covenant;—Held (1) that the covenant only required B. to obtain the fire policy usual with X., or similar offices at the date, or during the currency, of the lease; and (2) that evidence was admissible that the custom of such offices was always to except damage caused by foreign enemies [*Upjohn* v. *Hitchens*, 1918, 2 K.B. 48 C.A. *per* Warrington and Scrutton, L.L.J., *diss.* Pickford, L.J., who held that A. was entitled to an absolute and not a qualified policy. In the similar case of *Enlayde* v.

Inadmissible.

become entitled to the fee; see also *Leggott* v. *Barrett*, 15 Ch.D. 306, C.A., where James, L.J., remarked that the preliminary contract could not, even though recited in the final deed, be looked at to enlarge, diminish, or modify the latter, such a recital only having the same effect as a preamble in a statute, *i.e.* as showing the object of the parties and what they were about to do, so as to afford a guide to the construction of the words. *Leggott* v. *Barrett*, *sup.* was followed *inter alia*, in *Greswold-Williams* v. *Barneby*, *ante*, 595; but *cp. ante*, 590].

A. sells land to B. without express reservation of lights, and afterwards sells adjoining land to C. D., B.'s devisee. having obstructed C.'s lights, and C. having removed the obstruction, in an action by D. against C.,—held, evidence tendered by D. that C., before buying his land, had inquired whether lights were reserved in A.'s conveyance to B. and been told they were not, and that after buying it he had bargained to obtain the right to lights from B., was inadmissible to show that A. intended to reserve the light in his conveyance to B. (*Wheeldon* v. *Burrows*, 12 Ch.D. 31, 45, 60).

A. and B. (two railway companies) agree with C. (the owner of a dock and railway thereon) to pay C. certain charges for "traffic in any year" going over C.'s railway. Held, that the word "traffic" being unambiguous and naturally meaning all traffic over C.'s railway to and from A. and B.'s railways, evidence of the facts and history of the case and of prior dealings and litigation between the parties, was not admissible to restrict that word to *import and export traffic* only, excluding traffic to and from warehouses on the dock let to tenants of C. and called *lessees traffic* (*G. W. Ry.* v. *Bristol Corpn.*, 87 L.J.Ch. (H.L.) 414).

A., a cattle dealer, bought cattle from B., at Buenos Ayres for shipment to Durban, B. agreeing to insure them "*against all risk*." B. obtained an ordinary "all risk" policy, at Lloyd's, which excepted "losses by detention." The cattle were detained owing to disease at Durban and slaughtered. Held that the contract was for an absolute, not a qualified, "all risks" policy and evidence of the meaning of and custom respecting such a clause among cattle dealers in Buenos Ayres and insurance brokers in London, as also that A.'s agent raised no objection to the policy at the time, was not admissible to restrict the contract (*Youill* v. *Robson*, 1908, I.K. B. 270, C.A., cited *post*, 662-3).

A. (an urban Council) having invited tenders for certain work, agrees with B. (a contractor) that the latter shall carry out the work. The contract (1) recites

Admissible.

Roberts, 1917, 1 Ch. 109, Sargant, J., construed the words "damage by fire" in their strict, primary, and absolute sense, and rejected evidence of the custom of Insurance offices to show a secondary and qualified meaning, resting the rejection on Wigram's Prop. II., *ante*, 621; see also Rule V. *ante* 629, as to the admissibility of usage].

A., a London brewer, lets a public-house to B., a publican, B. covenanting to deal exclusively with A. for beer, provided A. supplied it at "the fair market price." Evidence that the bulk of the London brewers' trade was with tied houses, that beer was supplied by them at standard prices, that tied houses were allowed a recognized discount, but that free tenants obtained a higher discount, was admitted as surrounding circumstances to show that in B.'s case the term 'market' was to be construed according to the tied and not to the free rates (*Charrington* v. *Wooder*, 1914, A.C. 71).

A., who owned printing works, and B., who rented from A. a hotel adjoining them, executed an agreement under which A.'s works were to be extended and B. was to rent the extra rooms over the extension as bedrooms. The agreement contained no restriction upon A.'s user of his works. In an action by B. to restrain A. from using these so as to cause noise and vibration to B.'s bedrooms;—Held (1) that evidence was admissible that both parties believed, and had been assured by the architect, that such joint user could be enjoyed without mutual detriment, that they intended this, but that both were mistaken; (2) that the implied obligations of the contract were to be determined by their common intention; but (3) that in the absence of evidence that A.'s premises had been built, or his machinery used, improperly, or that either A. or B. had done or asked to do, anything not in their joint contemplation, neither party had any cause of action against the other (*Lyttleton Times Co.* v. *Warners*, 1907, A.C. 476).

A. grants a right of way to B., the agreement containing no restrictive words. Evidence of (1) the nature of the road; and (2) the purpose for which it was to be used, is admissible as surrounding circumstances to show whether it is a right of way for all purposes, or only, *e.g.* for foot passengers (*Cannon* v. *Villars*, 8 Ch. D. 415).

A. sues B. on a covenant to repair. Evidence of the age, character, and class of house and state of repair it was in when B. entered, is admissible as surrounding circumstances to show the extent of B.'s liability under the covenant (*Proudfoot* v. *Hart*, 25 Q.B.D. 42).

Inadmissible.

the tender, specification and drawings: (2) expressly incorporates the specification and drawings; and (3) provides that the work shall be executed "agreeably to the specification and drawings." In an action by B. for work outside the specification and drawings, but included in the tender;—Held, that the contract being unambiguous and the tender though recited, not being incorporated, therein, it could not be referred to to show the extent of the work contemplated [*Kinlen* v. *Ennis U.D. Council*, 1916, 2 I.R. 299, H.L.].

Admissible.

A., a cattle-dealer, sues B. on the following *guarantee*:—"£50. I will be answerable for £50 that C., butcher, may buy of A." A. tenders evidence that, being in negotiation with C. to sell him stock worth £91, and not caring to trust him so largely, he had said to B., C.'s uncle, "If you will give me your guarantee for £50 I will keep supplying C. as I did his father"; that B. consented; that afterwards C. paid the £91, but, being supplied on credit, got into fresh debt with A. Held, the guarantee being ambiguous, that these facts were admissible as surrounding circumstances to show that B.'s guarantee was not confined to the £91, but was continuing and covered C.'s fresh debts [*Heffield* v. *Meadows*, L.R. 4 C.P. 595; Montague Smith, J., remarked, "if it had contained anything so specific as to show it was intended to apply to a single transaction, we could not have extended it by reference to the surrounding circumstances." *Cp. Henniker* v. *Wigg*, 4 Q.B. 792, *Cp. Grahame* v. *G.*, 19 L.R.I. 249 and *Ulster Bank* v *Synnott*, I.R. 5 Eq. 595, where correspondence, interviews, and subsequent dealings and admissions were given in evidence for the same purpose; and see *Spencer* v. *Lotz*, 32 T.L.R. 373, where surrounding circumstances were admitted to show that the guarantee was to be confined to the town where the principal debtor then traded and not to be extended to others to which he afterwards removed].

A. sues B. for non-acceptance of wool, under a contract signed by B. to take "*your wool* at 16*s.* a stone." B.'s defence is that A. tendered wool partly from *other* farmers. Held, that a letter from A. to B.'s agent offering to sell a quantity of wool partly of his own clip and partly that of other farmers, and a later letter (both before the contract) stating that A. had sold part of his own clip, but was promised other wool which would go with his own, were admissible to show that "your wool" included both classes (*Macdonald* v. *Longbottom*, 1 E. & E. 977).

A., a railway engineer, sued B., a bank, on a contract for the construction of a new line, by which A. was to receive extra commission "on the estimate of £35,000 if he succeeded in reducing the *total cost of the works* below £30,000." A. succeeded in reducing the total cost of the *works* but not of both works and land together, below £30,000. Held, that prior conversations and letters between A. and B. before the contract, and a circular issued by B. to the public and shown to A. inviting capital on the basis of "the estimated cost of the *line* being £35,000," were admissible, not to vary the contract, but to show that the cost of the *land* was to be

Inadmissible.

A., a leather-factor, sues B., the wife of C., on the following *guarantee*:—"In consideration of you, A., having at my request agreed to supply goods to C., bootmaker, I guarantee you £500, to continue in force for six years only." Held, that the guarantee being ambiguous proof of surrounding circumstances was admissible; but that though evidence (1) of who and what the parties were, and (2) of the subject-matter of the guarantee (*i.e.* the application of C. to A. for further goods, A.'s refusal unless secured, and B.'s guarantee), was receivable under this head; yet that further evidence, viz. that at the date of the guarantee A. held a dishonoured bill of £176 of C.'s, that another of £170 was just coming due, and that, on C. applying for further goods, A. refused unless guaranteed by B., who thereupon signed the document, verbally agreeing that it should cover C.'s past debts,—was inadmissible [*Morrell* v. *Cowan*, 7 Ch.D. 151, C.A., approved in *Brunning* v. *Odhams*, *infra*. In *Laurie* v. *Scholefield*, L.R. 4 C.P. 622, Byles, J., remarked, "in construing the guarantee, we may look at the position of the parties, but not what was said at the time of giving it"; so, in *Wood* v. *Priestner*, L.R. 2 Ex. 66, 282, Kelly, C.B., at p. 68, said that the Court "could not consider statements by either party as to what he meant by the words used"].

A. being owed money by B. for printing a certain periodical, declines to bring out the next number unless with C.'s guarantee. C. thereupon signs and gives A. the following document:—"If you will bring out the present number, I will repeat my guarantee to see you paid in full." Held, that though the relationship of the parties and the existence of B.'s indebtedness might be proved as surrounding circumstances, A. could not under this head prove that C. had previously given him an oral guarantee for the whole of B.'s debt, and that the written guarantee was given in substitution for the oral one [*Brunning* v. *Odhams*, 75 L.T. 602, H.L.; *cp. Mercantile Bank of Sydney* v. *Taylor*, *post*, 637].

A corporation, having passed a resolution in Nov., 1861, to enlarge a reservoir, agree with B., a stone merchant, that they shall take "all the stone they may require for *the enlargement of the old C. reservoir* for £175." In July, 1862, the corporation pass a resolution further to enlarge the reservoir. In an action by B. for the stone taken in the second enlargement, which the corporation contended came within the agreement, B. tenders evidence of (1) the minutes of the two resolutions of the corporation; and (2) a conversation between the manager of the corpora-

Admissible.

included in the £30,000 [*Bank of N. Zealand* v. *Simpson*, 1900, AC. 182; direct testimony by the parties as to their intentions was in fact also received, though the decision in terms excludes it].

A. sues B. for royalties on rifles made by B. for the Government. A. had granted B. a general license to use his patent in making rifles on B. paying a royalty on every rifle manufactured "*under the powers hereby granted.*" Evidence by B. (1) of letters between them prior to the license showing that both parties believed (though erroneously) that the Government could use all patents free of charge; (2) that for some time before the license B. had made rifles for the Government under A.'s patent, paying no royalties to A.; and (3) that A. had obtained a bonus from the Government for such gratuitous user of his patent;—held, admissible to show that the deed did not apply to royalties on rifles made for the Government (*Roden* v. *Lond. Sm. Arms Co.*, 46 L.J. Q.B. 213; *cp. Lyttelton Times Co.* v. *Warners*, *ante*, 635).

In an action on a marine policy with a proviso "Warranted *no St. Lawrence* October to April," evidence of the geographical position and physical characteristics of the gulf and river of that name, and that they were almost equally dangerous between those dates, held, admissible to show that the words excluded both (*Birrell* v. *Dryer*, *ante*, 22; *Royal Exch. Assur.* v. *Tod*, 8 T.L.R. 669).

B., a charterer, contracts with A., a shipowner, "to pay lighterage to enable steamer to *complete loading at N. dock.*" A. having removed the ship to another dock, owing to the adverse state of the tide, B. claims to set off the extra lighterage thus incurred against A.'s claim for freight. Held, that the contract being ambiguous, a telegram from B. prior to its execution, — "Lighterage, if any, through inability to take full cargo at N. my expense," was admissible to show the intention [*The Curfew*, 1891 P. 131, *per* Hannen and Butt, JJ.; *aliter* if there had been no ambiguity in the contract, *The Nifa*, 1892, P. 411].

A. sues B. for a debt. B. pleads that A., for valuable consideration, *released* B. from "all debts and claims whatsoever." Evidence by A. that at the time of the release the statement of accounts between them with respect to the debt in question was not known to either of them; —Held, admissible to exclude that debt from the release [*Lyall* v. *Edwards*, 6 H. & N. 337. So, where, in consideration of certain payments by an executor, parties interested in the estate released all their claims thereto and afterwards the estate was increased by a then unknown claim

Inadmissible.

tion and B. in which the former gave a rough estimate of the amount of stone required, which estimate was greatly less than the stone actually taken. Held, though admissible to show that the enlargement contemplated was the Nov. one, and not that of July as well, yet that the evidence was not admissible to limit the amount that might be taken for such enlargement (*Chadwick* v. *Burnley*, 12 W.R. 1077).

A., a shipbuilder, agreed with B., an owner, to lengthen and repair an iron steamship so as to entitle her to class 100 A1 at Lloyd's. The specification stipulated that the iron plating was to be "*overhauled and repaired*," and a clause, afterwards struck out, provided that any *new* plates were to be paid for by B. In an action by A. against B. for the cost of the new plates, held, that only the final contract and not the deleted clause could be looked at; that by it A. was bound to supply any new plates required; and that prior letters and interviews showing that new plates were not contemplated by the parties, and that the clause was only deleted because they were found not to be requisite, were inadmissible [*Inglis* v. *Buttery*, 3 App. Cas. 552; and *cp. Cumberland* v. *Bowes*, 15 C.B. 348. *Contra*, *Strickland* v. *Maxwell*, 2 Cr. & M. p. 550, where a deleted clause was referred to in construing a contract; and words deleted in the will, omitted from the probate copy, have been received in aid of interpretation, *Re Battie-Wrightson*, 1920, 2 Ch. 330, cited *post*, 661].

A bank *releases* A., a debtor, from "all debts due by A. to the bank at this date." A. at the time owed the bank unsecured debts and also one guaranteed by B.—In an action by the bank against B. on his guarantee, held, that the bank could not give evidence of conversations between its manager and A. at the time of the release, showing the release was only intended to apply to the unsecured debts and not to the secured one (*Mercantile Bank of Sydney* v. *Taylor*, 1893, A.C. 317, cited *ante*, 599, 647; and *cp. Exp. Kirk*, 5 Ch. D. 800).

Admissible.

succeeding, it was held that the release did not apply to the increase (*Turner* v. *T.*, 14 Ch.D. 829.) But *op. Ellen* v. *G.N. Ry.*, *ante* 588-9; and for cases where knowledge was rejected to *vary* a contract, see *Leduc* v. *Ward* and *Cato* v. *Thompson*, *ante*, 590-1].

A. contracts to "sell B. 70,000 trees, and to plant, and *keep them in order*, replacing dead ones, for two years for £220." To prove that "keeping in order" meant planting and pruning only, and not weeding and cleaning the ground as well, A. was allowed, the words being ambiguous, to prove that the value of the trees together with their planting and pruning nearly exhausted the £220, so that there was no surplus left for weeding and cleaning [*Allen* v. *Cameron*, 1 Cr. & M. 832. This case is doubted in Sugden, v. & P. 14th ed. 170; and see also *Inglis* v. *Buttery*, 3 App. Cas., at p. 557. In the first-mentioned case, Bayley, J., added that the words been "unambiguous, the price could not have been considered, any more than the amount of the premium can be considered to gauge the risk in a policy," citing for the latter proposition, *Gabay* v. *Lloyd*, 3 B. & C., 793, 795, which, however, does not seem to apply].

B., a clerk, sues A., his master, for wrongful dismissal. A. had sent B. by post "£100 *for business purposes*," to which B., after deducting arrears of his own salary, duly applied it. Held, evidence of previous correspondence between the parties was admissible to show that "business purposes" did not include A.'s salary (*Smith* v. *Thompson*, 8 C.B. 44).

A., the owner of a ship, engages B. as master, B. to receive "£120 in lieu of *privilege*." In an action by A. against B. for freight on goods carried in the cabin, B., in order to show that "privilege" did not include cabin freight, may prove a conversation prior to the contract, in which he asked, "What privilege will you allow me?" to which A. replied, "None; but there is a large cabin and you may make what you please of it" (*Birch* v. *Depeyster*, 4 Camp. 385; 1 Stark. 210).

So, prior conversations have been admitted to show that in a contract of sale, "candlesticks *complete*" meant fitted with mosquito shades (*Sarl* v. *Bourdillon*, 1 C.B. N.S. 188).

And similar evidence is receivable to show that "N.M." meant New Zealand Mutton (*Cameron* v. *Wiggins*, 1901, 1 K.B. 1).

A., a publisher, sues B., an author, for failure to supply literary matter in accordance with the following contract: "Dictionary of Practice. £80 a year for 5 years from Mich. 1828. £60 for rest of Mr. B.'s life. Feb. 15, 1827." Held, that

Inadmissible.

A., having written to a railway company for their terms for carrying marble, the company reply that they will only be answerable for damage if the value is declared and insurance paid. Some weeks later, after various letters and interviews, A. writes, "Please forward the three cases of marble, *not insured*, to B." In an action for negligence by A., held, (1) that there was no "special signed contract" exempting the company under the Railway and Canal Act, 1854; and (2), by a majority of the H.L., that the prior correspondence was inadmissible for any purpose, not being contained in, or referred to by, the contract; but, *per* Ld. Cranworth, that but for the statute it would have been admissible to explain the words "not insured"; and, *per* Ld. Chelmsford and three of the advisory judges, that it was admissible as surrounding circumstances for that purpose though not referred to (*Peek* v. *N. Staff. Ry.*, 10 H.L. C. 473). So, where A. wrote to the company, "Please receive and forward the following cheeses, to B., *owner's risk*"—in an action by A., the company having tendered their ordinary form of consignment note to show that "owner's risk" implied a reduced rate exempting the company,—Held, that the note not being signed by A., or referred to in his forwarding note, was inadmissible; but that the course of dealing between A. and the company showed that A. *knew* of the alternative rate and so could not recover (*Lewis* v. *G.W.Ry.*, 3 Q.B.D. 195; *op. Leduc* v. *Ward* and *Cato* v. *Thompson*, *ante*, 590-1).

A. sues B. for non-delivery of "60 tons of *Ware* potatoes at £5 a ton" which B. had contracted to sell him. Held, that evidence of persons in the trade was admissible that "Wares" were the largest and best potatoes in the trade; but not that A. had contracted for "Regent's" wares, whereas B. had tendered an inferior kind called "kidney" wares, since this would vary and limit the written contract (*Smith* v. *Jeffryes*, 15 M. & W. 561; no equivocation was held to arise, since "wares" meant only *one* sort, the best, and not *two sorts; cp. post*, 657; and see further as to this case, *Cauldwell* v. *Elger*, 139 L.T.Jo. 603-4).

A. sells a cargo of goods to B. "*fourteen days* from ship's arrival to be allowed *for delivery*." Held, that in the absence of usage, evidence that the *parties* meant fourteen days after the ship had arrived and the captain had received the bill of lading, was inadmissible. (*Sotiliehos* v. *Kemp*, 3 Ex. 105; see more fully *post*, 642).

A., a manager, engages B., an actor, at £10 a week *during the run of the piece*. Evidence that before the contract A. agreed to make the run of the piece eight weeks

Admissible.	*Inadmissible.*
the terms being incomplete and unintelligible, testimony by a witness present at the transaction was admissible to explain the sense in which they were used, provided the evidence was not inconsistent with such terms (*Sweet* v. *Lee*, 3 M. & G. 452; 4 Scott, N.R. 77).	at least, held, inadmissible to explain the phrase (*Emery* v. *Parry*, 17 L.T. 152; *cp. Grimston* v. *Cuningham*, *ante*, 594).
A. sells B. wool "deliverable in England with all despatch; *names of vessels to be declared soon as shipped.*" In an action by A. for non-acceptance, B. may prove that the wool was to A.'s knowledge required for the purpose of re-sale; that its value fluctuated; and that it was not saleable till the names of the vessels were declared,—in order to show the words amounted to a condition and not merely to a warranty (*Graves* v. *Legg*, 9 Ex. 709; *Behn* v. *Burness*, 3 B. & S. 751; Sale of Goods Act, 1893, s. 11 (*b*)).	So, evidence of the correspondence and circumstances attending the execution of a settlement, have been rejected to show that money to which A. "was entitled in possession" included a share in money to which he was entitled in reversion (*Bradford* v. *Romney*, 30 Beav. 431).
	County justices bought land adjoining a prison and had it conveyed "in trust for them for the purposes of the Prison Act, 1877." In an action by the Prison Commissioners to decide whether the land belonged to them or to the justices, held, evidence of the minutes passed by the justices before and after the sale showing that it was bought not for the purpose of enlarging the prison (which would vest it in the Commissioners), but of rendering it more commodious and safe (which it was contended would not divert it from the justices), was inadmissible (*Prison Commissioners* v. *Clerk of Peace*, 9 Q.B.D. 506, 511).

(*Wills.*)

Persons. A. leaves a legacy to "the persons who shall be in partnership with me at my death, or to whom I shall have disposed of my business." Evidence may be given as to what persons filled those capacities at those dates (*Stubbs* v. *Sargon*, 2 *Keen*, 255).	*Persons.* A. leaves a legacy to "B. his executors, administrators and assigns." B. having died in A.'s lifetime, C., B.'s representative, claims the legacy, and tenders evidence that A. *knew* of B.'s death when making the will, in order to show that A. intended the legacy to be transmissible. Held, not receivable (*Maybank* v. *Brooks*, 1 Bro. C.C. 84; *ante*, 618).
A. leaves a legacy to "Mrs. G." Held, extrinsic evidence was receivable to show that a friend of A.'a called Mrs. Gregg was meant thereby (*Abbot* v. *Massie*, 3 Ves. Jr. 148. In *Clayton* v. *Nugent*, 13 M. & W. at p. 204, Rolfe, B., remarked of this case, "the Lord Chancellor does not say *what* evidence was to be received; probably the testator was in the habit of calling Mrs. Gregg Mrs. G."; *cp. Shore* v. *Wilson*, *post*, 662).	A. by will leaves a cup to "Lord S. and his heirs as an heirloom," and afterwards by codicil leaves "all his effects to B." Held, that the will spoke from its date, and Lord S. having died between the dates of the will and codicil, the gift lapsed, and evidence of A.'s intention that it should go to S.'s successor was inadmissible [*Re Whorwood*, 34 Ch.D. 446, C.A. Evidence that A. knew that the Lord S. alive at the date of the will was dead at the date of the codicil, was in fact received, but held not to affect the construction of the will].
	A. leaves a legacy to B. (a married woman), with remainder to her children for life, and a gift over to her grandchildren. In an action by the grandchildren, evidence that B. was, at the date of the will, past child-bearing and that this fact was known to A., held, inadmissible to show that children then living were meant so as to validate the gift over, which was otherwise void for remoteness (*Re Sayer*, 6 Eq. 319).
A. appoints as his executor "Percival ——, of Brighton, Esq., the father." Evidence that A. knew two persons called Percival Boxall, father and son, both of	A. leaves a legacy to "Mr.——," and another to "Lady——"; extrinsic evidence is not admissible to fill up the blanks (*Re De Rosaz*, *opposite*, and cases cited).

Admissible.

whom lived at Brighton, was admitted, probate being granted to the former (*Re De Rosaz*, 2 P.D. 66; if the words "the father" had been omitted an equivocation would have arisen and declarations of intent also have been receivable; *ante* 523, 627. *Cp. Furniss* v. *Phear*, 36 W.R. 521).

A. leaves legacies to "my nephews and nieces [naming them]; also to —— Cort and —— Cort; also to my sisters [naming them]." Evidence that there were three persons answering to the blanks—viz. the husband of A.'s deceased sister and their son and daughter: that A. knew his sister had children and that there were only two living at the date of the will, but did not know their Christian names, —held, admissible (*Re Gregson's Trusts*, 2 H. & M. 504; *aliter* as to direct declarations of intent, *post*, 661).

A. leaves a legacy "to the children of B. and C." Extrinsic evidence is admissible to show whether B. and C. were alive or dead at the date of the will, and whether they were or were not capable of intermarrying, so as to show the meaning of the gift (*Re Walbran*, 1906,, 1Ch. 64; *Re Sibley*, 5 Ch.D. p. 499).

Subject-matter. A. left to B. "the sum of i.x.x.," and to C. "the sum of o.x.x." Evidence that A. was a jeweller and in the course of his business used private marks to denote sums of money, according to which the former meant £100 and the latter £200,—held, admissible (*Kell* v. *Charmer*, 23 Beav. 195).

A. bequeathed to B. "£4000 for the charitable *purposes agreed on* between us." It was objected that the will disclosing a general charitable intent, evidence to limit it was inadmissible. Held, that the will only disclosed a limited charitable intent, and that extrinsic evidence was receivable to show what the purposes agreed on were (*Re Huxtable*, 1902, 2 Ch. 793, C.A.; see *Secret Trusts*, *ante*, 580, 598).

A. devises his property on various trusts, but directs that "in case *certain contingent property and effects in expectancy* shall fall in and become vested interests in my children during the life of my wife," a different disposition should take effect. Held, that "contingency" having a definite legal meaning, evidence was admissible as to whether the children were entitled to any and what contingent interests at the date of the will, on the principle *id certum est*, &c., and that such

Inadmissible.

So, where the devisees were indicated by single letters only, having no reference to their names, a card kept by A. separate from the will and containing a key to the persons meant, was held inadmissible to explain the will (*Clayton* v. *Nugent*, 13 M. & W. 200; *aliter* if A. was proved to have habitually called particular persons by those names; or if the card had been so referred to as to have been incorporated by the will, *ante*, 526).

And where the gift was to "my dearly beloved," declarations by A. as to whom he intended were rejected, though evidence of the state of the family was admitted, and evidence would have been received to show who he had habitually so called (*Sullivan* v. *Sullivan*, I.R. 4 Eq. 457).

Subject-matter. A. leaves his widow a life interest in his property, adding, "And I desire and empower her by her will, or in her lifetime, to dispose of my estate in accordance with my wishes verbally expressed to her." Held, extrinsic evidence of A.'s wishes was inadmissible, since the case was not one either of secret trust, or of incorporating an existing identified paper, but resembled that of filling up a blank (*Re Hetley*, 1902, 2 Ch. 866).

A. bequeathed to B. "£4000 for the charitable purpose agreed on between us." Evidence by B. (1) that A. was under a misapprehension and that no purposes at all had been agreed on between them (*Re Huxtable*, 1902, 1 Ch. 214, *per* Farwell J.); and (2) that the *income* of the £4000 was to be applied to the agreed charitable purposes during B.'s life, but that B. was to dispose of the *capital* after his death as his own property, held, inadmissible as contradicting the will (*Re Huxtable, opposite*).

In *King* v. *Badeley, opposite*, evidence that A.'s wife had a relative called E., who was rich, and that after the date of A.'s will E. died leaving certain benefits to A.'s wife and children; and that, subsequently to this, A. made an unexecuted codicil stating that "part of the expectations referred to in my will have been realised,"—Held, inadmissible, since it added to the will what had not been expressed therein. *Cp. Neale* v. *N.*, *post*, 642.

A. bequeaths to B. his "140 shares in

Admissible.

evidence explained without adding to the will (*King* v. *Badeley*, 3 Myl. & K. 417).

A., a doctor leaves "all the books in my house" to B. The question being whether a number of MS. professional notes bound into volumes passed as "books," evidence that B. was also a doctor and that the contents of the notes would be of greater use and interest to him than to strangers, was received to show that they did so pass (*Willis* v. *Curtois*, 1 Beav. 189, 193).

A. devises his "estate called Cleeve Court" to B.;—evidence is admissible as to what property A. designated by that name at the time of his death; as to his treatment of, and additions to, it; and what he called it both before and after the date of his will (*Castle* v. *Fox*, 11 Eq. 542; *cp. Webb* v. *Byng*, 1 K. & J. 580, 586, and *post*, 648, 655-6).

A. having a special power of appointment over a sum of Consols in favour of her children, by her will, which made no reference to the power, left "all the money belonging to her in Consols or any other funds, and all other property she might die possessed of, to her children." The question being whether the will executed the power,—held, evidence that both at the date of the will and of her death A. had no other property than that comprised in the power, was admissible to show an intent to execute the power (*Re Gratwick*, L.R. 1 Eq. 177; *Re Wait*, 30 Ch.D. 617).

Inadmissible.

the C. company." It is proved that A. held 40 fully-paid and 240 partly-paid shares therein. Evidence of declarations by A. that he intended 140 of the partly-paid shares to go to B. is inadmissible, although under the circumstances these alone were held to pass (*Re Cheadle, Bishop* v. *Holt*, 1900, 2 Ch. 620, C.A.). So, declarations by A. showing that by "farm" he meant two farms which he worked together, has been held inadmissible (*M'Gonigle* v. *M'G.*, 1910, 1 I.R. 297 C.A.).

A. having directed payment of (1) his debts, funeral and testamentary expenses, and of (2) a number of general legacies, —gave "all the residue and remainder of his two mortgage debts, after payment of his debts, funeral and testamentary expenses, to A. and B.," there being no general residuary bequest. The question being whether the debts and funeral and testamentary expenses only, or the legacies as well, were to be paid out of the mortgage moneys;—Held, that the former construction was correct, and that the words being unambiguous, evidence of surrounding circumstances was not receivable; also, even if ambiguous, evidence of the amount of the testator's property at the date of the will, showing that there was then no other property but the mortgage moneys out of which the legacies could be paid—was inadmissible (*Higgins* v. *Dawson*, 1902, A.C.I.).

A. made a settlement of his property by a separation deed, in which he reserved to himself a general power of appointment by will over one-third thereof, declaring trusts of the remainder for his wife and children. By will, prior to the deed, he had left all his property on trust for his wife and children. Held, that the will was a good execution of the general power, and that the settlement and circumstances under which it was executed were not admissible as evidence of a contrary intent (*Boyes* v. *Cook*, 14 Ch.D. 53, C.A.; *cp. Re Clark*, *id.* 422).

RULE II.

Primary Meanings. Correct Names and Descriptions.

Primary Meanings. A., by agreement dated Sept. 29, 1902, gives B. an option to purchase certain patents within *six months* from that date. Held, that though the belief, and subsequent acts, of the parties were not in general admissible to extend the word "months" from lunar to calendar months—yet evidence either of an agreement so to extend the time, or of conduct by A. amounting to a waiver of the strict meaning, was admissible [*Bruner*

Primary Meanings. A. sues B. on a contract to pay commission if A. sold B.'s land "within two *months* after the auction day." A. sold the land within two calendar, but not within two lunar, months. Held, that at common law the primary meaning of month being lunar month, and there being nothing in the context or surrounding circumstances, and no usage, to displace it, evidence (1) that by the conditions of sale, approved by B., the

Admissible.

v. *Moore*, 1904, 1 Ch. 305; *Morrell* v. *Studd*, 1913, 2 Ch. 648; *cp. Wilkins* v. *M'Ginity*, 1907, 2 I.R. 660. In *Helsham-Jones* v. *Hennen*, 87 L.J. Ch. 569, Eve, J., held that in every contract, save mercantile ones in the City of London, 'month' *prima facie* means lunar month, unless the context or surrounding circumstances show otherwise].

A. devises a life interest in property to "My dear *wife* Dorothy A. as long as she shall remain my *widow*." Evidence was admitted (1) that A. had bigamously married Dorothy, whom he knew to be the wife of B. and had lived with her as Mr. and Mrs. A.; (2) that after A.'s death she had returned to B. and reverted to her former name of Mrs. B.; and (3) that she had since given herself up for bigamy and been convicted therefor. Held, that the words *wife* and *widow* were used by A. in a secondary sense, and that the lady took the life-interest as *persona designata* (*Re Wagstaff*, 1908, 1 Ch. 162, C.A. *Cp. Doe* v. *Rouse*, and *Re Howe*, *post*, 652). So, where A. bequeathed an annuity to his "*wife*"; evidence that he had no lawful wife, but that he lived with B. and had referred to her as his wife,—Held, admissible and that B. was entitled to the annuity (*Re Brady*, 26 T.L.R. 257; for cases in which there are two claimants to the title, see *post*, 651-2).

A., a testator, having married B., a woman whose husband C. was believed by both of them to be dead, although they knew there was a possibility of his being alive, left property to B. "*during her widowhood*." A.'s will being disputed, on the ground that C. was alive,—Held, that under the circumstances the word *widowhood* did not impart a condition, but only a definition of the period of enjoyment and that B. was entitled to the property until death or remarriage. [*Re Hammond*, 1911, 2 Ch. 342; *cp. Re Boddington*, 25 Ch.D.

Inadmissible.

purchaser could object to the title within one "calendar" month; and (2) of an admission by B. asking when he could see A. and "liquidate his claim,"—was not admissible to alter the meaning [*Simpson* v. *Margitson*, 11 Q.B. 23; *Bruner* v. *Moore*, *opposite*. By the Interpretation Act, 1889, s. 3, month is now, unless otherwise expressed, to be construed "calendar" month in every statute passed since 1850].

So, where certain gas-meters were to be inspected "*daily*,"—evidence of a practice of the parties to omit Sunday inspection, held, inadmissible to control the meaning of the word (*Lond. C.C.* v. *South Metro. Gas Co.* 1904, 1 Ch. 76, C.A.)

A. sells B. a cargo of seed, "fourteen days to be allowed after ship ready to discharge, for delivery." In an action by A. for non-acceptance, held, the words being unambiguous, evidence tendered by B. that the meaning of the parties was that A. was bound to deliver the seed immediately, but that B. had fourteen days in which to accept it was inadmissible. [*Sotilichos* v. *Kemp*, 3 Ex. 105; 18 L.J. Ex. 37; *aliter*, perhaps, if a usage to that effect had raised an ambiguity; *ante*, 638].

A., a widow, being about to marry her deceased husband's brother, conveyed lands on trust, "after the solemnisation of the said intended *marriage*," for herself for life and then in fee for C., her youngest son. A. having died, in ejectment by B., her eldest son and heir, against C.; —Held, that the words being clear and unambiguous, evidence of the knowledge and surrounding circumstances of the parties was inadmissible to show that by "marriage" they meant the proposed invalid union [*Neale* v. *N.*, 79 L.T. 629 C.A.; *cp. Phillips* v. *Probyn*, 1899, 1 Ch. 811; and *Re Garnet*, 93 L.T. 117. The analogies (1) of "children" sometimes including illegitimates, and (2) of such evidence being receivable to identify persons or property,—were expressly held *not* to apply. The case, however, illustrates the principle that no meaning can be proved which the words will not properly bear; see *King* v. *Badeley*, *ante*, 640-1].

A. demises to B. his "*messuage* at Dale." Extrinsic evidence would not be admissible to show that by these words A. referred to a sheet of water which he owned at the same place (*Waterpark* v. *Fennell*, 7 H.L.C. 650, 680, *per* Ld. Cranworth; *cp. Miller* v. *Travers*, *post*, 655).

A., by will, leaves "to my *heir* £4000." It being contended that A must have referred to a single person, evidence was tendered that A. had promised to make B., a stranger, "his heir," and was in the habit of so describing B. Held, inadmis-

Admissible.

685, where the circumstances led to the term being construed as a condition].

Persons. A. left property to his "children." He had no children of his own, but had four step-daughters. Evidence that they lived with him, adopted his surname, were known in the neighbourhood as his children and were so treated and called by him, and that they called him "father," held, admissible, and to entitle them to the property (*Re Jeans*, 72 L.T. 835).

A., by will, leaves property to "the children of the late Mary G." The latter had left two children, B., legitimate, and C., illegitimate. Evidence was admitted that A. knew these facts and had clothed and maintained C., who was a reputed child of Mary G., and B. and C. were accordingly held entitled (*Gill* v. *Shelley*, 2 Russ. & Myl. 336).

A., by will, leaves property to "the children, living at my death, of my deceased niece Margaret K." Mrs. K. had five children by K., and afterwards one child by M., all living at A.'s death. The

Inadmissible.

sible; and, A. having three co-heiresses, the legacy was given to them (*Mounsey* v. *Blamire*, 4 Rus. 484; explained in Wigram, Extr. Ev. s. 36 and *note; cp. Re Fish*, 1894, 2 Ch. 83, 86).

Persons. A testator leaves a legacy to "his children," having at the date of the will both legitimate and illegitimate children. Held, that the former alone took, and that extrinsic evidence to show he intended the latter was inadmissible (*Ellis* v. *Houston*, 10 Ch. D. 236).

A., who had two illegitimate children by B., subsequently married her. The day after his marriage he made a will leaving his property to B. for life, with power to dispose of it "*between my children by her.*" A. died soon after, leaving no other children. Held, that B.'s illegitimate children could not take as there was at the date of the will a possibility that B. might have legitimate children by A. (*Dorin* v. *D.*, L.R. 7 H.L. 568; *Hill* v. *Crook* L.R. 6 H.L. 265).

A., by will gave property in trust for her brother B. for life, and after his death *for all or any of his children* living at the death of the survivor of A. and B. At the dates of A.'s will, and of A.'s and B.'s deaths, all in 1911, B. had illegitimate children by S., whom he married in 1904. Held that the legitimates only took, and evidence that B. always supposed, and had been informed by B., that K. was his lawful wife and his children by her legitimate, and that they had been so treated and received in the neighbourhood and by A.,—was not admissible to enlarge the meaning of "children" [*Re Pearce*, 1914, 1 Ch. 254, C.A. following *Hill and Crook and Dorin* v. *D.*, *sup.*; and overruling *Re Du Bochet*, 1901, 2 Ch. 441 *contra*. See also *Re Browne*, 61 L.T. 463, and *Re Brown*, 63 *id.* 159. *Re Pearce* was followed in *Re Embury*, *infra*, and *Re Dieppe*, 138 L.T.Jo. 564].

A. leaves property to "the children of my sisters B. and C." A. had three sisters, B., who before the will had, to A.'s knowledge, changed her name and become a nun; and C. and D., who, to his knowledge were married and had children. Held, there being a sister who answered the name of B., and who might leave the convent and marry,—declarations by A. that he intended C.'s and D.'s children, were rejected (*Delmare* v. *Robello*, 1 Ves. J. 412; see Wigram, Extr. Ev., 4th ed. p. 23; and *cp. Holmes* v. *Custance*, 12 Ves. 279).

In *Andrews* v. *A.*, *opposite*, letters from A. after the second marriage declaring the gift to be confined to the five children of K. were rejected as evidence of intention, though admitted so far only as they stated

Admissible.

question being whether M.'s child also took,—evidence that after K.'s death his five children lived with A., who took a great interest in them and their mother; but that A. was greatly displeased with his niece's second marriage to M., her own manservant, and had dropped her entirely, and never spoke of her except as Margaret K., and after her death, withdrew the five K. children from M.'s custody, supporting them himself, while ignoring M.'s child, having been admitted as "surrounding circumstances," as also evidence *contra* denying some of these facts,—Held, that the word children must have its *prima facie* meaning and included M.'s child (*Andrews* v. *A.*, 15 L.R.I. 199, C.A.).

A., who died in 1908, by will, in 1907, left property to *the children of my sisters B. C. and D.*" B. had illegitimate children only and C. and D. legitimate children only. Evidence having been received that B. at the date of the will was a widow, 68 years old, that she had been married in 1869 having had two children by her husband before marriage and none after; that she was living with A. at the date of the will and death; and that A. knew all the facts and was on affectionate terms with the children;—Held, that as there were not, and never could be, legitimate children of B., the illegitimates were entitled to share (*Re Eve*, 1909, 1 Ch. 796, approved in *Re Pearce*, *sup.*).

A testator left property to his sister B., "wife of C.," and after her death to "B.'s children." B. was never married, but at the date of the will was cohabiting with C., by whom she had had children, though she was then past child-bearing. Evidence was received that the testator knew of this connection, had frequently visited B. and C., and always treated their children as his own nephews and nieces. Held, that the words "wife" and "children" were not to be construed in their strict sense, and that the children took [*Re Horner*, 37 Ch.D. 695; *O'Loughlin* v. *Bellew*, 1906, 1 Ch. 542].

A. left to "each of the children of Mary Lord, £5 for insuring." Mrs. Lord had three children by Lord before, but none after, their marriage. Evidence that A. had been struck down by paralysis and nursed by his relative Mrs. Lord, and her children, in whose house he shortly after died, and that he knew that her children were illegitimate, but was on very friendly terms and exchanged visits with their mother and themselves,—Held, that the language of the will showed that he referred to *existing* children and thought death near at hand, and that, under the above circumstances, her children took. (*Re Haseldine*, 31 Ch.D. 511, C.A.; *Re Deakin*, 1894, 3 Ch. 565).

Inadmissible.

the circumstances of the testator's property.

A. left property to "my nephews and nieces, children of W. H. D., living at my death." A. had no nephews or nieces, but his aunt had married W. D., by whom she had several children, amongst others W. H. D., a son, and unmarried. Held, that "my nephews and nieces" must be struck out as *falsa demonstratio* (see Rule III. *post*), but as there remained "children of W. H. D." which was a correct description, the gift failed, and evidence that the testator knew that W. H. D. was an epileptic and unlikely to marry and intended the gift for the children of W. D. was inadmissible [*Re Chenoweth*, 45 Sol. Jo. 520; 17 T.L.R. 515; *cp. M'Hugh* v. *M'H.* 1908, 1 I.R. 155, 158].

A. leaves property to his "nephews and nieces." A. had none, but his wife had both. Held, that these took, and that, there being no one claiming in competition, evidence of unfriendly treatment by A., or direct declarations by him that they were not intended, was inadmissible (*Sherratt* v. *Mountford*, L.R. 8 Ch. 928).

A. left property to "his niece E.W." Neither A. nor his wife had any nieces, but his wife had two grand-nieces called E. W., one of whom was legitimate and the other illegitimate. —Held, that there being no latent ambiguity (*i.e.* equivocation), the legitimate one took, and evidence that the other lived in the house with A. and was habitually called by him "his niece," was not receivable (*Re Fish*, 1894, 2 Ch. 83, C.A.).

A. left one-third of his property to his "first cousins" and two-thirds to his "second cousins." At his death A. had first cousins, second cousins, and children of first cousins. Held, that second cousins did not include children of first cousins, and that evidence that A. habitually called such children his "second cousins" was probably inadmissible [*Re Parker*, 17 Ch. D. 262, C.A.; *cp. Cloak* v. *Hammond*, *Re Taylor*, *post*, 652, where "cousin" was held applicable in a secondary sense to the wife of a cousin].

Admissible.	*Inadmissible.*
A., in his will, after referring to B. as his 'son-in-law' and to his daughter Mary B. as 'the wife of B,' gave property in trust, after her death, to the "children of Mary B." Evidence was given that B. had, with A.'s knowledge and approval, 'married' Mary, the sister of his deceased wife and had children by her; and that they were all treated by A. as legitimate relations and had acquired that reputation. Held that, using the will as a dictionary, there was a sufficient designation therein, coupled with the surrounding circumstances to give the property to Mary B.'s children. (*Hill* v. *Crook*, L.R. 6 H.L. 265; *Re Hellicell*, 1916, 2 Ch. 580).	
A testator appointed his "nephew George Ashton" to be his executor. He had both a legitimate and an illegitimate nephew of that name. Held, as he had, in other parts of his will, spoken of his legitimate and illegitimate relations indiscriminately as his "relations," parol evidence was admissible to show that the illegitimate nephew was intended [*Re Ashton*, 1892, P. 83; following *Seale-Hayne* v. *Jodrell*, 1891, A.C. 304 (where, however, no question of evidence arose); *Cp. Re Corsellis* 1906, 2 Ch. 316. So, where the testator left a legacy to "my sisters" and had one legitimate and one illegitimate sister,—both took (*Re Embury*, (1914) 111 L.T. 275].	
A. left property to his "niece Mary Benyon, and after her death to her three daughters, Mary, Elizabeth, and Ann, as tenants in common." Mary Benyon had three legitimate daughters of those names, Ann, the only survivor of whom, took possession on her mother's death; she had also an illegitimate daughter, christened Elizabeth Thomas, by a man Thomas, whom she afterwards married. In ejectment for a share of the premises by Elizabeth Thomas;—Held, that though *prima facie* the words of the will imported legitimate daughters only, yet that, as illegitimates might be included, evidence, other than direct declarations, was admissible that A. did or did not intend Elizabeth Thomas to take. On evidence that A. never knew of the death of the legitimate Elizabeth or of the birth of the illegitimate one, or of their mother's second marriage, all of which had been concealed from him, and that he always wrote to her mother as "Mrs. Benyon,"—Held, that Ann was entitled to the whole (*Doe* v. *Benyon*, 12 A. & E. 431).	
A testator appointed "William McCormack" as one of his executors. There was a Thomas McCormack, one of the deacons of A.'s chapel, and his son William Abraham McCormack. Upon evidence: (1) That A. had told one of the witnesses of his will that "he wished Mr.	A. appoints as one of his executors "Francia Courtenay Thorpe of Hampton, gentleman." There were living, at the date of A.'s will and death, (1) Francia *Corbet* Thorpe of Hampton, the testator's brother, and (2) Francis *Courtenay* Thorpe, the former's son, a lad of twelve,

Admissible.

McCormack, one of the deacons of his chapel, to be his executor"; (2) that Thomas McCormack was the only deacon of that surname; and (3) that it did not appear that A. was acquainted with the son,—Held, that the father was intended [*Re Brake*, 6 P.D. 217; 29 W.R. 744; following *Charter* v. *C.*, *post*, 652, and Wigram, Prop. v., neither of which, however, sanctions the admission of the first head of evidence. *Re Peel, opposite*, was also cited. *Re Brake, sup.*, might, perhaps, be placed under Rule III., *post*, since though the name in the will did substantially, yet it did not completely, fit the son. *Cp.*, however, Equivocations, *ante*, 627, where substantial identity has, in some cases, been held sufficient under that Rule].

A., by will in 1846, gives a legacy to "The Benevolent Institution for the delivery of poor married women at their own Habitations." It was claimed by an existing society called "The Royal Maternity Society for delivering poor women at their own Habitations" which had been founded in 1757, and adopted its present name in 1824. In opposition to this claim, evidence was received that there had been a society called "The Benevolent Institution for the sole purpose of delivering poor married women at their own Habitations," which was founded in 1817, but ceased to exist in 1824, of which A. was a life governor, and to which she subscribed and frequently recommended poor women to apply. Held, that if both societies had been in existence the latter, being more accurately described, must have taken; but that as the former was sufficiently described, and as the only evidence that A. was not aware of its existence was an affidavit by A.'s maid that she believed A. was not aware of its existence (*ante*, 61), the former took [*Coldwell* v. *Holme*, 23 L.J.Ch., 595; 18 Jur. 396; followed in *Re Magrath* 1913, 3 Ch. 331; see cases *post*, 651-3].

A. left an annuity to his "brother Edward Parsons for life, and afterwards equally to his children by his present wife." A brother, Edward Parsons, and his wife, had both died before the date of the will, and their children took other legacies thereunder, but another brother, Samuel Parsons, who had a wife and children, claimed the annuity.—Held, evidence that he was the only brother alive at the date of the will, and that A. often called him "Edward" and "Ned," was admissible, and that he took the annuity (*Parsons* v. *P.*, 1 Ves. J. 265).

Inadmissible.

residing with him. Held, that A.'s nephew, being correctly described, satisfied the description, and evidence that A. had asked his brother to be his executor and the latter had accepted; that A. had afterwards referred to him as such; and that the word "Courtenay" was introduced by mistake, was inadmissible [*Re Peel*, L.R. 2 P. & D. 46; (fuller) 22 L.T. 417. Mr. Taylor remarks that to unprofessional men this case appears a reduction of the rule to an absurdity (s. 1202 *n*)].

A., by his will, gives a legacy to "The National Society for the prevention of Cruelty to Children." There was an English Society precisely answering that name, and also a Scots Society similarly named except that the word *Scottish* was prefixed to "National," Held that the former took; and that evidence that A. was a domiciled Scotsman, who had lived all his life in Scotland, that his will was made in Scots' form and prepared by a Scottish solicitor, that the legacy in question was inserted among a series of other legacies to Scottish charities, that his brother was a director of the Scottish Society which had recently and specially been brought to A.'s notice, and that the English Society neither operated in Scotland, nor appeared to be known to A.;—was, even if admissible, not sufficient to deflect the name from its strict application (*National Soc. &c.* v. *Scottish National Soc., &c.*, 1915, A.C. 207; *post*, 658).

A leaves a legacy to "the London Orphan Society in the City Road." There was (1) an "Orphan Working School" in the City Road and (2) a "London Orphan Asylum" at Clapton. Held, that the former answered the description, and that evidence in favour of the latter was inadmissible [*Wilson* v. *Squire*, 1 Y. & C. Ch. Cas. 654. Evidence was admitted in favour of (1) that A. frequently passed it on his way to business, and had instructed his solicitor to give a legacy to it in his will (*sed qu.* as to such declarations, unless tendered merely to show A.'s knowledge of the institution); but rejected in favour of (2) that A. was a subscriber thereto, and had expressed an intention to leave it a legacy. The description of (1) seems, however, hardly correct enough to bring the case within the rule so as to exclude evidence of (2); see cases *post*, 651-3].

A. left "£20 for mourning and his premises called Rose Cottage" to his "niece Elizabeth Stringer." A. had had a niece, Elizabeth Stringer, who died before the date of his will, and whose funeral he attended; but at the date of his will the only person known to A. in the least like this description was a great-grandniece, Elizabeth Jane Stringer, a

Admissible.	*Inadmissible.*
	child five years old. Held, the latter took as sufficiently answering the description, and evidence that the will was a copy of an earlier one made in Elizabeth Stringer's lifetime, and that the legacy to her had by inadvertence of the solicitor, who did not know of her death, been recopied into the new will without A.'s attention being directed thereto, was inadmissible [*Stringer* v. *Gardiner*, 4 De G. & J. 468. Mr. Justice Stephen remarks that this decision, the result of which was to give a legacy to a person whom the testator had no wish to benefit, and who was neither named nor described in the will, appears to be a practical refutation of the principle or rule on which it is based (Dig. Note xxxiii.). *Cp. Coldwell* v. *Holme, supra*].
	A. leaves a legacy to his "cousin A. R. C. Loftus." A. had had a cousin of that name who, at the date of the will, was known by A. to be dead. Evidence that by a mistake of the draftsman the above name was inserted instead of his cousin's, George Loftus, held, not admissible, there being no ambiguity, and the gift held void [*Re Ely*, 65 L.T. 452. This case was disapproved in *Re Ofner*, 1909, 1 Ch. p. 63, cited *post*, 650, and *Re Halston*, 1912, 1 Ch. 435, *post*, 651. *Cp. Stringer* v. *Gardiner*, *sup.*; and *Charter* v. *C.*, *post*, 652].
Property. See cases, *post*, 648-9.	*Property.* A. bequeaths "33 shares in the E. Co. to B., and the remaining shares to C." It appeared that A. held 74 shares in the E. Co., 37 being original fully-paid bonus shares, which had been allotted share for share to every holder of original ones.—Held, that B. took 33 single fully-paid shares; and that testimony by the secretary of the company that A. and most but not all, of the other shareholders used to treat and speak of the two classes as one (*i.e.* in his case as 37 double shares), and gave only one receipt for their dividends on both, was not admissible [*Millard* v. *Bailey*, L.R. 1 Eq. 378; approved in *Re Trimmer, ante*, 599; and *cp. Mercantile Bank* v. *Taylor, ante*, 599, 637. *Aliter* had there been a usage by all the holders to treat all the shares as double shares].
	A. bequeaths to B. his 140 shares in the C. company." It was proved that A. owned 40 fully-paid and 240 partly-paid shares therein. Evidence of declarations by A. that he intended 140 of the partly-paid shares to go to B., held, inadmissible, though under the circumstances these alone were held to pass (*Re Cheadle, Bishop* v. *Holt*, 1900, 2 Ch. 620, C.A.).
	A. bequeaths "the sum of £2000, Spanish bonds or coupons belonging to me" to B. A. owned 4 Spanish debentures nominally of £1000 each, but worth actually about £500. Held, that these debentures being sufficiently described, B. was

Admissible.	*Inadmissible.*
	entitled to 2 but not to all of them; and that evidence that (1) A. habitually described the debentures as "of £500 each" and the 4 as "securities for £2000"; and (2) had declared her intention to leave the whole of them to B.,—was inadmissible (*Horwood* v. *Griffith*, 4 De G. M. & G. 700).
A. devised to B. "all my mansion-house at Tedworth in Hants, and all my lands in Hants devised to me by my late husband, and all my other hereditaments in Hants." Evidence was received that there was an extensive property known as "the Tedworth Estate," partly in Hants and partly in Wilts, and that it had been enjoyed together as one property, without division to mark the county boundaries, and was so devised to A. by her late husband, and that the mansion-house was largely disproportionate to the Hants lands, which formed the smallest part of the estate. Held, only the lands in Hants passed, notwithstanding that (1) they were insufficient to keep up the house; (2) that farms were thereby divided; and (3) that cottages were in some cases separated from their gardens [*Webber* v. *Stanley*, 16 C.B. N.S. 698, disapproving *Stanley* v. *S.*, 2 J. & H. 491, *contra*, where further evidence had been received and relied on; *cp. Pedley* v. *Dodds*, 2 Eq. 819; and *Cave* v. *Harris*, 57 L.J.Ch. 62].	A. devises to B. "my estate of Ashton in the county of Devonshire." Held (1) that "my estate *of* Ashton" was equivalent to "my estate *at* Ashton," and passed only such of A.'s lands as were situated in the manor or parish of Ashton; and (2) that evidence that A. habitually included lands outside these limits in the term "Ashton Estate,' and had instructed the scrivener who made his will "to give my Ashton Estate" to B.,—was inadmissible [*Doe* v. *Chichester*, 4 Dow. 65. In *Homer* v. *H.*, 8 Ch. D. 758, 774, Baggallay, L.J., stated that this and other cases "establish that under a devise of lands *at* a place, extrinsic evidence is not admissible to show that the testator intended to pass lands *not* at that place, either by reason (1) of the *enjoyment* of such other lands with the original ones for a long period of time; or (2) of his having *dealt* with them as one property; or (3) of his having *habitually referred* to them as one property under one distinguishing name." *Doe* v. *Chichester*, *sup.*, however, seems supportable solely on the ground that in this particular will *of* was held to mean *at* (see *Webb* v. *Byng*, 1 K. & J. p. 586; *Webber* v. *Stanley*, 16 C.B. N.S. p. 754; and *cp. ante*, 641, and *post*, 655-6)].
A. devised his "messuages and manufactory on the west side of High Street in the occupation of B. and C., together with all appurtenances," to D.—Evidence was received that A. owned two manufactories, one on the west side of High Street and another, half the value, on the east side, both of which were at the date of the will, and had been for thirty years before, occupied and used together under one lease by B. and C. as one manufactory and at a single rent, and that though the smaller one had originally been separate yet it could not now be so used without considerable alteration and readjustment. Held, as the premises on the west side satisfied the description, they alone passed (*Smith* v. *Ridgway*, L.R. 1 Ex. 331).	A. devised to B. the "townland of East T., including the house, offices, gardens, and demesne of Woodville." In addition to the original demesne of Woodville, part of East T., A. owned two adjoining lands M. and C., not part of East T. Held, evidence that A. had always treated and spoken of M. and C. as part of the demesne of Woodville was inadmissible (*King* v. *K.*, 13 L.R.I. 531, 537-8).
A. devised to his wife "my residence called S. House and the premises thereto as the same are now occupied by me." Evidence was given that at the date of the will A. had let off to his two sons for their business an office in the yard of S. House and the stables and coach-house, and that A. only occupied the remainder. Held, that only the parts occupied by A. passed, and that the inconvenience of such a division could not be considered. Davey, L.J., thought that the will must first be construed, and that evidence could only be adduced afterwards to show if there was anything answering the description.	A. conveys to B. an estate called Gotton Farm by a deed which describes it as consisting of the particulars specified in a schedule and delineated in a plan thereon. In trespass by A. against B., the latter cannot prove that a close, not mentioned in either, was always occupied and tenanted by A. as part of the farm and so passed by the deed to B. [*Barton* v *Dawes*, 10 C.B. 261; *Llewellyn* v. *Jersey*, 11 M. & W. 183; *Boyle* v. *Mulholland*, 10 Ir. C.L. Rep. 150; *Baird* v *Fortune*, 4 Macq. H.L. 127, 149. In the case of lands abutting on highways or non-tidal rivers, however, the owner of the land will be

Admissible.

Smith, L.J., remarked that if evidence were not resorted to the construction was plain, and that if it were it was in favour of the sons [*Re Seal, Seal* v. *Taylor*, 1894, 1 Ch. 316; *Morrell* v. *Fisher*, 4 Ex. 591; *Magee* v. *Lavell*, L.R. 9 C.P. 107, in which case Denman, J., stated that extrinsic evidence was only admissible so far as to identify the subject-matter. In *Re Seal, sup.*, evidence further than to show what premises were occupied by A., would seem, under the present Rule, to have been inadmissible].

Inadmissible.

presumed to own the soil to the middle of the road or river, though the map only shows the land as going up to the side of either; and evidence in rebuttal of this presumption may then be given, post, *Devonshire* v. *Pattinson, post*, 675).

A. conveys a house to B. "as now staked and marked as lot 24 in the particulars of sale, with all ways thereto appurtenant." Held, that a plan of the premises marked on the particulars of sale, but not on the conveyance, was not admissible to show that a right of way, though not appurtenant, was included [*Barlow* v. *Rhodes*, 1 Cr. & M. 439. So, where minerals had been reserved by the grantor in a conveyance, the conditions and particulars of sale were rejected to show that sandstone was not included, *Greville* v. *Hemingway*, 87 L.T. 443, cited *ante*, 633].

A. buys the "entire rights and liabilities" of a business from B., and agrees "to take over B.'s liabilities as scheduled." Held, there being other liabilities which were not scheduled, that evidence was not admissible to show that by "liabilities" the parties meant only those scheduled [*Lloyd* v. *Sturgeon Co.*, *ante*, 594; and *cp. Mercantile Bank of Sydney* v. *Taylor*, *ante*, 599].

RULE III.

Incorrect Names, Descriptions, &c.

One Person or Object. A., having contracted to buy land from "B. as legal personal representative of C.," resists specific performance on the ground that B. had misdescribed himself as such. B. may prove that at the time of the contract he was the only person entitled to take out letters of administration to C.'s estate and that, after the contract, he did take them out (*Towle* v. *Topham*, 37 L.T. 308).

A vendor conveys property to "William Wray of Laurel House, Highgate." Evidence is admissible that the deed was executed by Henry Wray, who signed the name "William Wray" for himself and several partners, as purchasers (*Wray* v. *W.*, 1905, 2 Ch. 349; *cp. Simmonds* v. *Woodward*, 1902, A.C. 100, cited *ante*, 625).

In a settlement case, a deed of apprenticeship is produced made between "Joseph R. and John B.," but signed "Joseph R. and Joseph B." Testimony by John B. is receivable that he was the person mentioned, and that he had served the apprenticeship and been bound by the indenture (*R.* v. *Wooldale*, 6 Q.B. 549).

And where a voting-paper beginning "I, the undersigned A.," was signed "B." Evidence by the town clerk that he gave A.'s paper by mistake to B., who signed it without noticing the mistake, was admitted to explain the patent ambiguity and vali-

Admissible.

Inadmissible.

date the vote (*Summers* v. *Moorhouse*, 13 Q.B.D. 388).

So, where Thomas D. executed a will, but opposite his mark had been written "John D."—evidence was received that there was no person at his address except Thomas D., that the mistake arose through his being commonly known as, and called, "John," and that he had five children as named in the will (*Re Douce*, 2 S. & T. 593; *Re Clarke*, 1 *id.* 22).

A., by will, left "All for mother." Evidence that he had no mother, but called his wife "mother," was received and the gift upheld (*Thorn* v. *Dickens*, 1906. W.N. 54). So, where A. left small legacies to convents, "£50 to S." (a young nephew), and "the rest to my mother," Evidence that A. had no mother, but, in dictating his will to C. had said "your mother," which S. by mistake wrote as "my mother,"—was received, and the Court of Probate acting as such, struck out the word "my," and acting as a Court of construction allowed "mother" to be explained by parol evidence and construed the word as referring to the mother of S. [*Re Wrenn*, 42 Ir. L.T. Rep. 152; *ante*, 327, 332].

A. leaves a legacy to "my grand-nephew Robert O." A. had no relative of that name, but had two grandnephews, brothers, Dr. Alfred O., and Richard O. A memo. in A.'s writing: "To my grandnephew, Dr. Alfred O., £100. To his brother Robert O., £100," was received, not as evidence of intention, but to explain the mistake although the document only amounted to a *single instance* of misdescription, and not to a *general habit*, and although the memo. formed part of A.'s *instructions for his will* (*Re Ofner*, 1909, 1 Ch. 60, C.A.).

A. leaves a legacy to "the daughters of my late friend Ignatius Scoles, deceased."—A. had no deceased friend of that name, but had a friend Ignatius Scoles, a priest, unmarried and alive, who had several sisters, all the children of Joseph Scoles, who was dead at the date of the will. Evidence of former wills made by A. in which legacies were left to the daughters of Joseph Scoles, architect, was admitted to show that father and daughters were both known to A., and so inferentially that the latter, though misdescribed, were intended (*Re Waller, White* v. *Scoles*, 80 L.T. 701, C.A.).

A., by will, left land to "John William H., son of Israel H." Evidence was received that the latter had had a son of that name, who to A.'s knowledge had died when 10 days old and 17 years before the date of the will; also that Israel H. had another son, living, John Robert H., who was known to A.; that A. had desired that this son should bear the same name as his deceased brother, but that A.

See *Re Murphy*, cited *ante*, 332. In *Re Ofner*, and *Re Waller*, *opposite*, the memo. and former wills, respectively, were rejected as evidence of an *intention* by A. to benefit the claimants. See also *Robertson* v. *Flynn*, 1920, 1 I.R. 78, C.A., where instructions for a will were received merely to show the testator's knowledge of a legatee's name, and not his intention.

Admissible.

did not know the second name Robert had been substituted for William; that this son constantly stayed with A. and was told by the latter that "*the land would ultimately belong to him.*" Held, that the living son took [*Re Halston*, 1912. 1 Ch. 435, not following *Re Ely*, *ante*, 647; but following (with regard to A.'s declarations) *Re Blackman*, 16 Beav. 377, where statements that the testator had left, or would leave, property to the legatee, were admitted. The last named case, however, is doubted in Wigram, 4th ed., p. 71 *n*; and both cases seem on this point, contrary to principle, see *Doe* v. *Hiscocks*, *Charter* v. *C. &c.*, *post*. 652, and *Beaumont* v. *Fell*, *opposite*.

A. having left a legacy to "Catherine Earnley" which was claimed by Gertrude Yardley,—evidence was admitted that there was no such person as the former, but that the latter was a friend of the testator, who usually called her "Gatty," which might have been mistaken by the acrivener for Katy, *i.e.* Catherine. [*Beaumont* v. *Fell*, 1723, 2 P. Wms. 141. In *Doe* v. *Hiscocks* (1839), 5 M. & W. 363, it was said that *Beaumont* v. *Fell*, though somewhat doubtful, can be reconciled with true principles upon the ground that no such person as Catherine Earnley existed, and that A. was accustomed to call Gertrude Yardley "Gatty." Mr. Taylor also considers that though this case carries the doctrine to its extreme limits, the Court was perhaps justified in deciding in favour of the claimant (8th ed., s. 1211). See *Re Hooper*, 88 L.T. 160, where property bequeathed to "Percy H." was given to William H., on evidence that he was called "Bertie" which might be mistaken for "Percy." In *Beaumont* v. *Fell*, *sup.*, it was said that this laxity would not apply to a grant or even a devise of *land*, by reason of the mistake both of Christian and surname; but see *Simmonds* v. *Woodward &c.*, *ante*, 625].

A. left a legacy to the "Patagonian, Chilian, and Peruvian Missionary Society." Evidence was received that there was no such society, but that there was a "South American Society" which carried on missions at those places, and that A. knew of and subscribed to it, and the legacy was given to it [*Makeown* v. *Ardagh*, I.R. 10 Eq. 445; *Re Vaughan*, 17 T.L.R. 278, where entries in the testator's cash book showing donations made ten years *after* the date of the will were admitted to identify a misdescribed institution (*cp. ante* 615, 625; and see *post*, 653].

Two or more Persons or Objects. A. leaves a legacy to "my dear wife, Caroline." Upon evidence that A.'s wife's name was Mary, but that she had separated from him, and that he had then bigamously married a woman called Caroline,

Inadmissible.

In *Beaumont* v. *Fell*, *opposite*, declarations of intention by A., *i.e.* that "*he would do well for her by his will*," were also received, though these would now be inadmissible (*post*, 652). In *Mostyn* v. *M.*, 54 H.L.C. 167-8, Ld. Brougham said he 'took *Beaumont* v. *Fell* no longer to be law, but to have been overruled by *Miller* v. *Travers*, 8 Bing. 244" (cited *ante* 601 and *post* 655). This seems too sweeping. In the report of *Miller* v. *Travers*, *Beaumont* v. *Fell* is not mentioned, and the effect of the former case would seem to be to overrule, not the whole of the latter, but only the portion admitting A.'s *declarations of intent*. Wigram clearly recognizes this, remarking: "*Beaumont* v. *Fell* is extremely difficult, if not impossible, to reconcile with *Miller* v. *Travers*, *unless* it be upon the ground that the description of the legatee was in the circumstances of that case, sufficient without reference to what the testator *had declared*" (s. 193). In *Doe* v. *Hiscocks*, quoted *opposite*, *Beaumont* v. *Fell* was in fact supported upon this ground.

Two or more Persons or Objects. A. devises land to "John Hiscocks, the eldest son of John Hiscocks." The latter had two sons, Simon, his elder, and John, his second son, who, however, was the eldest son by a second marriage. Held, that

Admissible.

who was living with him at the date of his will and death;—Held, that the latter took (*Doe* v. *Rouse*, 5 C.B. 422; *cp. Re Howe*, 33 W.R. 48; and *ante*, 642).

A. appointed his "son Forster Charter" his executor. A son, known by A. to have died before the date of the will, had been so called, but A.'s only living sons were William Forster Charter and Charles Charter. Evidence that William Foster had quarrelled with his father and for many years lived away from home, and was habitually called by his father "William" or "Willie" and not "Forster"; while Charles lived at home and helped his father to work the farm, was received to show that the latter and not the former was intended (*Charter* v. *C.*, L.R. 7 H.L. 364; *ante*, 332-3; *cp. Re Towhill*, 3 L.R.I. 21).

A. left a legacy to "my cousin Harriet Cloak." A. had at the date of the will no cousin strictly answering that name, but had (1) a cousin whose name had been Harriet Cloak, but who had since married and become Harriet Crane; and (2) a cousin's wife whose name was Harriet Cloak. Held, that "cousin," though primarily meaning by consanguinity, might in a secondary sense mean by affinity; and that evidence that A. was more intimate with (2) than with (1), and knew, at the date of the will, that (1) was married and no longer called Cloak, was admissible and sufficient to give the legacy to (2) [*Cloak* v. *Hammond*, *Re Taylor*, 34 Ch.D. 255, C.A.].

A leaves a legacy to "B.'s daughter, my godchild, for her sole and separate use." On evidence that B. had two sons, one of whom was B.'s godchild, and two daughters, one of whom only was married, neither being a godchild of B.;—Held, that the godson took (*Re Blayney's Trusts*, I.R. 9 Eq. 413).

So, where A. devised property to "Elizabeth, the natural daughter of B." and it appeared that B. had a natural son, John, and afterwards, on B.'s marriage to C., a legitimate daughter, Elizabeth;—Held, on evidence that A.'s nephew was the putative father of the former, and that in consequence A. had wished him to marry B., though there was no proof that A. knew the sex of B.'s illegitimate child, that John took (*Ryall* v. *Hannam*, 10 Beav. 536).

A. left a legacy to "the fund for superannuated preachers and widows of Wesleyan ministers." There was no fund of that name; but there were (1) "The Worn-out Ministers and Ministers' Widows Auxiliary Fund," and (2) "The Itinerant Methodist Preachers' Annuitant Society." Evidence was received that A. was a subscriber to (1); and also that he had once, 25 years before, given a donation to (2),

Inadmissible.

though the circumstances of the family might be proved, yet, as there was no equivocation, evidence of instructions given by A. for his will and declarations made by him after its execution were not admissible to show which of the two was intended (*Doe* v. *Hiscocks*, 5 M. & W. 363.)

In *Charter* v. *C.*, *opposite*, it was held that though the testator's treatment and habits of speech as to both sons might be proved, yet as there was only a misdescription and not an equivocation, his declarations showing that he intended Charles and not William, were inadmissible. [See also *Bernasconi* v. *Atkinson*, 10 Hare, 34; *Re Ingle*, 11 Eq. 578, and *Re Chappell*, 1894, P. 98, in which declarations of intention were also rejected in cases of misdescription].

In *Cloak* v. *Hammond*, *opposite*, at p. 258, Cotton, L.J., remarked that evidence of the testator's expressions of intention before and after the making of the will was inadmissible, this not being a case of equivocation where the words were equally applicable to two or more persons, but of misdescription, where the words were not strictly applicable to any person.

Admissible.	*Inadmissible.*
—the former being held entitled (***Bunting*** v. ***Marriott,*** 19 Beav. 163; ***cp. King's Coll. Hosp.*** v. ***Wheildon,*** 18 *id.* 30).	
A. left a legacy to "The London Hospital for Incurables." There was a Royal Hospital for Incurables at Putney, the oldest and largest near London; and a British Home for Incurables at Clapham Rise. Affidavits by A.'s widow were received (with hesitation) that A. had visited Clapham Rise and knew of, and had expressed sympathy for, the inmates of the latter; while she did not believe he knew of the existence of the former. Held, by a majority of the Court, that the former took—and that the affidavits were no proof that A. did not know of its existence [***Re Beale,*** 6 T.L.R. 308, C.A.; ***British Home*** v. ***Royal Hospital,*** 1904, Times, Mar. 11, C.A., where the same institutions were involved and entries in A.'s diary of subscriptions made several years *after* the will to both, were received. ***Cp. Re Doane,*** 8 T.L.R. 550; and ***ante,*** 646 and 651].	A. left legacy to the "Royal Hospital for Women." There was none quite answering that name, but there were several somewhat similarly named, some of which claimed the legacy. Held, that conversations between A. and her solicitor when giving him instructions for her will, were not admissible to identify the legatee (***Re Batemann,*** 27 T.L.R. 313; ***cp. Re Raven,*** 1916, 1 Ch. 373, cited ***post,*** 658).
Erroneous enumeration of Class. A., by will in 1873, leaves a legacy to "each of the 3 children of Mrs. W., widow of Wm. W." The latter, a half-brother of A., had died in 1857, leaving a widow and 3 children, one of whom died in 1870, the other 2 surviving. In 1858 Mrs. W. had married again, and at the date of the will had 6 children by her second husband. On evidence that A. knew of the existence of the first 3 children, but not of the death of the one, and knew of the death of Wm. W. and the widow's remarriage, but not of the number of children by such remarriage;—Held, that the two children alone took (***Newman*** v. ***Piercey,*** 4 Ch.D. 41. ***Cp. Andrews*** v. ***A.,*** ***ante,*** 644).	***Erroneous enumeration of Class.*** A. bequeaths a fund "equally between my 9 grandchildren, viz., the 3 children of B., the 3 of C., the 2 of D., and the one of E." D. had 4 children, 2 by his first and 2 by his second wife. Held, this was a gift to grandchildren as a class, and that no evidence beyond the state of the family was admissible to confine the bequest to the children of D.'s first marriage. The evidence tendered, but rejected, was that A. knew of the children of D.'s second marriage, but had never seen them, had said he knew nothing about them, and had often declared his intention only to benefit the children of D.'s first marriage (***Matthews*** v. ***Foulshaw,*** 12 W.R. 1141).
	A. left a legacy to "the 3 children of B. born prior to her marriage with C." At the date of the will B. had 4 illegitimate children prior to such marriage—3 by A., and one, some years earlier, by another man. Held, that the presumption of mistake did not apply to illegitimate children; that in the absence of evidence to show that A. knew of the existence of the fourth child and admitted it to be his, the 3 alone took; but that declarations by A. that he only intended to benefit his own children, were inadmissible (***Re Mayo, Chester*** v. ***Keirl,*** 1901, 1 Ch. 404).
Property. A. by will leaves to B. "shares" in a company in which he had only debenture stock; monies on "current account" when he had only a deposit account; and "freehold" houses when he had only leaseholds. Held, these all passed to B. (***ante,*** 625).	***Property.*** A. agrees with B. "to do the brick-work of the several houses in South Street *and* Southampton Street," B. to find the materials. In an action by A. against B. for not finding materials for the latter houses, B. tendered evidence (1) that he had no ground in Southampton Street, though he afterwards bought some and built houses thereon; and (2) that "and" was a mistake, and he ten-
A. lets B. the second floor of 13 and 14 Old Bond Street, "together with free ingress and egress through the staircase of	

Admissible.

No. 13."—There was a lift, but no staircase, in No. 13, and two staircases (front and back) in No. 14. In an action by B., claiming the use of the latter on the ground of mistake in the lease, A. counter-claiming for rectification confining B. to the use of the lift of No. 13;—Held, as the description referred to a non-existent thing, "the staircase at 13," and was too indefinite to refer to 14, it was doubtful whether the doctrine of *falsa demonstratio* applied, but on the evidence of common mistake the lease was rectified, giving B. the use of the back staircase in No. 14 [*Cowen* v *Truefitt*, 1899, 2 Ch. 309, C.A. *Cp. Hutchins* v. *Scott*, *ante*, 602].

A. bequeathed all his cash in bank, Consols and shares to B. He had no Consols at the dates of his will or death, but had some 2 1-2% Bank of England Annuities. A letter written shortly after his will to B. in which these latter were referred to as "Consols," was admitted and the Annuities held to pass [*Re Windsor*, 47 Ir. L.T.R. 344 (1918)].

A. directed his executors to sell "my two freehold cottages at Trowbridge, known as numbers 19-20 Castle Street," and divide the proceeds between B. and C.; he devised 39 Castle Street, to D. At the dates of his will and death he owned two freehold cottages 19-20 Thomas Street Trowbridge, and 35 Castle Street, but had never owned 19-20 Castle Street. Held, that the word "My" introduced an ambiguity; that "Castle Street" could therefore be rejected as *falsa demonstratio*, and the direction applied to "my two freehold cottages at Trowbridge known as numbers 19 and 20" (*Re Mayell*, 1913. 2 Ch. 488). So, where A. left "143-4 W. Street" in the town of Y., to relatives, evidence that there were such houses, but he had no interest in them, but owned 143-4 T. Road, in that town;—Held that the latter passed [*Re Brimble*, 144 L.T. Jo. 217 (1918)].

A., the owner of land on a river bank, to which he had moored a wharf, sues B. for interference with the flow of the stream. B. denies A.'s title to the land further than the water's edge. The root of A.'s title was a Crown grant to C. in which the soil of the river was granted "to a distance two chains from the shore," a conveyance by C. to D. in which the boundary was similarly described; and a conveyance by D. to A. in which the boundary was described as "the water's edge." Held, that the expression "the water's edge" being ambiguous, evidence that before D.'s conveyance, A. was put in possession of the river soil for 2 chains, and moored his wharf, thereto, and had occupied it undisturbed by the Crown or D. for many years, was receivable and A.

Inadmissible.

dered a receipt by A. in respect of work done "at houses in South Street, Southampton Street." Held, that the document being unambiguous, evidence that "and" was inserted by mistake was inadmissible; but on the other admissible evidence A. was only entitled to a verdict in respect of the South Street houses [*Hitchin* v. *Groom*, 5 C.B. 515; the question of the intention of the parties was held to be for the Court on the construction of the document, and not for the jury. *Cp. ante*, 602].

A. sues B. on a bill of exchange accepted by the latter, the amount in figures in the margin being £245, but in words in the body of the bill, "Two hundred pounds." Evidence that the bill was given in payment for goods of £245; that B. intended to accept for that amount; and that he had been applied to three times for the "bill of £245 left with him for acceptance,"—held, inadmissible, the ambiguity being a patent one, and that A. could only recover £200 [*Saunderson* v. *Piper*, 5 Bing. N.C. 425; *cp. Villiers* v. *Skelton*, *ante*, 602].

Admissible.

entitled thereto [*Booth* v. *Ratte*, 15 App. Cas. 188. In *Watchman* v. *A.-G.* *ante* 614, this is treated as a case of patent ambiguity].

A. obtains an advance from a bank upon executing a deed charging the premises in a schedule thereto, which described them as "three leasehold houses in C. held by the mortgagor under a lease of the 25th September." A. owned these three houses, but only one was held under that lease. A.'s trustee in bankruptcy having claimed that the contract only charged one of the houses;—Held, that all the houses were charged; that though the agreement might have been rectified, the case could be treated as one of misdescription, and evidence was admissible, in identification, that before the advance A. pointed out the three houses to the manager as those he offered to charge, and that the manager accepted them, and made the advance on that basis (*Re Boulter*, 4 Ch.D. 241; *cp.* *ante*, 72).

A. devised her "freehold lands and hereditaments at M." to B. A. had two freehold fields at M. Evidence was admitted (1) that A. was not aware of any difference in tenure between them, or (as the fact was) that they had devolved on her in two different rights; and (2) that the four fields were usually known and *reputed* in the locality to be "freeholds" and B. was held entitled to all four (*Re Steel*, 1903, 1 Ch. 135; *cp. infra*, 656).

A. devised "all that part of Rigby's estate devised to me by my father's will, consisting of L. meadow, K. pasture, F. meadow, and M. meadow."—Held, on evidence that by his father's will two other closes were devised to A., and that extreme inconvenience would result from separating them, the whole six passed (*Travers* v. *Blundell*, 6 Ch.D. 436).

A testator devised to A. "all my farm called Trogues-farm now in the occupation of C." and to B. the residue of his lands. In ejectment by B. for two closes of which A. had taken possession under the devise, B., to show that these were not parcel of Trogues farm, nor did the testator take them as such, tendered evidence (1) that the two closes were not in the occupation of C. but of M., who paid rent for them to the testator, showing that the latter knew they were not in C.'s occupation; and (2) that by the will of H., who had devised them to the testator, they were devised as "Dale-closes," separately from Trogues-farm; and (3) evidence in reply by A. that shortly before making his will the testator served a notice to quit on M., in which he described the two closes as "my lands belonging to and called Trogues-farm," showing that he considered them as parcel,—Held, admissible, and

Inadmissible.

A. devised "all his real estates in the county of Limerick and city of Limerick" to trustees. He had no real estates in the county of Limerick, but he had some in the county of *Clare* and the city of Limerick. The question being whether the estates in Clare passed, evidence was tendered that in the draft of the will approved by A. the estates in Clare had been included, but that, by mistake of the conveyancer, "Limerick" had been substituted for "Clare" in the will afterwards executed by A. Held, (1) that the evidence was inadmissible as it made the will speak on a subject on which it was silent, like filling up a blank, and by adding a new devise tended to nullify the statute, (2) that the case could not be treated as one of misdescription, since there was neither an imperfect nor any description of the estates in Clare, and that the claimant was attempting not to apply an existing description but to introduce a new one [*Miller* v. *Travers* (1832) 8 Bing. 244; *ante*, 332, 601. For a discussion of this case, see Wigram, Extr. Ev. ss. 174-94; Thayer Pr. Tr. Ev. 474-80. Prof. Thayer thinks the case, though sound, decides no point of evidence, or construction (see, however (2) above), but merely one of substantive law. "It was an attempt to reform a will by adding words omitted by mistake. The claimant was trying, not to do a permissible thing by objectionable evidence, but a thing which, whether his evidence was good or bad, was forbidden by statute, viz. to give effect to a parol devise" (*id.* 474-8)].

A testator devised to A. "the house in which I now reside, with the stables and *other buildings adjoining*, and the several closes called X., part of the farm and lands *now in my own occupation*," and to B. the

Admissible.

that the closes passed as parcel of the farm to A. (*Goodtitle* v. *Southern*, 1 M. & S. 299).

A. devised to B. "all his estate in Shropshire called Ashford Hall." On a bill to execute the trust, the heir contending, on the authority of *Doe* v. *Chichester*, *ante*, 612, that only the capital messuage and mansionhouse called Ashford House, containing about ten acres, passed, and not that and other neighbouring parcels of about 150 acres.—Held, evidence *contra* was admissible that A. and his predecessor had always used the whole as one estate and had habitually described it as "the Ashford Hall Estate," as the heir himself had also done, and that the whole passed (*Ricketts* v. *Turquand*, 1 H.L.C. 472; *cp. Doe* v. *Jersey*, 1 B. & Ald. 550; *Castle* v. *Fox*, *ante*, 641; *Hardwick* v. *H.*, 16 Eq. 168).

A., by will in 1804, devised "all my lands in D. parish" to B. for life, then to C. At the date of his will A. had a farm in D. parish, one part of which was in the adjoining parish of W. In ejectment against C. by A.'s heir for the lands in W., evidence by C. was admitted that the latter were commonly *reputed* to be in D. parish; that B. had during her life occupied them as such without disturbance; and that though rated in W. since 1824, they had been rated in D. in 1804 (*Anstee* v. *Nelms*, 1 H. & N. 225; *cp. Re Steel*, *supra*, 655).

A. devised to B. "all that farm and lands called H., in the parish of L., containing by estimation eighty acres, more or less, now in the occupation of B." Evidence was received that there was a farm in the occupation of B. known as H. and so called for sixty years, containing 89 acres of freehold in the parish of L. and 86 acres of copyhold in an adjoining parish, the whole used and rented as one farm;—Held, that the whole farm passed (*Whitfield* v. *Langdale*, 1 Ch.D. 61; *Crawshay* v. *C.*, 72 L.T.Jo. 259).

Specific Legacy. Mistake. A., by will in 1796, left to his wife for life the interest and proceeds of £1250 "part of my stock in the 4% Bank of England Annuities," with gifts thereof over after her decease. At the dates of A.'s will and death he had no such stock; but in 1792 he had had some, which he had sold and re-invested in Long Annuities, and these latter he owned at his death. Evidence was admitted that the mistake arose through A.'s solicitor, not knowing of the change, but copying the description from a former will, and the legacy was held a general one (*Selwood* v. *Mildmay*, 3 Ves. jun. 306).

A. bequeaths in legacies to B. and others "£1000 of the 3 per cent. Consols

Inadmissible.

property not devised to A. The question being whether two cottages originally adjoining the house, but which before the date of his will the testator had separated therefrom by a wall and let off, passed to A.,—Held, that they passed to A. as "adjoining," although they were not in the testator's own occupation, and that declarations by him that he meant the cottages to go to B. were inadmissible [*Doe* v. *Holton*, 5 Nev. & M. 391; *cp. Doe* v. *Hubbard*, 15 Q.B. 227, in which a question put to the solicitor who drew the will of "what the testator had said as to the two cottages?" was disallowed, Campbell, C.J., remarking that the inquiry was not confined to the meaning the testator usually affixed to the expression "his two cottages," or to the designation by which any part of his property usually went, but was calculated to bring out an answer as to his intentions in making the will].

Specific Legacy. Mistake. In *Selwood* v. *Mildmay*, and *Lindgren* v. *L.*, the evidence tendered was expressly held not admissible to show that A., when he used the erroneous description of the first stock, meant to bequeath the moneys and securities substituted therefor.

A., who died in 1911, by her will in 1907, bequeathed to B. her shares in the X. Co. A. had no shares in the X. Co. at either date, but she had had shares in that Co. until 1900, when the X. Co. was amalgamated with the Y. Co., and the shares of the former exchanged for those of the latter. Held, as A. had no shares in the X. Co. at her death, that extrinsic evidence was not admissible as to what shares she held, or as to the history of the Co. [*Re Atlay*,

Admissible.

now standing in my name at the Bank." At the date of her will and death A. had no Consols. Held, evidence that three years before her will, A. had had that amount of Consols, which she then sold out, lending the proceeds to B., who paid her the same dividends until her death, was admissible not to prove the mistake in description, which was obvious, but to explain how it arose; and that the legacies, which would have been specific had A. owned the Consols, were general ones payable out of her personal estate [*Lindgren* v. *L.*, 9 Beav. 358, approving *Selwood* v. *Mildmay*, *sup.* These two cases were doubted by Wigram, Extr. Ev. ss. 134, 193 and *note* to latter; but were followed in *Goodlad* v. *Burnet*, 1 K. & J. 341, in *Findlater* v. *Lowe*, 1904, 1 I.R. 519, *Re Smith*, 20 T.L.R. 207, and *Re Jameson*, 1908, 2 Ch. 111).

A. makes a specific bequest of securities, directing that if converted into others the latter should be considered legally the same on production of sufficient memoranda to show the change. Held, memoranda by A., after the will, but not incorporated in the probate, stating she had sold out certain securities and reinvested in others, were conclusive evidence of the change (*Townsend* v. *T.*, 1 L.R.I. p. 187; *cp. ante*, 586, 603).

Inadmissible.

56 Sol. Jo. 444. Eve, J., remarked, "Extrinsic evidence is only admissible in these cases where there is an ambiguity, latent or patent, or a misdescription. Here there is neither. Supposing she had *bequeathed* shares in some existing Co., but only *held* shares in a Co. of the same name, I doubt if extrinsic evidence would be admissible. But here the only question is, did she hold the shares specified in the legacy at the date of her death. The answer is no"].

RULE IV.

Equivocations.

A. sold goods to B. "to arrive ex *Peerless* from Bombay." Evidence was admitted that there were two ships of that name, and that A. intended one and B. the other [*Raffles* v. *Wichelhaus* 2 H. & C. 906; here the ambiguity went not merely to the interpretation, but to the *factum*, of the instrument, and the parties not being *ad idem* there was no contract; *cp. ante*, 573-4 *n.* For Mr. Justice Holmes' explanation of this case, viz., not that each party *meant*, but that each *said*, a different thing, see *ante*, 628; *contra*, Williams, V. & P., 2nd ed., 750 *n*].

A. sues B. on the following guarantee: "With regard to the transferring of C.'s order, it shall be paid. B., Jan. 20." A. had supplied two lots of goods on C.'s order: one on Jan. 13, for £15, the invoice of which A., at C.'s direction, had sent to B.; and one for £44, before sending which to C., A. had required B.'s guarantee, and upon receiving it as above, the goods were sent. Held, that declarations of intention by B. were admissible to show to which of the two debts his promise applied (*Brunton* v. *Dullens*, 1 F. & F. 450).

A. sued B. for non-delivery of "60 tons of *ware* potatoes at £5 a ton," which B. had contracted to sell him. Evidence having been given by persons in the trade that there were 3 sorts of potatoes, wares, middlings and chats, of which "wares" were the largest and best;—Held, that no equivocation arose, since wares meant only *one sort*, the best; and that evidence that there were two sorts, Regents wares (the best) and kidney wares (inferior), and that each party meant a different sort, was inadmissible (*Smith* v. *Jeffreys*, 15 N. & W. 561; cited *ante*, 638).

A., by will in 1881, recited that she had "settled" certain property on her daughter. Evidence having been given that A. had made no settlement *inter vivos*, but had made a prior will in 1873, to which the word "settled" might possibly apply;—Held, declarations by A. showing she intended to refer to a settlement *inter vivos* which she erroneously supposed she had made, were inadmissible, since, except in her own mistaken belief, there was no second "settlement" to which the words could apply, and so no ambiguity (*Paton* v. *Ormerod*, 1892, P. 247, *per* Jeune, P.).

Admissible.

A. sold B. a public-house called "The Jolly Sailor, with offices, &c., as *per* plan." On the back of the agreement A. had written to his solicitor: "Mr. M., please put on the number in the plan." In an action for specific performance by B., evidence (1) that there were two plans of the property, one as lot 9 and the other as lot 12, the dimensions of which differed; and (2) of A.'s admission in cross-examination that it was lot 12 that was referred to, was received, and the agreement held sufficient under the statute [*Naylor* v. *Goodall*, 26 W.R. 162; *cp. Hodges* v. *Horsfall*, 1 Russ. & M. 116, where the evidence failing to identify which of several plans was intended, specific performance was refused; *cp. ante*, 633].

A. devised to B. certain lands "bounded by the Dublin road." At the date of the will there were two Dublin roads in existence, the "old" and the "new." Held, evidence that A. was familiar with the old road, and had referred to it in a lease executed by him in his lifetime, but that he was not familiar with the new road, was admissible (*Carroll* v. *Barry*, 40 Ir. L.T.R. 122).

A. devised one house to "George Gord, the son of George Gord," another to "George Gord, the son of John Gord," and a third to "George Gord, *the son of Gord*." Held, declarations by A. that by the third devisee he meant the first of the two Georges, were admissible [*Doe* v. *Needs*, 2 M. & W. 129. Parke, B., remarked that the mention of two fathers called Gord had no more effect than proof of that fact by extrinsic evidence; *aliter* had the third devise been to "George Gord, the son of — Gord," for then there would have been a patent ambiguity showing that no certain object had been selected].

A. left property to "the deceased son (named Bamber) of my father's sister." It being proved that there were three such deceased sons,—Held, declarations of intention were admissible, though, none being proved, the gift was declared void (*Re Stephenson, Donaldson* v. *Bamber*, 1897, 1 Ch. 75, C.A.).

A., by will, leaves property to "My grandnephew Frederick Johnson." A. had no grandnephew of that name, but had a niece named Johnstone who had two sons (grandnephews of A.), Robert William Johnstone, and Joseph Francomb Johnstone. Held, that the description being equally, though not completely or accurately, applicable to both, declarations of intention by A. in favour of the latter were admissible and that he took the property (*Re Ray*, 1916. 1 Ch. 461).

A. devised one part of his property to "my nephew Morgan Morgan" and another part to "my nephew Morgan Mor-

Inadmissible.

A. leaves a legacy to the "National Society for Prevention of Consumption." There was no society precisely answering that description, but there was one in London of that name, but with the additional words "and other forms of tuberculosis," and also a *local branch* thereof near A.'s house. Held, no equivocation, as there was only one institution and not two; and that declarations by A. showing which he referred to, were inadmissible (*Re Raven*, 1915. 1 Ch. 673). So, where the bequest was to the "National Society for the Prevention of Cruelty to Children," and there was an English society precisely of that name, and also a Scottish one, of the same name save that the word "Scottish" was prefixed to "National";—it was held that the former took, the case being treated, not as one of equivocation, but of correct and less correct description, under Rule II (*National Soc. &c.*, v. *Scottish National Soc. &c.*, 1915. A.C.; 207; *ante* 646).

A. devised to "Matthew Westlake, my brother, and to Simon Westlake, my brother's son, my house called S., jointly and severally." It was proved that A. had three brothers, Thomas, Richard, and Matthew, each of whom had a son called Simon. Held,—it being clear *on the construction* that A. was speaking of the son of that brother who was then particularly in his mind,—there was no ambiguity, and evidence of A.'s declarations in favour of Richard's son was inadmissible (*Doe* v. *Westlake*, 4 B. & Ald. 57).

A. left a legacy to his "niece Laura, second daughter of my brother J.H. Webber"; another to his "niece Laura"; and the residue to "Laura Webber." It appearing that he had another niece called Laura F. T. Webber,—extrinsic evidence in favour of the latter was rejected, on the ground that the intention being clear *from the will itself*, no equivocation arose (*Webber* v. *Corbett*, L.R. 16 Eq. 515).

A., by will. leaves £300 to "the children of Peter Henry Douglas." A. had no relative so called, but had two relatives of the same degree, Peter John Douglas, (who had 5 children) and Henry Osborn Douglas (who had 3 children), the children of each claiming the legacy. Held, that declarations of intention by A. were not admissible, although they might have been had there only been one class of claimants [*Douglas* v. *Fellows* (1853) Kay, 114, 118].

Admissible.

gan of M." and ordered "the above Morgan Morgan" to pay certain sums to A.'s sister. There being two nephews called Morgan Morgan, one of M. T. and the other of M.,—in ejectment by the lessor of the former against the devisee of the latter, it was contended that as the devise was in one case to M. M. simply, and in the other to M. M. of M., it was clearly to different nephews, and no evidence *contra* could be given. Held, however, that declarations by A., that he meant both properties to go to M. M. of M. were admissible (*Doe* v. *Morgan*, 1 Cr. & M. 235).

A. a testatrix, leaves property "between my brother B., his wife, and their *daughter*." B. had five daughters. Held, evidence (1) that A. was particularly intimate with C., one of B.'s daughters, had desired C. to live with her, and wrote constantly and affectionately to C., while she took little notice of the others, and (2) that, in a former will, she had left property to "B. and his daughter C.";—was admissible to identify C. as "the daughter" referred to (*Re Jeffrey*, 1914. 1 Ch. 375).

A. devises property to "my grandson Robert William Henderson." A. had two grandsons, one Robert William Henderson and the other William Robert Henderson. Held, that an equivocation arose, and declarations of intent by A. were admissible to show to which he referred (*Henderson* v. *H.*, 1905, 1 I.R. 353).

A. leaves a legacy to "my nephew." A. had several nephews, viz., B., son of A.'s sister, and C., D., and E., sons of A.'s brother. Evidence was received (1) that B. and his mother resided with A. and helped to manage his farm, whilst C., D., and E. had, years before the will, emigrated to America, and A. knew and heard little of them; (2) that A. had stated to the solicitor who drew the will that he intended B. to take the legacy [*Phelan* v. *Slattery*, 19 L.R.I. 177; the V.-C. remarked that though (1) would have been sufficient *per se* to decide the case, yet, there being an equivocation, (2) was also admissible].

A. left a legacy to "Robert Careless, my nephew, son of Joseph Careless." A. had no brother Joseph, but had a brother John and one Thomas, each of whom had a son Robert Careless. Evidence that A. was intimate with one, but hardly knew the other, was admitted to show to which he referred (*Careless* v. *C.*, 1 Meriv. 384).

A. devised property to "William Marshall, my second cousin." The testator had no second cousin of that name, but had two first cousins once removed, one called William Marshall, and the other William J. R. B. Marshall. Held, declarations of intention were admissible to

Inadmissible.

A. devised land to "my wife Alice for life, and after her death to Margaret M.; and I give the use of £500 stock for *her* natural life, but after *her* death among the brothers and sisters of my said wife." Held, that evidence was not admissible to show whether "her" referred to the wife or Margaret M.; but, upon the construction, held it referred to the wife [*Castledon* v. *Turner*, 3 Atk. 257. So in *Re Williams*, 134 L.T. Jo. 619, it was held that, unless otherwise expressed in the context, the rule of construction was that "her" applied to the last antecedent person, and evidence contra was inadmissible].

A. by will gives a farm to "my nephew Joseph Healy"; £200 to "Joseph Healy, only son of my brother Joseph, to be paid at such time and in such manner as my brother Joseph may direct"; and the residue to "my said nephew Joseph." A. had two nephews, one the son of a deceased brother James and the other the son of a living brother Joseph. Evidence that shortly before the will A. ordered the son of his brother Joseph out of the house and never to show his face there again was admitted, and this being held sufficient with the wording of the will to decide the case, declarations by A. that he meant the farm and residue to go to his other

Admissible.

remove the doubt (*Bennett* v. *Marshall*, 2 K. & J. 740; approved in *Webber* v. *Corbett*, *ante*, 658).

A. devised property to his "nephew Joseph Grant." A. had a nephew by blood and also one by marriage of that name. Evidence that the latter lived in A.'s house, helped to manage his business, and was habitually called by A. his "nephew"; while A. had for years been estranged from the family of the former and did not know of his name or existence;—held, admissible to show that the nephew by marriage took [*Grant* v. *G.*, L.R. 5 C.P. 727. This case being considered by the majority of the Court (*dub.* Blackburn, J.) as one of equivocation, direct declarations of intent were also received.—The extension of "nephews" to include not only those by consanguinity, but by affinity, was approved by Jeune, J., in *Re Ashton*, 1892, P. 83, *ante* 645; and also apparently by James, L.J. in *Sherratt* v. *Mountford*, 8 Ch. App. 928, 930, who remarked, "a man commonly calls his wife's nephews and nieces *his* nephews and nieces, especially when they are children and accordingly in *Grant* v. *G.*, the Court held that that parol evidence was admissible that a wife's nephew was intended by 'my nephew' though the testator had a nephew of his own of that name." In the same case, however, Mellish, L.J., said that, primarily, nephews means a man's own nephews, but that, ***if he has none***, his wife's nephews will take as being such in "an ordinary and secondary sense." The latter view was followed in preference to that in *Grant* v. *G.*, by Jessel M.R. in ***Wells* v. *W.*, 18 Eq. 504; and in *Re Taylor***, 34 Ch.D. 255, 257, Cotton, L.J.. observed that *Grant* v. *G.* "had not always been looked upon favourably"; see, also, Theobald, Wills 7th ed. 132; and *Re Green*, 1914, 1 Ch. 134, where Sargant, J., stated that *Grant* v. *G.* must now be taken as overruled].

A testator leaves a legacy to the children of his daughter R. by any husband "other than Mr. Thomas Fisher of Bridge Street, Bath,"—extrinsic evidence held admissible to show that at the date of the will the testator's daughter was unmarried, and was being courted by Henry Tom Fisher, son of Thomas Fisher of Bridge Street, at whose house he lived; that the testator strongly disapproved of the younger Fisher, who was known to him only as Tom Fisher; and that Thomas Fisher, the father, was a married man with a wife living. The testator's daughter having subsequently married Henry Tom Fisher, her children were held not entitled to the legacy [*Re Wolverton*, 7 Ch.D. 197. Prof. Thayer thinks that this was not a case of equivocation, Pr. Tr.

Inadmissible.

nephew were rejected (*Healy* v. *H.*, I.R. 9 Eq. 418).

Admissible.

Ev. 465; but Jeune, J., in *Re Ashton*, 1892, P. p. 87, treats it as such, and the report of the former case in 37 L.T. 573, appears to confirm this].

A. devised land to "John Allen, the grandson of my brother Thomas, charged nevertheless with the payment of £100 to each and every the brothers and sisters of the said John Allen." There were two such grandsons, one having several brothers and sisters, the other having one brother and one sister. It was contended that this excluded evidence in favour of the latter. Held, however, that the phrase "brothers and sisters," though it supplied an argument in favour of the former, formed no part of the description; and consequently that an equivocation arose, and declarations by A., made several months after the will, and in favour of the latter, were receivable (*Doe* v. *Allen*, 12 A. & E. 451).

A. appointed as her executrix "my granddaughter—." A. had at the date of her will and death three granddaughters. Held, that the case involving only a partial and not a complete blank, extrinsic evidence, including declarations of intent by A., were admissible to identify the particular granddaughter referred to (*Re Hubbuck*, 1905, P. 129).

A., who had accounts at several banks, bequeathed her balance "*at the said bank*" to B. Held, that a clause, which gave the name of the bank, but had been erased, could be looked at to supply the name (*Re Battie-Wrightson*, 1920, 2 Ch. 330).

Inadmissible.

A. devised lands to "— Cort and — Cort." There were three persons, a father and his son and daughter, known to A. and answering these names. Held, as this number exceeded the number of devisees, declarations of intent by A. were inadmissible, and that the doubt could be determined only on evidence derived from the state of the family and the will itself (*Re Gregson's Trusts*, 2 H. & M. 504; *ante*, 640).

As to the supposed case of equivocation raised by a gift to "the three children of A." when A. has more than that number, see *ante*, 625, 627.

RULE V.

Usage. Contemporanea Expositio. Course of Dealing. Experts.

Usage. Evidence of usage has been held admissible to interpret the following words:—The usages of the House of Commons, to explain the meaning of, and formalities involved in, taking an oath "solemnly and publicly" pursuant to the Parliamentary Oaths Act, 1866 (*Att.-Gen.* v. *Bradlaugh*, 14 Q.B.D. 667, C.A.); a theatrical usage, to show that the word "year" in a contract meant those parts of the year during which the theatre was open (*Grant* v. *Maddox*, 15 M. & W. 737); a mercantile usage, to show that "months" in a charter-party meant calendar and not lunar months (*Jolly* v. *Young*, 1 Esp. 186; *Simpson* v. *Margitson*, &c., *ante*, 642); or that "October," in a contract of marine insurance, meant from the 25th to the 31st of that month (*Chaurand* v. *Angerstein*, Peake R. 43). So, usage is admissible to show that, in a lease of a rabbit warren, the words "thousand rabbits" meant in that particular part of the country twelve hundred (*Smith* v. *Wilson*, 3 B. & Ad.

Usage. Evidence of usage has been held inadmissible to interpret the following words:—That words of weight, measure, or number, having a statutory meaning attached to them, were not used in that meaning (*Smith* v. *Wilson*, 3 B. & Ad. pp. 731-734; *O'Donnell* v. *O'D.*, 13 L.R.I. 226; the statutory meaning may, however, be excluded by the express terms of the document, Tay. s. 1165). So, evidence of local usage is inadmissible to show that the terms "Lady Day" or "Michaelmas" in a *lease* (made since the Act for altering the style) relate not to March 25 and September 29, but to the old style (*Doe* v. *Lea*, 11 East, 312; *Doe* v. *Benson*, 4 B. & Ald. 588; in the latter case, Alderson, B., held that such evidence would be admissible to control a *parol* letting; but this distinction would probably not now be sustainable, Tay s. 1165 *n;* 1 Smith's L. C., 10th ed. 552.)

A., a master, covenanted to find B., an apprentice, "meat, drink, lodging, certain

Admissible.

728); or that "18 pockets of Kent hops at 100*s.*," meant at 100*s.* per cwt. (*Spicer* v. *Cooper*, 1 Q.B. 424); that a "full and complete cargo of quarters of barley, English weight," meant 400 lb. to the quarter (*Dreyfus* v. *Allen*, 9 T.L.R. 1); and a "full and complete cargo of sugar," meant full and complete according to the customary mode of packing and loading sugar at the particular port (*Cuthbert* v. *Cumming*, 11 Ex. 405); that "Liverpool merchandise," meant such as was ordinarily shipped therefrom, and not ordnance stores (*Vandespar* v. *Duncan*, 1891, W.N. 178); that "warranted no St. Lawrence," excluded, in a contract of marine insurance, both the gulf and river of that name (*Birrell* v. *Dryer*, *ante*, 637; and see *Uhde* v. *Walters*, 3 Camp. 16; *Robertson* v. *Money*, Ry. & M. 75). So, the term "arrived in dock," and the time when lay-days commence (*Norden Steamship Co.* v. *Dempsey*, 1 C.P.D. 654); or the mode of calculating running days (*Nielsen* v. *Wait*, 16 Q.B.D. 67), may be explained by the custom of the port; as also the expressions "regular terms of loading" (*Leidemann* v. *Schultz*, 14 C.B. 38); "in turn to deliver" (*Robertson* v. *Jackson*, 2 C.B. 412); "steamer to be discharged as fast as she can deliver" (*The Jaederen*, 1892, P. 351). Nor is a usage that the owner is bound to put timber into lighters, brought alongside, inconsistent with a charter-party providing that it shall be taken from alongside at merchant's expense (*Akticselkab* v. *Ekman*, 1897, 2 Q.B. 83, C.A.). And in an infringement case, the meaning attached by the trade to "white selvage" is admissible in explanation of the term (*Mitchell* v. *Henry*, 15 Ch.D. 181); as also is a usage that goods bearing a trade mark with English words are presumed to be made in England (*Watson* v. *Jaeger*, 13 T.L.R. 150).

To explain an ancient grant to "godly preachers of Christ's Holy Gospel";—evidence that the grantor was a member of a sect of Protestant Trinitarian Dissenters whose usage it was to apply this particular designation to themselves, is admissible [*Shore* v. *Wilson*, 9 C. & F. 355; and *cp.*, *contemporanea expositio*, *post*, 664].

Usage has been admitted to show that in the building trade "weekly accounts" meant accounts of day-work only, and not of measured work, although the words were not in themselves ambiguous (*Myers* v. *Sarl*, 3 E. & E. 306); as also that an agent who signed a contract merely "by telegraphic authority," was not to be liable for mistakes in the telegram (*Lilly* v. *Smales*, 1892, 1 Q.B. 456).

Inadmissible.

yearly wages, and all other *necessaries*." In an action for wages by B., held, A. could not prove a custom in the trade to deduct from their wages the cost of clothes and washing supplied to apprentices, since this contradicted the deed (*Abbott* v. *Bates*, 33 L.T. 491; *aliter*, if it had been shown that in that trade "necessaries" had acquired a limited meaning which excluded clothes and washing).

A. let B. a shop, the latter covenanting not to use it as "a public-house, tavern, or *beer-house*." B. used it principally as a grocery, but also sold beer to be drunk off the premises. In an action by A. for breach of covenant, evidence of a usage in the trade that "beer-house" included such a shop;—Held, inadmissible, the lease being an ordinary one and not a trade instrument between brewers and publicans (*Holt* v. *Collyer*, 16 Ch.D. 718).

A.'s agent buys cattle in Buenos Ayres, from B., the price to include a policy insuring them "against all risks." B. supplied a policy "against all risks," but with a clause "free of detention and its consequences," which A.'s agent accepted. Disease breaking out, the cattle were detained and lost. In an action by A., B. tendered evidence of a custom at Buenos Ayres that an "all risks" cattle policy includes the exceptive clause, unless expressly excluded. Held, inadmissible, since the contract being made without reference to any particular form, or place, A. was entitled to an absolute and not a qualified policy. [*Youill* v. *Scott-Robson*, 1908, 1 K.B. 270, C.A.; *cp. Schloss* v. *Stevens*, 1906, 2 K.B. 665. *Aliter* if the contract had been between insurance brokers and underwriters in London, or had contemplated the usual form of policy in use at Buenos Ayres for cattle. *Cp. ante*, 634, and *post*, 663].

As to customs of a port, held inadmissible as inconsistent with the terms of a charter-party, see *Hayton* v. *Irwin*, *The Nifa*, and *Lishman* v. *Christie*, cited *ante*, 125.

A testator, in several places in his will, used the word "close" in its ordinary sense of "inclosure"; held, evidence was not admissible of a usage in that part of the country that close meant "farm" [*Richardson* v. *Watson*, 4 B. & Ad. 787, 799; *aliter*, if the context had not so limited its meaning].

Usage has been rejected to show that where, under a written contract, goods were to be paid for "by bills," this meant approved bills, and gave the vendor an option of rejecting bills of which he disapproved (*Hodgson* v. *Davies*, 2 Camp. p. 532, approved in *Trueman* v. *Loder*, 11 A. & E. p. 599).

In an action on a policy of insurance on "the ship T., her tackle, apparel, boat, and

Admissible.

In an action on a general marine policy on goods, a usage that goods loaded *on deck* are not within the protection of the policy is admissible, that being an unusual and dangerous position and the usage not contradicting the policy (*Blackett* v. *Royal Exchange Co., opposite; Miller* v. *Tetherington*, 6 H. & N. 278; 7 *id.* 954).

The usage of the district is admissible to show what trees are included in the term "timber" in a particular county; as also to show that in a devise, grant, or lease of an estate, a "power to cut timber for the repairs of the estate" includes a power to cut and sell it for the personal benefit of the donee as well (*Dashwood* v. *Magniac*, 1891, 3 Ch. 306, C.A.; in *Baird* v. *Fortune*, 4 Macq. H.L. 127, 149, Ld. Wensleydale stated that prior, contemporaneous, and subsequent enjoyment of a privilege attached to land was evidence to explain the terms of a deed).

A contract to deliver "50 tons best palm oil with fair allowance for inferior, if any," may be explained by usage to be satisfied by the delivery of 50 tons, of which the greater part was inferior (*Lucas* v. *Bristow*, 27 L.J.Q.B. 364).

A. lets premises to B., in 1905, B. covenanting to insure them "against loss or damage by fire." B. insured them with the X. office whose policy exempted them from "fire caused by a foreign enemy." A. accepted this policy for several years, but in 1915, required B. further to insure against fire by enemy air-craft. In an action against for breach of covenant for omitting so to do;—Held, A. was only required to effect such a policy as was usual with first class offices; and that evidence was admissible that it was the practice of such offices always to except fires by foreign enemies [*Upjohn* v. *Hitchens*, 1918. 2 K.B. 48, C.A.; but see *Enlayde* v. *Roberts*, and *Youill* v. *Scott-Robson*, cited *ante*, 634, 662].

A. contracts to sell to B. "*about* 10,000 tons of coal." Evidence of a usage that in that trade "about" meant 5 per cent. more or less, held, admissible [*Societe Anonyme* v. *Scholefield*, 1900, Times, Nov. 24, *per* Mathew, J.; *cp. Acme Co.* v. *Sutherland Co.*, 48 Sol. Jo. 254. In *Alcock* v. *Leeuw*, 1 Cab. & Ell. 98, Mathew, J., held that, in a charter-party, "about" so many barrels, meant by the custom of the trade 10 per cent more or less; *cp. Lomas* v. *Barff*, 17 T.L.R. 437; and *Harrison* v. *Micks*, 33 *id.* 221. In *Harland* v. *Burstall*, 17 T.L.R. 338, a similar custom was alleged, but held not to have been proved. As to surrounding circumstances to explain "more or less," see *ante* 633-4].

A. sells B. 50 tons of goods "in warehouse" and tenders a transfer note "For

Inadmissible.

other furniture," her boats, slung *outside* the ship having been lost.—Held, a usage that boats so slung were not protected was inadmissible as inconsistent with the express words (*Blackett* v. *Royal Exchange Co.*, 2 Cr. & J. 244. This case was approved by Ld. Campbell in *Humfrey* v. *Dale*, 7 E. & B. p. 275, for the same reason).

Under an Inclosure award of 1822 the local Surveyor of Highways was authorised to let the herbage of certain private roads for the grazing of sheep, but not of cattle. In an action for an injunction against the local council for depasturing cattle, evidence of a usage for fifty years so to let the herbage had been received as evidence of a lost grant. Held, on appeal, that as such a grant could have no legal origin, it could not be presumed, and evidence to establish it was inadmissible (*Neaverson* v. *Peterborough Council*, 66 J. P. 404, C.A.; *cp. N. E. Ry.* v. *Hastings*, *post* 664).

On a warranty of "prime singed" bacon, evidence of a practice in the trade to receive bacon which was slightly tainted, as "prime singed," is inadmissible (*Yates* v. *Pym*, 6 Taunt. 446).

In an action on a contract for the sale of corn "as per sample," held, that a witness could not be asked whether a sale of corn afloat imported only a warranty of *quality* and not of *condition*, since (1) this varied the plain words; (2) was not preceded by an inquiry as to the difference, if any, between the words quality and condition; and (3) here the corn being sold before, and not when, afloat, the usage was irrelevant (*Malcolmson* v. *Morton*, 11 Ir. L.R. 230).

A. contracts to sell to B. "*about* 300 quarters of barley, more or less, shipped on board the X." A., having tendered, and B. refused to accept, 320 quarters, in an action by A., held, that the evidence of mercantile men as to what was the customary meaning of "about" and "more or less" was inadmissible [*Cross* v. *Eglin*, 2 B. & Ad. 106. *Sed qu.*, perhaps, as to this decision; see cases *opposite;* and also 48 Sol. Jo. 25. In *Watkinson* v. *Wilson*, 55 Sol. Jo. 617, "about 4 years" was held not to extend to 5 years].

A. sells B. 50 tons of certain goods. A usage to show that the contract would be

Admissible.

about 50 tons." Evidence of a usage among warehousemen only to accept transfer notes (*i.e.* delivery orders) in this form, they objecting to make themselves responsible for any particular weight, held, admissible (*Moore* v. *Campbell*, 10 Ex. 323).

Contemporanea Expositio. By a charter in 1621, A.'s predecessors were granted certain lands and manors on the coast, and in 1848 a quay was built on the foreshore. The charter did not in terms grant the foreshore but its language might or might not include it. In an action by A., claiming the quay, against B., evidence that A.'s predecessors had built the quay, maintained it and collected the tolls thereon, with but slight interruptions since 1848, was received to show that the foreshore was included in the grant of 1621. [*A.-G.* v. *Vandaleur*, 1907, A.C. 369. Evidence of acts of user *before* the grant is also admissible for the same purpose, *Van Diemen's Land Co.* v. *Table Cape Board*, 1906, A.C. 92; *cp. Shore* v. *Wilson*, *ante*, 662].

Course of Dealing. A. sues B. for non-delivery of goods which B. had contracted by bill of lading "to *deliver* safely at the port of London to A." The goods having been lost by fire after landing, but before receipt by A., evidence is tendered by A. that, in previous transactions between them, the course of dealing had always been for B. to deliver the goods by cart to A.'s London warehouse. Held, admissible not to extend, narrow, or vary the written contract, but to construe the word *deliver*, in anticipation of a case which, though not in fact pleaded, might be made by B., that by a custom of the port mere landing was a good delivery [*Bourne* v. *Gatliff*, 11 C. & F. 45, 70-1; *cp. ante*, 106].

The question being as to the meaning of "Pacific ports" in a marine insurance slip;—evidence that the course of dealing between the parties in similar contracts was to treat the words as confined to ports on the west coast of the Pacific, held, admissible (*Royal Exchange Co.* v. *Tod*, 8 T.L.R. 669).

To explain the term "owner's risk" in the defendant's forwarding note, the course of dealing between the parties was admitted to show that the plaintiff knew that there was a second kind of risk, viz., "Company's risk," for which a higher rate was charged than he had paid under the former note (*Lewis* v. *G.W. Ry.* *ante*, 638).

Where a joint proposal had been made by A. and B. to buy property, evidence of their subsequent *acts*, but not of their *declarations*, was admitted to show that they intended to take it as tenants in common, and not as joint tenants (*Harrison* v. *Barton*, *ante*, 599).

Inadmissible.

satisfied by a delivery order authorising B. to receive "about 50 tons" would be inadmissible (*Moore* v. *Campbell*, *opposite*).

Contemporanea Expositio. To explain the meaning of the term "Bills" in an old Bank Act (6 Anne, c. 22), although matters of contemporary general history and notoriety may be referred to, yet insulated facts, such as the rules of a mining company (1706), or the deed of partnership of a then recently established bank (1698), are not admissible (*Bank of England* v. *Anderson*, 4 Scott, 50, 83-4).

Course of Dealing. A. by deed in 1854 granted leave to B. (a railway company) to make a railway through his land, B. agreeing to pay a certain rent on all coal carried over "any part of the railways comprehended in their Act and shipped at C."—In an action by A. for such rent, held, the words being unambiguous, evidence that for forty years B. had paid and A. accepted rent only on such coal as passed over A.'s land, and was shipped at C., was not admissible to disentitle A. to rent on all coal passing over parts of B.'s railways, and shipped at C., but not passing over A.'s land (*N. E. Ry.* v. *Hastings*, 1900, A.C. 260; *Clyde Navigation* v. *Laird*, 8 App. Cas. 658).

The question being whether an Act, which provided for "daily" testings of gas-meters, was intended to include Sunday testings, evidence of a practice by the parties only to test on weekdays, held, inadmissible (*L.C.C.* v. *South Met. Gas Co.*, 1904, 1 Ch. 76).

A. lets land to B. for 21 years by a lease containing a covenant that at the expiration of the term A. would grant a new lease for the same term with "all covenants, grants, and articles, as in the original lease contained";—held, the words being unambiguous, evidence of a *course of dealing* between the parties and their predecessors continually to renew is not admissible to construe the covenant (*Iggulden* v. *May*, 9 Ves. 325).—Nor, in construing an agreement, is the *construction put by one party alone* admissible (*McClean* v. *Kennard*, 9 Ch. 336); except against him as an estoppel (*Marshall* v. *Berridge*, 19 Ch. D. 233; *Gandy* v. *G.*, 30 Ch.D. 57; *Roe* v. *Mutual Loan Fund*, 19

Admissible.

Experts. The question being whether a legacy of a sculptor's "mod tools for carving" meant modelling tools for carving, or moulds, or models; the *opinions* of statuaries were admitted to prove that there were no such tools known as modelling tools for carving, and that the word "mod" would be understood by a sculptor as an abbreviation for models (*Goblet* v. *Beechey*, 3 Sim. 24; 2 Rus. & Myl. 624).

The question being whether A., by the manufacture and sale of margarine, had broken a covenant not to carry on business as a *provision merchant*;—The opinions of traders were received (1) as to what class of goods were included in the word "provision" taken in conjunction with "merchant"; and (2) whether a margarine dealer came within such class [*Lovell* v. *Wall*, 104 L.T. 85 (C.A.); 27 T.L.R. 236; cited *ante*, 394].

Inadmissible.

Q.B.D. 347. Compare *ante*, 430; and *post*, 683).

Experts. The question being as to what lands acquired by a railway company were "delineated" upon statutory plans; the *opinions* of engineers on the point are not admissible, the word being intelligible to ordinary readers (*Dowling* v. *Pontypool Co.*, *ante*, 388, 390). So, as to the meaning of the words "nominal rent" in a modern statute (*Camden* v. *Inland Rev. Commrs.*, 1914. 1 K.B. 641. C.A.)

In *Lovell* v *Wall*, *opposite*, the opinion of traders as to whether A. in making and selling margarine would be properly described in the trade as a "provision merchant," were held inadmissible.

CHAPTER XLVII.

ADMISSION OF EXTRINSIC EVIDENCE TO REBUT PRESUMPTIONS AFFECTING DOCUMENTS.

Where any legal or equitable presumption arises against the apparent intention of a document, extrinsic evidence (including direct declarations by the writer) is admissible to rebut, or in reply only, to support, such presumption.

[Tay. ss. 1227-1231; Steph. art. 91 (9); Hawkins, Wills, 300, 305, 313; Whart. ss. 932-937.]

Principle. The ground of admission is not to show, in the first instance, the intention of the document, but to ascertain whether the presumption raised by law is well, or ill, founded (*Kirk* v. *Eddowes,* 3 Hare, 509, 517). If no presumption is raised, or if though raised no rebutting proof is offered, evidence either to create or to fortify it will be inadmissible since in the former case it would contradict the document, and in the latter be unnecessary, *i.e.* as proving that which is presumed (Tay. s. 1229; Jarman, Wills, 5th ed. 392).

Rules of construction must be distinguished from *legal presumptions* affecting documents. Where the meaning of a document can be ascertained by construction, no direct evidence of intention may be given by either side; but a presumption of intent is always rebuttable, and, being so, evidence in support is in fairness also allowed (*Hall* v. *Hill,* 1 Dr. & War. 94; *Lee* v. *Pain,* 4 Hare, 201, 206; *Barrs* v. *Fewkes,* 13 W.R. 987; Tay. s. 1231). For illustrations of the distinction, see Satisfaction of Debts, *post,* 667-8. Repetition of Legacies, *post,* 669, and Executors' Right to Residue, *post,* 670-1; and for an instance of the development of a rebuttable presumption of law into an irrebuttable rule of construction, see *Barrs* v. *Fewkes, post,* 675. Mr. Hawkins points out that the anomalous case of what are called "presumptions" of law are in reality rules of construction derived from the civil law, which, having obtained a lodgment in English law, but being disapproved of, have been allowed to retain their own antidote in the shape of the capability of being rebutted by parol evidence which, in common with other rules of construction, they possessed in the system from which they were derived (Wills, p. v.). Confusion, however, often arises from the loose way in which the term "presumption" is used in the text-books and cases, *i.e.* instead of being confined to its strict sense of an inference raised by Courts of law independently of, or against, the words of a document, it is often used to denote an inference in favour of a given construction of particular language, as in *Coote* v. *Boyd,* 2 Bro. C.C. 521, in which Ld. Thurlow remarked that

"where a presumption arises from the construction of words, simply *quâ* words, no evidence can be admitted," clearly using the word as tantamount to a rule of law (*Lee* v. *Pain, supra,* 666; Tay. s. 1231). It is commonly said, too, that presumptions of law may be rebutted not only by external but internal evidence; but in a case involving double portions, Cotton, L.J., remarked, "You look at the will for some expression of intention whether one or both [portions] are to be paid. If you find no such expression, then you are driven to a presumption of law, which only arises in the absence of an expressed intention. . . That is entirely independent of the construction of the will. . . . You first construe the will, and if in any way a presumption arises, you admit evidence to rebut that presumption" [*Re Tussaud,* 9 Ch.D. 363, 374; Wigram, Extr. Ev., 4th ed. p. 54 *n*].

Satisfaction of Portions and Debts. *Portions.* Where a father or person *in loco parentis,* has covenanted to provide for a child and afterwards, by a different instrument, make a substantially similar provision for it, equity, presuming against double portions, holds that the latter, unless otherwise expressed, is a satisfaction *pro tanto* of the former, but admits evidence to rebut the presumption [*Chichester* v. *Coventry,* L.R. 2 H.L. 71; *Re Tussaud,* 9 Ch. D. 363; *Re Lawes,* 20 *id.* 81; *Re Lacon,* 1891, 2 Ch. 482; and *Re Scott,* 1903, 1 Ch. 1. As to the distinction between Satisfaction and Ademption, see *infra,* and Theobald, Wills, 7th ed. 759-60]. The rule does not apply to a *mother,* unless proof be given that the duty of providing for the child falls on, or has been assumed by, her (*Re Ashton,* 1897, 2 Ch. 574, 578); nor to a grandfather unless on similar evidence (*Re Dawson,* 1919, 1 Ch. 102); nor to a second provision made either for *valuable consideration* (*Re Lacon,* 1891, 2 Ch. 482), or of a *dissimilar nature* (*Re Jacques,* 1903, 1 Ch. 267), or by the *same* instrument (*Re Tussaud,* 26 W.R. 874, *per* Brett, L.J.: "Where there is only one instrument in question, extrinsic evidence cannot be adduced to show what it means. The doctrine only applies where there are two. If they are very unlike in their provisions, you cannot bring evidence to show that there ought to be a satisfaction of the first by the second, but if they are so much alike that this satisfaction will be presumed in equity, extrinsic evidence is admissible to rebut the presumption"). Declarations by the donor to be receivable under this head must have been made contemporaneously with the second document, and not before or after it (*Hall* v. *Hill,* 1 Dr. & War. 94, 128-130).

Debts. A presumption of satisfaction arises also where a legacy is left to a *creditor* of equal or greater amount than the debt (*Crichton* v. *C.,* 1895, 2 Ch. 853; 1896, 1 Ch. 870; *Re Fletcher,* 38 Ch. D. 273; *Re Rattenberry,* 1906, 1 Ch. 667; Theobald, Wills, 7th ed. 764-7), evidence being similarly receivable in rebuttal or support (*Plunkett* v. *Lewis,* 3 Hare, 316). Contrary to the rule as to portions, however, equity leans against the satisfaction of debts, and seizes upon trifling distinctions to exclude it. Thus, if the debt was contracted about, or after, the date of the will, or arises upon a negotiable security or current account, or if the legacy is residuary, contingent, of a different nature, or less advantageous than the debt, no satisfaction will arise (Theobald 7th ed. 764-7); while where there is a direction in the will to pay debts and legacies, or even, debts alone, an inference against satisfaction arises as a rule of construction, and not merely as a presumption, and extrinsic

evidence is also inadmissible (Hawkins, Wills, 300-301; *Horlock* v. *Wiggins*, 39 Ch.D. 142, C.A.; *Re Huish*, 43 Ch.D. 260).—On the other hand, a legacy to a *debtor* does not even *primâ facie* release the debt; and declarations by the testator showing an intent to forgive it will therefore only be operative if amounting in law to a release under seal, a contract for value, or an accord and satisfaction, or if, in equity, it would be unconscionable for those taking the estate to ignore the intent (*Cross* v. *Sprigg*, 6 Hare, 552; *Peace* v. *Hains*, 11 *id.* 151; *Strong* v. *Bird*, 18 Eq. 315; *Re Stewart*, 1908, 2 Ch. 215; *Re Pink*, 1912, 2 Ch. 528, C.A.; *Re Tinline*, 56 Sol.Jo. 310). An appointment of the debtor as executor, however, releases the debt in law, though not in equity (*Re Bourne*, 1906, 1 Ch. 697); and in such cases evidence of a continuing intent to forgive the debt during the testator's life, though not a mere intent to forgive by his will, has been held to rebut the merely equitable claim (*Re Hyslop*, 1894, 3 Ch. 522; *Re Applebee*, 1891, 3 Ch. 442; *Strong* v. *Bird*, *sup.*; *Re Griffin*, 1899, 1 Ch. 408, 412; *Re Goff*, 111 L.T. 34; *Re Pink*, *sup.*)

Ademption and Repetition of Legacies. *Ademption.* Where a father, or person *in loco parentis*, leaves a legacy to a child and afterwards makes it an advancement, the legacy is presumed to be adeemed *pro tanto* (*Hopwood* v. *H.*, 7 H.L.C. 728; *Re Scott*, 1903, 1 Ch. 1; *Re Jacques*, *id.* 267). And the same result follows in the case of illegitimate children, if the testator has placed himself *in loco parentis* thereto (*Palmer* v. *Newell*, 20 Beav. 32; *Re Lawes*, 20 Ch. D. 81), and in that of strangers, if the legacy is expressed to be for a particular purpose and the subsequent gift is intended to be for the same purpose, so that it would be unconscionable for the donee, knowing this, to retain both (*Pankhurst* v. *Howell*, 6 Ch. App. 136; *Griffith* v. *Bourke*, 21 L.R.I. 92, 95; *Re Pollock*, 28 Ch.D. 552; *Re Smythies*, 1903, 1 Ch. 259; *Re Corbett*, 2 Ch. 326; *Re Shields*, 1912, 1 Ch. 591); though in the case of residue this presumption will not be applied in favour of strangers to the detriment of children (*Meinhertzhagen* v. *Walters*, 7 Ch. App. 670; *Re Heather*, 1906, 2 Ch. 230). It is immaterial whether the subsequent gift be in writing or not (*Hopwood* v. *H.*, *sup.*; *Re Tussaud*, 9 Ch.D. 363, 373); but prior gifts will not operate as ademptions unless so expressed (*Leighton* v. *L.*, 18 Eq. 458; *Taylor* v. *Cartwright*, 41 L.J.Ch. 529). Where the intent clearly appears from the documents themselves declarations by the donor are not receivable (*Re Aynesley*, 1915, 1 Ch. 172, C.A.); but where the matter is doubtful, such evidence may be given, provided the declarations were made contemporaneously with the advance (*Re Pollock*, *sup.*, *per* Ld. Selborne; *Kirk* v. *Eddowes*, 3 Hare, 509, 522; and in *Ferris* v. *Goodburn*, 27 L.J.Ch. 574, 576, and *Griffith* v. *Bourke*, *sup.*; declarations both contemporaneous and subsequent thereto seem to have been admitted). Evidence of the making of other advances is also relevant to determine the intention of the advance in question (*Hopwood* v. *H.*, *supra*; *Fowkes* v. *Pascoe*, 10 Ch. App, 343, 348). As to ademption by sale or change of the subject matter of a specific legacy, see *ante*, 626.

Cases of *express* ademption are not affected by the present rule. Thus, a parol declaration by the donor at the time of a gift that it is in satisfaction of a prior legacy, is admissible as part of the transaction (*Kirk* v. *Eddowes*, 3 Hare, 509; but see *Re Shields*, 1912, 1 Ch. 591, cited *post*, 672); and if

the second gift is in writing, and expressly adeems the legacy, no evidence *contra* can, on general principles, be given (*id. cp. Re Aynesley, sup.*). Moreover, where the will directs that advances shall be deducted from legacies, or brought into hotch-pot, and recites the amounts advanced, such recitals are conclusive, even though erroneous, evidence *contra* not being admissible unless the will contains an express or implied intention that only sums actually received shall be deducted (*ante,* 586, 603, *post,* 671-2; *Re Wood,* 32 Ch.D. 517; *Re Kelsey,* 1905, 2 Ch. 465). Documents existing prior to the will, if incorporated therein, even though not included in the probate, are also conclusive as to the amounts, not as evidence but as part of the instrument itself (*Quihampton* v. *Going,* 24 W.R. 917; *Re Coyte,* 56 L.T. 510); subsequent memoranda, however, should on principle be excluded (*Smith* v. *Condor,* 9 Ch.D. 170; *Re Hyslop,* 1894, 3 Ch. 522; *contra, Whateley* v. *Spooner,* 3 K. & J. 542; and *Townsend* v. *T.,* 1 L.R.I. 180, 187; *cp. ante,* 586, 603, 672).

Repetition: Legacies Cumulative or Substitutional. Legacies, whether identical in amount or not, given to a stranger legatee by *different* instruments are cumulative unless otherwise expressed; and this being a rule of construction, evidence *contra* is inadmissible (*Hurst* v. *Beach,* 5 Madd. 351; *Lee* v. *Pain,* 4 Hare, 201, 216; *Wilson* v. *O'Leary,* 7 Ch. App. 448). Legacies given by different instruments, but identical both in *amount* and *motive,* are substitutional; but this being merely a legal presumption is rebuttable by evidence (*Hurst* v. *Beach, sup.; Hall* v. *Hill,* 1 Dr. & War. 94, 116; *Suisse* v. *Lowther,* 2 Hare, 424; *Roch* v. *Callen,* 6 *id.* 531, 533; Tay. s. 1227). Legacies by the *same* instrument are, unless otherwise expressed, cumulative if of different amounts (*Brennan* v. *Moran,* 6 Ir.C.L.R. 126), but substitutional if of the same (*Burkinshaw* v. *Hodge,* 22 W.R. 484). In the former case (*Brennan* v. *Moran, sup.*), and probably in the latter also (Hawkins, Wills, 305; *per* Brett, L.J., *ante,* 667), this is a rule of construction, not rebuttable by evidence. Where the instruments themselves are substitutional, upon which point evidence is admissible both in a Court of Probate and one of construction (*ante,* 326, 330), the legacies also will be substitutional.

Advancement and Resulting Trust. A purchase by a father or person *in loco parentis,* in the name of a child, or by a husband or wife in the name of each other (*Mercier* v. *M.,* 1903, 2 Ch. 98), is, unless otherwise expressed, presumed to be a gift; but a purchase in the name of a stranger is presumed to be upon a resulting trust for the purchaser.

In the case of a father, no evidence, other than that he is such, is in general necessary to show the obligation to provide, which is the foundation of the presumption (*Bennett* v. *B.,* 10 Ch.D. 474); though if the son stands in the relation of solicitor to client, the presumption will be excluded (*Garrett* v. *Williamson,* 2 De G. & S. 244). In the case, however, of mothers, or persons *in loco parentis,* proof that the duty falls on, or was assumed by, them must be given (*Re Ashton, ante,* 667; *Bennett* v. *B., sup.; Re Lacon,* 1891, 2 Ch. 482). In addition to this, evidence may be required both: (1) To prove payment by the real purchaser, which may be shown by parol, even though otherwise expressed in the deed (*ante,* 581, *cp. ante,* 586); and either by direct evidence or circumstantial, *e.g.* that the nominal purchaser was very poor (*Lench* v. *L., ante,* 118; *Wilkins* v. *Stevens,* 1 Y. & C.C.C. 431); and (2) to prove the intention with which the money was paid. Less

evidence is said to be required to rebut a resulting trust arising from a purchase in another's name, than to prove a trust by parol, it being only necessary in the former case to show that he who paid the price did not intend to take the benefit of the purchase (*Nicholson* v. *Mulligan*, I.R. 3 Eq. 308). For this purpose the oral testimony of the parties is receivable (indeed, where this is available there is no necessity to resort to the presumption, *Exp. Cooper*, 26 Sol.Jo. 530, C.A.; *Fowkes* v. *Pascoe*, 10 Ch. App. 343), as well as their declarations out of court if made contemporaneously with the transaction (*Stock* v. *McAvoy*, 15 Eq. 55, 59; *Williams* v. *W.*, 32 Beav. 370; *Jeans* v. *Cooke*, 24 *id.* 513, 521; *Christy* v. *Courtenay*, 13 *id.* 96; *Sidmouth* v. *S.*, 2 *id.* 447; *Fowler* v. *F.*, L.Jo. May 11, 1912, Div. Ct., 1 Cy. Ct. Rep. 27; *O'Brien* v. *Sheil*, I.R. 7 Eq. 255; *Tucker* v. *Burrow*, 2 H. & M. 515, 524; *Morrison* v. *M'Ferran*, 35 Ir. L.T. Rep. 81). Prior and subsequent declarations, by the donee are, however, receivable as admissions against the declarant to show that he considered himself to be merely a trustee (*Jeans* v. *Cooke*, 24 Beav. 513), and declarations by either are admissible, after their death, as declarations against interest (*Stock* v. *McAvoy, sup.*), or even, it has been held, in their own favour as corroborative evidence (*Re Gooch*, 62 L.T. 384). Similar purchases in the names of other nominees may also be given to show the intent of the purchase in question (*ante*, 176, 668); although a manorial custom that on a purchase by A. in the name of B. the latter takes beneficially, has been held unreasonable and bad (*Lewis* v. *Lane*, 2 Myl. & K. 449; *cp Jeans* v. *Cooke, sup.*). It has been doubted whether evidence to rebut a resulting trust arising by presumption, though admissible in the case of instruments *inter vivos*, can be received in the case of *wills;* but on principle there seems no ground for the distinction (*Re Tussaud*, 9 Ch.D. 363; *Re Bacon*, 31 Ch.D. 460).

Executors. (1) *Acceptance of Office.* It is a presumption of law that a legacy left to an executor is conditional upon his acceptance of the office; and parol evidence may be given in rebuttal or support thereof (*Re Appleton*, 25 Ch.D. 893.) (2) *Appointment of Debtors as Executors;* as to this, see *ante*, 668. (3) *Right to Residue.* Before 11 Geo. IV. & 1 Will. IV. c. 40, and where there was nothing to the contrary in the will, the executor in general took the undisposed of residue beneficially; since the Act, he takes it in trust for the next-of-kin (*Williams* v. *Arkle*, L.R. 7 H.L. 606; *Re Roby*, 1908, 1 Ch. 71, C.A.) unless a contrary intent appears by the will (*Re Howell*, 1915, 1 Ch. 241, C.A.); and the statute cannot be displaced by parol evidence that he was intended to take beneficially (*Love* v. *Gaze*, 8 Beav. 472). Where, however, there are no next-of-kin (s. 2), or there is an express gift of the residue upon trusts which either do not exhaust the property, or fail (*Williams* v. *Arkle, sup.*), the Act does not apply, and the executor's right will still prevail over that of the Crown or next-of-kin respectively, unless excluded by construction or presumption. Where the exclusion is by construction, no evidence *contra* will be admissible; where it is by presumption, extrinsic evidence, including declarations of intention by the testator before, at, or after the making of the will, may be given in rebuttal or support, those made contemporaneously being entitled to the most weight (*Clennell* v. *Lewthwaite*, 2 Ves. 465, 644; *Williams* v. *Jones*, 10 *id.* 77, 82; *Langham* v. *Sandford*, 19 *id.* 649; *Trimoner* v. *Bayne*, 7 *id.* 508, 517-8;

Lynn v. *Beaver,* Tur. & Rus. 63, 68; *cp. Whitaker* v. *Tatham, ante,* 628). A presumption against the executors' title has been held to arise and rebutting evidence in his favour to be admissible (*a*) where there is on the face of the document an intention to give the property to some one else, but the name of the donee is omitted (*Re Bacon,* 31 Ch.D. 460); or (*b*) where a legacy is left to a sole executor *simpliciter,* since the presumption is that a testator by giving part did not intend to give the whole (*Lynn* v. *Beaver, sup.; Langham* v. *Sandford,* 17 Ves, 435, 444). The distinctions here, however, are somewhat artificial; thus, whilst a legacy to an executor "for his care and trouble" amounts to a declaration of trust by construction which excludes evidence (*Langham* v. *Sandford, sup.; Whitaker* v. *Tatham,* 7 Bing. 628; *Barrs* v. *Fewkes,* 13 W.R. 987, 988), a similar legacy to one executor, with nothing to another, raises only a rebuttable presumption against the latter, which admits it (*Williams* v. *Jones,* 10 Ves. 77). So, though equal legacies to several executors *simpliciter* merely raise a presumption against their title, equal legacies to executors "as such," or "for their care and trouble," are conclusive against it by construction and exclude evidence (*Ommanney* v. *Butcher,* Tur. & Rus. 260; *Farrington* v. *Knightly,* 1 P. Wms. 544; Hawkins, Wills, 313; as to unequal legacies, see *Re Knowles,* 28 W.R. 975, and *A.-G.* v. *Jefferys,* 1908, A.C. 411). A devise of realty to an executor upon trusts which do not exhaust the property, though formerly raising a mere presumption against his right, now raises a question of construction which excludes evidence (*Barrs* v. *Fewkes, sup.; Croome* v. *C.,* 59 L.T. 582).

Miscellaneous. Amongst miscellaneous presumptions, legal or equitable, which may arise against the apparent effect of documents and admit of evidence in rebuttal, are those by which half the bed of a non-tidal river or highway belongs to the adjoining owners respectively (*Devonshire* v. *Pattinson,* 20 Q.B.D. 263; *Ecroyd* v. *Coulthard,* 1897, 2 Ch. 554); by which the freeholder owns *usque ad cœlum et ad inferos* (*Doe* v. *Burt,* 1 T.R. 701); by which a wife who charges her separate property to pay her husband's debts is entitled to exoneration by him (*Paget* v. *P.,* 1898, 1 Ch. 470; *Re Marlborough,* 1894, 2 Ch. 133); by which an agreement, silent as to duration, is revocable at the option of the parties (*Llanelly Ry.* v. *L. & N. W. Ry., ante* 594); or by which an intervening charge is merged in the equity of redemption, or a lease in the fee (*ante,* 580).

EXAMPLES.

Satisfaction of Portions and Debts.

Admissible.	*Inadmissible.*
A testator having made a settlement upon his daughter at her marriage of £2000 to be paid six months after his death, pays £1000 to her trustees in part satisfaction thereof, and subsequently leaves her a legacy of £2800 by his will. To rebut the presumption against double portions, declarations by the testator that he intended the legacy to be in addition to, and not in satisfaction of, the provisions in the settlement, held admissible [*Re Tussaud,*	A., on the marriage of his daughter B., with C., gives a bond to C. for £800, part payable during A.'s life and part at his death. Afterwards A. leaves B. a legacy of £800. Held, that though the bond debt was a portion, yet as it was due to C. and not to B. no presumption against double portions arose and declarations by A. that the legacy was in satisfaction of the bond were inadmissible (*Hall* v. *Hill,* 1 Dr. & War. 94).

Admissible.	*Inadmissible.*
9 Ch.D. 363, C.A. The course adopted in this case seems unsatisfactory and to conflict with the decision itself. The evidence was first heard and then the Court decided that the differences between the legacy and settlement were so great that no presumption arose. Had this point been decided first, as seems the more convenient course, the evidence would apparently have been rejected].	A., in 1838, executed a voluntary deed giving certain annuities on his decease to two families of his natural children and their respective mothers. In 1840, one of the mothers married, and one of her children died. In 1851, A. executed a second deed giving very dissimilar annuities at his death to the remaining persons. Held, that on the *construction* of the deed of 1851, it was not intended to satisfy the deed of 1838; and that evidence that A. when executing the second deed did so under a mistake, having forgotten the existence of the first deed, and that he did not intend to give more portions than one, was inadmissible (*Palmer* v. *Newell*, 20 Beav. 32, 39).
A., a father, owing B., his daughter, a debt, settles property largely in excess of the debt upon her on her marriage with C. The settlement is expressed to be "in consideration of natural love and affection," and C. is ignorant of the debt. Held, a presumption that the debt was satisfied arose, and that evidence in rebuttal or support respectively was admissible (*Plunkett* v. *Lewis*, 3 Hare, 316).	
A. borrowed £1100 from B., his mother-in-law, who boarded with him, paying him £212 10*s.* a quarter, it being agreed that the debt should be repaid by quarterly deductions of £100 from B.'s payments. Afterwards B., by her will, appointed A. her executor. Held, that the appointment released the debt at law, and that in order to rebut any equitable claim, evidence that after two quarterly deductions of £100 had been made, B. stated she did not want any more of A.'s debt returned and thereafter made full quarterly payments for board, inserting memoranda to this effect on the counterfoils of her cheques,—was admissible as showing a continuing intent to forgive the debt during B.'s lifetime [*Strong* v. *Bird*, 18 Eq. 315; *Re Applebee*, 1891, 3 Ch. 422; *Re Griffin*, 1899, 1 Ch. p. 412].	A. appointed B. his executor and left him a legacy of £500. B. at the time owed A. £100. In an unattested letter addressed to B. but never communicated to him, and found in a box with the will, though not included in the probate, A. gave B. various instructions as to the mode of winding up his estate and added, "The £100 I lent you does not form part of the £500 I left you, it is cancelled." Held, the letter being intended as a testamentary document, but not being duly executed, was inadmissible, though *aliter* perhaps had it been communicated to B. in A.'s lifetime (*Re Hyslop*, 1894, 3 Ch. 522; *Selwin* v. *Brown*, 3 Bro. P.C. 607; *Re Applebee opposite*).

Ademption and Repetition of Legacies.

Presumed Ademption. A., having left his daughter, B., a legacy of £3000, afterwards gives her a promissory note for £500. Held, declarations by A. at the time of the gift, that it was in part satisfaction of the legacy, admissible, not as varying the will, but as part of the transaction to show a *pro tanto* satisfaction of the legacy (*Kirk* v. *Eddowes*, 3 Hare, 509). So, where A. left a legacy to his son B., his will directing that loans to children should be deducted from their legacies, and afterwards advanced B. £200, inserting in the counterfoil of the cheque the word "loan"; —Held that this statement was admissible as part of the *res gesta* and that the legacy was adeemed *pro tanto* (*Re England* (1912) 134 L.T. Jo. 30, per Eve., J.)	*Presumed Ademption.* A. by will in 1904 gave £500 to trustees to buy a piece of land called St. Mary's meadow to be added to the glebe of the parish church, "in pursuance of the express wish of my deceased wife." In 1905 he bought this piece of land for £375 and conveyed it to trustees to add to the glebe, the deed reciting that it was "so bought and conveyed in memory of my wife. "In 1912 he executed a codicil confirming his will. Held, (1) that the will and deed clearly expressed the object of such gift respectively, and these not being the same, there was no ademption; and (2) that declarations by A. in 1896, after his wife's death, that "he wished to do something in memory of her," and later that "what he thought she would have liked best was the gift of St. Mary's meadow," were inadmissible [*Re Aynesley*, 1915. 1 Ch. 172, C.A. The decision would have been the same had there been no confirmatory codicil].
A. by will in 1874 bequeathed to B., her husband's niece, "£500 according to the wish of my late husband." Afterwards in 1881 A. paid B. £300, making an entry in her diary "a legacy from B.'s uncle."	

Admissible.

Held, a presumption of ademption arising, evidence that A., a year before the payment, told her friends she had asked B. if she would rather have £300 down or £500 by will, and that B. had written choosing the former,—was admissible, not as proof that the conversation took place, but as showing A.'s intention at the time of the conversation, although B. denied the letter and it was not produced [*Re Pollock*, 28 Ch.D. 552, C.A.; *cp. Maher* v. *Linigan*, 15 L.T. O.S. 97, where the legacy was also to strangers; and *ante*, 324-6].

Express Ademption. A. by will directed that "all moneys advanced by me to my children, as will appear by a statement in my handwriting" should be brought into hotchpot. An unattested paper made after the date of the will in which A. recited the advances, held, admissible though not conclusive, of the fact and amount thereof (*Whateley* v. *Spooner*, 3 K. & J. 542). So, where A. directed that advances made, or to be made, by him to his children as recorded in a certain book, signed by him, should be taken in satisfaction of their legacies, and A. afterwards destroyed the book:—Held that, as it would probably have been admitted to probate as part of the will, but had been revoked by destruction, none of the sums advanced could be brought into hotchpot (*Re Coyte*, 56 L.T. 510).

[For cases in which evidence of express directions that advances to certain children or on certain occasions were to be in satisfaction of legacies, such directions being omitted as to others, has been held admissible, but not sufficient to rebut the presumption that the latter also were adeemed, see *Hopwood* v. *H.*, 7 H.L.C. 728, and *Re Harrowby*, 46 Sol. Jo. 633, C.A.]

Repetition. A., by will, leaves a legacy to B. of a certain amount and expressed to be for a certain motive. Afterwards A., by a codicil, leaves M. a legacy of the same amount and for the same motive. Declarations by A. that he intended the legacies to be cumulative would be admissible to

Inadmissible.

Express Ademption. A. by will in 1864 bequeathed the residue of his property among his children and directed that sums advanced to them should be brought into hotchpot. In 1869 he advanced two of his sons money and in 1874 writes a letter to each, reciting the various sums so advanced and stating that if they gave him promissory notes for a certain proportion he would write off the balance. Held, that the whole of the advances must be brought into hotchpot and that the letters being subsequent to the will could not be incorporated therewith, and were inadmissible to vary it [*Smith* v. *Conder*, 9 Ch.D. 170, not approving *Whateley* v. *Spooner*, *opposite*. The Court remarked that the case was one not of rebutting a presumption, but of contradicting the will; *cp. ante*, 586, 603, 669].

A., by will in 1908, left a legacy of £300 to B., his nurse. In 1909 he gave her a sealed letter, with a cheque for £300 enclosed, stating the cheque was in satisfaction of the legacy; but he did not communicate its contents to B., one letter telling her to open it on his death. In 1910 he asked for the letter, opened it in B.'s presence, took out the cheque and resealing the letter, gave it back to B. stating she was to open it on his death. A. afterwards placed £300 at his bank, in their joint names with power to either to draw. Held, that B. was entitled to both sums; and that the letter of 1909, not having been communicated to B. during A.'s lifetime, was not admissible to show that the second gift was in substitution of the legacy [*Re Shields*, 1912, 1 Ch. 591, *per* Warrington, J., who stated that ademption, in this context, meant a transaction to which both donee and donor were parties. This case is doubted in 56 Sol. Jo. 498; and *cp. Re England*, *ante*, 672].

Repetition. A., by will in 1816, gives to "Mrs. B. an annuity of £150 payable half-yearly." Six months later, by a codicil on the margin of the will, he writes, "Now Mrs. C. £100 per ann. in quarterly payments." Evidence having been given that Mrs. B. cohabited with A. till shortly

Admissible.	*Inadmissible.*
rebut the presumption of substitution (*Hurst* v. *Beach*, 5 Madd. 351, 358-359; Tay. s. 1227).	after the date of the will, when she married C.,—Held, that the will and codicil though proved as distinct instruments must be construed as one, that the legacies were substitutional and declarations of intention by A. inadmissible (*Martin* v. *Drinkwater*, 2 Beav. 215). A., by will in 1895, gave certain legacies, and in 1896 by a "codicil to my last will" gave legacies of equal amount and substantially upon the same limitations to the same legatees, together with other legacies not contained in the will. Held, there being nothing in the language of the codicil to point to substitution, the legacies were cumulative, and evidence that at the date of the codicil the legacies therein alone disposed of practically the whole estate, was inadmissible (*Re Pinney*, 46 Sol. Jo. 552, following *Wilson* v. *O'Leary*, *ante*, 330, and *Higgins* v. *Dawson*, *ante*, 641).

Advancement and Resulting Trust.

A. buys shares in the C. company in the name of B., his son. To rebut the presumption of advancement, evidence that the shares were so bought merely to qualify B. for a directorship, that A. received the dividends himself, and kept the certificates in an envelope indorsed "C. Co.'s shares belonging to me"; **held admissible** [*Re Gooch*, 62 L.T. 384; the endorsement was received not as evidence of A.'s intention at the time, but as consistent with the whole transaction]. A. buys stock in the joint names of herself and B., the son of her daughter-in-law, C. Held, that to rebut the presumption of a resulting trust, the testimony of B. and C. as to A.'s intention in making the purchase, and also the fact that she had made several similar purchases in the joint names of herself and a grandson and companion respectively, were admissible (*Fowkes* v. *Pascoe*, 10 Ch. App. 343).	A. lodges certain securities at a bank in the joint names of himself and B., his daughter. After A.'s death, a memorandum, dated fifteen months subsequently to the deposit, is found in which he directs the securities to be applied to other purposes. Held, the memorandum was not admissible to rebut the presumption that the money was a gift to B. [*O'Brien* v. *Sheil*, I.R. 7 Eq. 255; *Williams* v. *W.*, 32 Beav. 370, and cases cited, *ante*, 670. *Aliter* if the memorandum had been contemporaneous with the deposit, since "the question was what was the intention at the time of the transaction, and not what it was subsequently." See, however, cases *ante*, 86].

Executors.

A., using a printed will-form, left the residue of his property "to——" (not filling in the space left in the form), and appointed B. his executor. Evidence of declarations by A. that he intended B. to take the property, held, admissible to rebut	A. appoints B. and C. his executors, leaving them all his personal estate "for you to pay all as follows," naming various debts and legacies which did not exhaust the estate. Held, there being nothing in the will showing A. intended B. and C. to take the residue beneficially, declarations to that effect by A. were inadmissible (*Love* v. *Gaze*, 8 Beav. 472.) A. left the residue of his real and personal property to B., his executor, "to enable him to carry into effect the purposes of his will." A surplus of real and personal property remaining after payment of the charges,—Held, in an action against B.

Admissible.

the *presumption* arising from the blank against the *prima facie* title of the executor to the undisposed of residue [*Re Bacon*, 31 Ch.D. 460; the Court remarked that the effect of the blank could not be greater than to raise a presumption against the executor].

Inadmissible.

by C. as A.'s heir-at-law, that, there being a resulting trust of the surplus by *construction* and not by *presumption*, evidence that A. intended B. to take the surplus beneficially, and not in trust for C., was inadmissible (*Barrs* v. *Fewkes*, 13 W.R. 987; *Croome* v. *Croome*, 59 L.T. 582).

Miscellaneous.

A. conveys certain land to B., described as "bounded by the river." To rebut the presumption that B., under this conveyance, is entitled to the bed of the river, *usque ad medium filum*, evidence may be given that the fishing had always been dealt with separately to the land, and was in fact let at the time of the conveyance [*Devonshire* v. *Pattinson*, 20 Q.B.D. 263, C.A.; see *Micklethwaite* v. *Newlay Co.*, 33 Ch.D. p. 145, *per* Cotton, L.J., as to the limits of such evidence].

So, where a several fishery was purchased at an auction and the conveyance did not in terms include the bed of the river, the particulars of sale, which excluded it, were received to rebut the presumption that the bed of the river passed [*Ecroyd* v. *Coulthard*, 1897, 2 Ch. 554; *Beaufort* v. *Aird*, 20 T.L.R. 602; and *cp. A.-G.* v. *Emerson*, *ante*, 112].

A. conveys land abutting on a highway to B., neither the acreage nor the map in the deed including any part of the highway. In an action by B. against A. for half the soil of the highway, it appeared that by one of the conditions of sale recited in the deed, B. was to pay for "the trees on the land sold" at a valuation; and by a further recital this was stated to have been done. Held, evidence that there were trees both on the acreage named and also on the side of the highway adjoining it, and that the former trees alone had been valued and paid for by B., was admissible to rebut the presumption that half the highway passed (*Pryor* v. *Petre*, 1894, 2 Ch. 11, C.A.).

A. having let B. a house and yard, C. brings ejectment against B. for a cellar under the yard. To rebut the presumption that the cellar passed to B. by virtue of the maxim *cujus est solum*, &c., C. may give evidence that the cellar was let off to D. at the time of B.'s lease and that B. never claimed it till after D.'s lease expired (*Doe* v. *Burt*, 1 T.R. 701).

As to declarations of intent by testators to rebut presumptions as to the date of alterations in wills, see *ante*, 327.

BOOK III.

EFFECT OF EVIDENCE.

CHAPTER XLVIII.

WEIGHT OF EVIDENCE. PRESUMPTIONS. ESTOPPELS.

WEIGHT OF EVIDENCE. Questions of the admissibility of evidence belong, as we have seen, to the judge, those of its weight, credibility and sufficiency, to the jury (*ante,* 11). But the weight of evidence cannot, like its admissibility, be determined by arbitrary rules, since it depends mainly on common sense, logic and experience. "For weighing evidence and drawing inferences from it, there can be no canon. Each case presents its own peculiarities and in each common sense and shrewdness must be brought to bear upon the facts elicited" (*R.* v. *Madhub Chunder,* 21 W.R.Cr. 13, 19 (Ind.), *per* Birch, J.; *cp. Ld. Advocate* v. *Blantyre,* 4 App. Cas. p. 792, *per* Ld. Blackburn).

In determining such questions, however, valuable aid is provided by the judge's direction on the following points:—who has the burden of proof; what presumptions apply; when corroboration is required; that statements are evidence for some purposes and not for others, or against some parties and not against others; that documents are sometimes conclusive and sometimes merely *primâ facie* evidence of the facts recorded; that oral evidence is more reliable than that given by affidavit; and that direct and positive testimony is preferable to the speculative opinion of experts [*ante,* 12-13, 386; Tay. ss. 50-69; Best, ss. 440-51; and for an elaborate examination of this topic, see Moore on Facts (Am.)]. As to what evidence is sufficient to be left to the jury, see *ante* 13.

PRESUMPTIONS. Presumptions may, as we have seen, be either of law or fact, and when of law may be either conclusive (*præsumptiones juris et de jure*), or rebuttable (*presæsumptiones juris*), but when of fact (*præsumptiones hominis*) are always rebuttable (*ante,* 7). Mixed presumptions are those which are partly of law and partly of fact. As to conflicting presumptions, see *ante,* 34.

[Tay. ss. 70-216; Ros. N.P., 17th ed. 33-44; Ros. Cr. Ev., 13th ed. 14-22; Steph. arts. 85-89, 98-101; and *cp.* Introd.; and Appendix, Notes i., xxxv.-xxxvii.; Best, ss. 296-471; Whart. ss. 1226-1365; Thayer, Pr. Tr. Ev. 313-352, 539-576.]

Conclusive Presumptions of Law. The modern tendency of courts being to contract the range of all arbitrary rules affecting the weight of evidence, and to leave questions of fact to be determined as far as possible by the probabilities of the particular case, many presumptions of law, which in early times were considered absolute and indisputable, have since been

relegated to the category either of rebuttable presumptions of law, or of mere presumptions or inferences of fact (Best, s. 307). Indeed, Prof. Wigmore maintains that "In strictness there cannot be such a thing as a conclusive presumption. Wherever from one fact another is conclusively presumed . . . the existence of the second is wholly immaterial; and to provide this is to make a rule of substantive law" (Ev. s. 2492). Dr. Wharton, also, remarks that while the *juris et de jure* class is still said to exist, no perfect individual of the class is to be found (s. 1234). In many cases at all events, these so-called conclusive presumptions are rules which belong, properly speaking, to the various branches of substantive law and not to the law of evidence. Thus, the presumption that an infant under seven is incapable of committing a felony, or that all men know the law (*i.e.*, that ignorance of the law is no excuse for crime), belong to the criminal law. Mr. Taylor gives the following instances, amongst others, of matters which are conclusively presumed, or amount to conclusive evidence, either by statute or common law:—The validity of any composition or general scheme of arrangement, when certified by the official receiver in bankruptcy (Bankruptcy Act, 1914 s. 16, subs, 14); the validity of the valuation list for the time being in force under the Valuation (Metropolis) Act, 1869, s. 45; the payment of simple contract debts after the expiration of six years (Statute of Limitations, 21 Jac. I. c. 16; the statute has, however, been held not to discharge the debt, but merely to bar the remedy); the proposition that judicial records are correct (see *ante,* 404, 576, 584); that bonds and other specialties, in the absence of fraud, were given for good consideration (*ante,* 32); and that ancient documents were duly executed (see *ante,* 523. [Tay. 8th ed., ss. 70-88]. Most of these matters, however, are now open to impeachment, including the presumption, which Mr. Taylor also regards as conclusive (s. 80), that *every sane person intends the probable consequences of his acts* [Mr. Best regards this as a *præsumptio juris,* merely (s. 305); it is, however, sometimes conclusive and sometimes rebuttable (*R.* v. *Beard,* 1920 A. C. 479; *R.* v. *Meade,* 1909, 1 K.B. 895; *Williams* v. *Birmingham Co.,* 1899, 2 Q.B. p. 345; *New's Trustee* v. *Hunting,* 1897, 2 Q.B. p. 27; *ante,* 148-9) and the presumption does not apply where the question is whether the Act, though likely to cause injury, was intentional or accidental (*R.* v. *Davies,* 29 T.L.R. 150)].

Rebuttable Presumptions of Law. Disputable presumptions of law differ from presumptions of fact in the following respects:—(1) Presumptions of law derive their force from *law;* while presumptions of fact derive their force from *logic.* And though many of the former have intrinsic logical weight, being indeed derived from the latter, yet there are others which have none. Thus, it is difficult to see what inherent probability there is that a prisoner who has been committed for trial is innocent. (2) A presumption of law applies to a *class,* the conditions of which are fixed and uniform; a presumption of fact applies to *individual cases,* the conditions of which are inconstant and fluctuating. Thus, the presumption of death arises whenever seven years' unexplained absence is proved; but when it is necessary to stablish the death at any precise period within the seven years, the question must be decided on the evidence adduced in each specific case (see *inf.*) (3) Presumptions of law are drawn by the *Court,* and in the absence of opposing evidence are conclusive for the

party in whose favour they operate; presumptions of fact are drawn by the *jury*, who may disregard them however cogent. [Greenleaf, s. 48 *n;* Whart. s. 1137; Best, s. 304; Tay. s. 111.] In practice, however, these distinctions are by no means easy to apply; and the line of demarcation, even when visible, is often overlooked. A presumption which is regarded by some judges and text-writers as one of law, is treated by others as one of fact, or of mixed law and fact; indeed, the same judges not infrequently place the same presumption in different categories at different times (Tay. s. 111). The chief function of a rebuttable presumption of law is to determine upon whom the burden of proof rests, using that term in the sense of introducing evidence (*ante,* 32-4). With regard to this class of presumptions it has been said "they are merely *prima facie* precepts; and they presuppose only certain specific and expressed facts. The addition of *other* facts, if they be such as have evidential bearing, may make the presumption inapplicable. All is then turned into an ordinary question of evidence, and the two or three general facts presupposed in the rule of presumption take their place with the rest, and operate with their own natural force as part of the total mass of probative matter. Of course the considerations which may have made these two or three facts the subject of a rule of presumption may still operate, or may not, to emphasize their quality as evidence; but the main point to observe is, that the rule of presumption has vanished" (Thayer, Pr. Tr. Ev. 346).

The following are some of the principal instances usually classed under the head of rebuttable presumptions of law:

Legitimacy. Access. It is a rebuttable presumption of law that a child, born during lawful wedlock, is legitimate, and that access occurred between the parents; and this presumption can only be displaced by a strong preponderance of evidence, and not by a mere balance of probabilities [*Banbury Peerage,* 1 Sim. and S. 155; *Morris* v. *Davies,* 5 C. & F. 163, 244; *Bosvile* v. *A.-G.,* 12 P. D. 177; *Burnaby* v. *Baillie,* 42 Ch.D. 282; *Hawes* v. *Draeger,* 23 Ch.D. 173; *Evans* v. *E.,* 20 T.L.R. 612, 615; *ante,* 198-9; *In the Estate of L.,* 1919, V.L.R., 17; Tay. s. 106; Best, s. 349. Formerly, legitimacy was conclusively presumed, if the husband had been within the four seas at the necessary time (Hubb. Ev. of Succn., 392-414)]. The presumption applies although the birth occurred so soon after marriage that the child must have been begotten before it [*R.* v. *Luffe,* 8 East, 198; *Turncock* v. *T.,* 16 L.T. 611; *Re Parsons,* 18 L.T. 704; *Gardner* v. *G.,* 2 App. Cas. 723, 728; *The Poulett Peerage,* 1903, A.C. 393, 395, where Ld. Halsbury remarked, "The question is to be treated as one of fact and like every other question of fact, when you are answering a presumption it may be answered by any evidence that is appropriate to the issue."] If the Court is satisfied that the husband *had,* or from circumstances of time, place and health, *could have had,* intercourse with his wife at the necessary time, the presumption will not be rebutted by proof that she also had connection with other men [*Banbury Peerage, sup.; Cope* v. *C.,* 1 M. & R. 269; *Wright* v. *Holdgate,* 3 C. & K. 158; *R.* v. *Mansfield,* 1 Q.B. 444; *Gordon* v. *G.,* 1903, P. 141; *Yool* v. *Ewing,* 1904, 1 I.R. 434, where the wife solemnly admitted the illegitimacy, though see as to such admissions, *inf.*]. But proof that access between husband and wife at the necessary time was impossible (*e.g.* from his impotence, or absence), or highly improbable, (*Morris* v. *Davies, sup.; Barony of Saye and Sele,* 1 H.L.C. 507; *Legge* v.

Edmonds, 25 L.J. Ch. 125; *Atchley* v. *Sprigg*, 33 *id.* 345; *Aylesford Peerage*, 11 App. Cas. 1; *In the Estate of L., sup.*), will rebut the presumption; and with this object not only the conduct of the parties, but the family treatment and reputation on the subject, are also admissible (*ante*, 117, 312). The direct testimony or declarations of the parents, however, cannot, as we have seen, be received (*ante*, 199), unless indeed such declarations be tendered merely as a part of their general conduct and not as evidence of the truth of the facts stated (*Aylesford Peerage, sup.*, and cases cited, *ante*, 77); but the declarations of a deceased person as to his *own* illegitimacy have been received both as admissions and as statements against interest (*Re Perton*, 53 L.T. 707; *ante*, 309).

If it is not proved that the child was born of the body of the wife (*Slingsby* v. *A.-G.*, 32 T.L.R. 364 (C.A.); affd. 33 *id.* 120 (H.L.); or that it was born *during* the marriage (*Robinson* v. *Buccleuch*, 31 Sol. Jo. 329, *per* C.A.), or that the alleged father was *alive* at the date of its conception (*Re Perton, sup.*), no presumption of legitimacy will arise. And if the child is proved to have been born more than nine months after the husband and wife have been judicially separated, it will be presumed to be illegitimate (*Hetherington* v. *H.*, 12 P.D. 112). As to the case suggested, in Steph. art. 98 *n*, of a child born six months after the death of one husband and three months after the mother's marriage with another, see *Shuman* v. *S.*, cited Thayer, Pr. Tr. Ev. 349-350; and for a case in which a child, born after the marriage of its parents, but conceived when the mother was not yet divorced from her former husband, was held legitimate, see *Ingestre* v. *A.-G.*, Times, Oct. 14, 1913, and *note* 30 L.Q. Rev. 153-7.

Marriage. Celibacy. A strong *primâ facie* presumption is, except in cases of bigamy or petitions for damages for adultery, made by law in favour of the validity of a marriage proved to have been celebrated *de facto* (*Piers* v. *P.*, 2 H.L.C. 331; *Sastry Velaider* v. *Sembecutty*, 6 App. Cas. 364). And mere cohabitation may suffice to raise a presumption of valid marriage (*id.*; *Doe* v. *Fleming*, 4 Bing. 266; *Collins* v. *Bishop*, 48 L.J. Ch. 31; *Fox* v. *Bearblock*, 17 Ch. D. 429; *Re Thompson*, 91 L. T. 680; *ante*, 110), which will not necessarily be rebutted by proof that the ceremony actually gone through was invalid (*Re Shephard*, 1904, 1 Ch. 456; doubted 20 L.Q. Rev. 226-7).

In cases of bigamy, it has been held that where proof is given of the first marriage, and of the prisoner and his wife having lived together thereafter, the onus is on him to show the non-continuance of the marriage; but if separation after the marriage is shown, the onus is on the prosecution to show his knowledge that the first wife was alive at the date of the second marriage (*R.* v. *Jones*, 15 Cox, 284; *cp. ante*, 384). As to death unmarried, see *inf.*, *Death.*

Issue, Possibility and failure of. Women over 53 who are either spinsters, or if married, have been childless for many years, are in general presumed to be incapable of child-bearing (*Croxton* v. *May*, 9 Ch. D. 388, C.A.; *Haynes* v. *H.*, 35 L.J. Ch. 303; *Re Hocking*, 1898, 2 Ch. 567. C.A.; *Re White*, 1901, 1 Ch. 570; *Re Summer's Trusts*, 22 W.R. 639; *Re Thornhill*, 1904, W.N. p. 112, C.A.; *Re Webster*, 114 L.T. Jo. 428; *Persse* v. *Mitchell*, 34 Ir. L.T.R. 135). North, J., however, declined to presume that a man over 72 years of age was past the possibility of issue, or even to hear medical testimony on the point (*P.* v. *N.*, 31 L. Jo. 690). As to failure of issue, see *inf.*, *Death.*

Death. A person who has has not been heard of for *seven years* by those who, if he had been alive, would be likely to have heard of him, is presumed to be dead (*Prudential Co.* v. *Edmonds,* 2 App. Cas. 487, 509); but there is no presumption as to the time during the seven years at which he died (*Re Phene's Trusts,* 5 Ch. App. 139; *Re Lewes's Trusts,* 6 Ch. App. 356; *Re Rhodes,* 36 Ch. D. 586; *R.* v. *Lumley,* L.R. 1 C.C. 196; and see a series of articles on this presumption, Sol. Jo. 1890, Feb. 15, *et seq.*). The above presumption has been held to apply though there were strong reasons for the deceased concealing his identity (*Wills* v. *Palmer,* 53 W.R. 169; *cp. Re Benjamin,* 1902, 1 Ch. 723; and *Re Harding, inf.;* see, however, *Re Lidderdale, inf.*). In the Probate Division, however, death is frequently presumed, as a matter of fact and not of law, before the seven years (*Re Matthews,* 1898, P. 17; *Re Winstone, id.* 143; *Re Benjamin, sup.; Re Aldersey,* 1905, 2 Ch. 181; *Re Long-Sutton,* 106 L.T. 643), and in one case the Court refused to presume death from unexplained absence under suspicious circumstances after twenty years (*Re Lidderdale,* 57 Sol. Jo. 3). With regard to the cause of death, accident rather than suicide will be presumed (*Harvey* v. *Ocean Co.,* 1905, 2 I.R. 1, C.A.,), There is no presumption of law that a person died without issue (*Re Jackson,* 1907, 2 Ch. 354); but where the deceased, when last heard of, was unmarried, he may be presumed as a matter of fact, though not of law, to have died unmarried and without issue (*Re Harding,* 1891, Times, May 28; *Re Callan,* 39 Ir. L.T. Jo. 372; *cp. Greaves* v. *Greenwood,* 2 Ex. D. 289).

Continuance of Life. Survivorship. Commorientes. There is no presumption of *law* as to the continuance of life (*ante,* 104). As to survivorship, if A. is proved to have died in a certain year and B. to have been last heard of more than seven years before, A. will be presumed to have survived B. (*Re Thompson,* 39 Ir. L.T. Jo. 372; *Re Callan, sup.;* as to less periods than seven years, see *Re Phene's Trusts, &c., supra*). There is, however, no presumption of survivorship in the case of *Commorientes, i.e.,* two or more persons who have perished by a common disaster (*Wing* v. *Angrave,* 8 H.L.C. 183; *Re Alston,* 1892, P. 142; *Re Johnson,* 78 L.T. 85; *Re Beynon,* 1901, P. 141; *Re Good,* 24 T.L.R. 493; *Re Roby,* 1913, P. 6; Tay. ss. 202-203; Best, s. 410; Steph. art. 99; *ante,* 118); nor of simultaneous death (*Re Rhodes,* Sup. Ct. U.S.A., *cited* 37 Ir. L.T. Jo. 231; in *Re Fisher,* 1915, 1 Ch. 302, it was said that no two persons can die *eo instanti*); the question in both cases being purely one of evidence.

Sanity. It is usually said that the law presumes every man to be sane until the contrary is proved (Tay. ss. 197, 370; *ante,* 32; Thayer, Pr. Tr. Ev. 380-383, who remarks that on an issue of sanity the presumption only frees the party in whose favour it operates from giving affirmative evidence of sanity in the first instance, not of relieving him from the entire burden of the issue); in *Sutton* v. *Sadler,* 3 C.B.N.S. 87, however, the presumption was held to be one of fact, which ought not to influence the jury in a case of conflicting evidence. On the other hand, when insanity is *primâ facie* established, *e.g.* by inquisition, it will be presumed to continue until disproved (*Prinsep* v. *Dyce Sombre,* 10 Moo. P.C. 232, and cases *ante,* 104).

Innocence, Marital Coercion. In early times, the law appears to have presumed guilt, not innocence; for if the prosecution proved a *primâ facie* case,

no *alibi* or other defence was allowable, since to have admitted "contrary probations would have opened a door to perjury" (Stephen, 1 Hist. Crim. Law, 352, 354-5; *ante,* 212). At the present day, in the absence of evidence, innocence of crime is usually said to be presumed by law; at all events the burden of proof is always cast upon the party asserting criminality (*ante,* 33-4). Its commission, when the question arises in a criminal (but *qu.* in a civil) case, must, however, be proved not by a mere preponderance of evidence, but beyond a reasonable doubt (*ante,* 10). [See Thayer, Pr. Tr. Ev. 551-576.] Children under *seven* are "conclusively presumed" to be incapable of committing a felony; but as to those between *seven* and *fourteen,* there is a rebuttable presumption of innocence, which can only be overcome by strong evidence of malice, in which case *malitia supplet ætatem* (*R.* v. *Lockley,* 47 Sol. Jo. 123; *R.* v. *Gorrie,* 83 J.P. Rep. 136). As to the presumption of marital coercion, see *ante,* 33.

Regularity. Omnia præsumuntur rite esse acta. This presumption, which is nearly akin to that of innocence, is chiefly applied to judicial and official acts; and though sometimes conclusive (see, *e.g.* as to the correctness of records, and the due execution of ancient documents) is in general only rebuttable. Thus, the constant performance of divine service from an early period in a chapel raises a disputable presumption of its due consecration (*Rugg* v. *Kingsmill,* L.R. 1 Ad. & Ec. 343; *R.* v. *Cresswell,* 1 Q.B.D. 446; *ante,* 109). Common instances of the presumption in its rebuttable form occur, also with respect to the validity of a person's appointment to a public office, from his acting therein (*ante,* 110); and as to the due execution of deeds and wills (*ante,* 326, 515). [Tay. ss. 143-149; Best, ss. 353-365; Ros. N.P. 43-44.]

Presumptions affecting Documents. Date: it is a general *primâ facie* presumption that all documents were made on the day they bear date (*Anderson* v. *Weston,* 6 Bing. N.C. 296; *Potez* v. *Glossop.* 2 Ex. 191; *cp. Butler* v. *Mountgarret,* 7 H.L.C. pp. 646-7), though as to wills, see *Re Adamson,* L.R. 3 P. & D. 253, 256. When, however, there is reason to apprehend *fraud or collusion* (Tay. s. 169; Steph. art. 85; *ante,* 62-3); or, when an indorsement made by a deceased person upon an instrument is used for the purpose of *defeating a plea of the Statute of Limitations,* independent evidence may be required that the writing was made at the time it bears date (*id.; ante,* 279-80). So, the date appearing on a deed of arrangement is not sufficient proof without corroboration as to the time when it was executed, to justify the making of a receiving order (*Exp. Slater,* 76 L.T. 539). As to presumptions respecting *sealing, delivery, attestation, alterations, stamps, ancient documents,* &c., see *ante.* chap. xlii.

Equitable Presumptions. It is beyond the scope of the present work to enter at large upon this subject; but a few of the more common equitable presumptions—*e.g.* those as to *satisfaction, ademption, advancement* and *cumulation of legacies*—have already been considered *ante,* chap. xlvii.

Presumptions of Fact. Presumptions of fact are, as we have seen, simply logical inferences of the existence of one fact from the proved existence of others. They are the inferences or presumptions which render circumstantial evidence admissible, and have already been considered at length under the head of relevancy and relevant facts.—Presumptions of fact of the more cogent

kind will, as we have seen, shift the burden of proof, no less than rebuttable presumptions of law (*ante*, 35-6).

ESTOPPELS. An estoppel is a rule whereby a party is *precluded from denying the existence of some state of facts which he has formerly asserted.* It is usually said to be only a rule of evidence, because at common law an action cannot be founded thereon (*Low* v. *Bouverie*, 1891, 3 Ch. 82, *per* Bowen, L.J.; *Re Sugden*, 86 L.J.Ch. 277, 280, *per* Neville, J.); but as in equity an action (*Williams* v. *Pinckney*, 67 L.J.Ch. p. 37, *per* V. Williams, L.J.), and in both a defence, can be, and as estoppels must be pleaded and evidence not, it may in many cases be regarded as a rule of substantive law (Ewart, Estoppel, 187-195; Salmond, 21 Law Quart. Rev. 80; Gulson on Proof, ss. 436-8).

Estoppels have been variously treated as conclusive presumptions of law (Tay. s. 89); as solemn admissions (2 Sm. L.C. 11th ed. 744), and as conclusive evidence. They are, however, distinguishable from each of these —*e.g.* from the first named, in that an estoppel may be waived by the party in whose favour it operates (*Scarf* v. *Jardine*, 7 App. Cas. 345; *ante*, 412); from the second as well as the first, in that it cannot in general be taken advantage of by strangers; and from the third in that the conclusiveness of evidence may result from mere logical cogency, while, when it results from same rule of law, it operates indifferently for or against all persons.

[Tay. ss. 89-103; Best, ss. 532-45; S. Smith, L.C., 11th ed. 724-865; Steph. arts. 102-5, and Note xxxviii.; and see generally the works of Ewart, Everest, Bigelow, Caspersz, and Cababé.]

Estoppels are of three kinds: (1) By Record; (2) By Deed; and (3) By Conduct. When falling under the first and second heads they must be *pleaded* if there be an opportunity of pleading them, otherwise they will be deemed to be waived, and the jury may draw their own conclusion from the facts proved (*ante*, 412); and they must generally be *mutual*—*i.e.* both parties must be bound or neither will be; strangers not being allowed to take advantage of such estoppels. When falling under the third head it has been said that they need not be pleaded (*Freeman* v. *Cooke*, 2 Ex. 654; *Phillips* v. *Im Thurn*, 18 C.B.N.S. 400; Tay. 8th ed. s. 92; *Fleming* v. *Bank of N. Zealand*, 1900, A.C. 557; *contra*, perhaps, under the Jud. Acts, Odgers, Pleading, 8th ed. 236 *n*; Everest, Estoppel, 2nd ed. 459, 466; *Coppinger* v. *Norton*, 1902, 2 I.R. pp. 242, 245; Tay. 10th ed. s. 92), and need not always be mutual (*inf.*).

Estoppels of all kinds, however, are subject to one general rule: they cannot override the law of the land (Cababé, 123). Thus, where writing is required by statute, no estoppel will cure the defect (*Hunt* v. *Wimbledon Local Board*, 4 C.P.D. 48). So, even a judicial record or deed is always impeachable for fraud or illegality. And the same is true as to incapacity of parties—*e.g.* a married woman, precluded from contracting by reason of coverture, was not estopped by her representation that she was single (*Cannam* v. *Farmer*, 3 Ex. 698), nor by her denial of a restraint on anticipation (*Bateman* v. *Faber*, 1898, 1 Ch. 144, C.A.); so, an infant is not estopped by his fraudulent mis-representation that he is of full age; and he is not bound to refund money obtained thereby (*Leslie* v. *Sheill*, 1914, 3 K.B. 607, C.A.). A trustee in bankruptcy is not estopped by a debtor's representation, made after an act of bankruptcy, that certain monies are not his own, though the debtor would be (*Re Ashwell*,

1912, 1 K.B. 300). Nor is a corporation estopped by acts which are *ultra vires* (*British Mutual Banking Co.* v. *Charnwood,* 18 Q.B.D. 714). It has, however, been held that though deductions from wages for a sick fund cannot be set off under the Truck Act, yet acquiescence in such deductions raises an estoppel (*Hewlett* v. *Allen,* 1892, 2 Q.B. 662, C.A.); and an admission of liability may estop a defendant from relying on the absence of a statutory notice of action (*Wright* v. *Bagnall,* 64 J.P. 420, C.A.; *Randall* v. *Hill's Dock Co.,* 69 L. J. Q. B. 554).

Estoppels by Record. The chief of these are Judgments, the conclusiveness of which has, for convenience, already been considered in conjunction with their admissibility (*ante,* chaps. xxxvi.-xxxvii.). An estoppel by record is also probably created by letters-patent between the Crown and the grantee, but this will not extend the benefit of the estoppel to all his Majesty's subjects (*Cropper* v. *Smith,* 26 Ch.D. 700, 712-13, where its effect as creating an estoppel by deed and by conduct was also considered). By the Patents Act, 1907, s. 29, a patent now has the same effect against the Crown as against a subject.

Estoppels by Deed. Where a party has entered into a solemn engagement by deed as to certain facts, neither he (*Bowman* v. *Taylor,* 2 A. & E. 278) nor any one claiming through or under him (*Dalton* v. *Fitzgerald,* 1897, 2 Ch. 86; *Clarke* v. *Hall,* 24 L.R.I. 316; but see *Re Anderson,* 1905, 2 Ch. 70), is permitted to deny such facts. This rule, however, is subject to the following qualifications:

(1) *The Estoppel must be mutual, i.e. it applies only between Parties and Privies, and only in Actions on the Deed.* It does not apply to actions on collateral matters even between the same parties (*Exp. Morgan, Re Simpson,* 2 Ch.D. 72); nor does it apply in general to proceedings between strangers, or a party and a stranger (*Cracknall* v. *Janson,* 11 Ch.D. 1, C.A.; Tay. s. 99).

The rule as to *mutuality* is relaxed in the case of a *deed poll,* since only the maker and his privies are intended to be bound thereby (Tay. s. 99); while even in the case of an *indenture,* one party alone may sometimes be bound—*e.g.* where he has gained an action or some other advantage on the footing of a given construction of the deed, he is estopped from afterwards setting up a different construction thereof (*Gandy* v. *G.,* 30 Ch.D. 57; *Roe* v. *Mutual Loan Fund,* 19 Q.B.D. 347; *Marshall* v. *Berridge,* 19 Ch.D. 233; *Re Lart, ante,* 427, 430).

(2) *No Estoppel arises upon Recitals or Descriptions which are either immaterial or not intended to bind.* With regard to the materiality of a recital, the following conditions must exist in order to raise an estoppel:—(*a*) There must be a distinct statement of some material particular fact (*e.g.* in a grant of land by A., a covenant that he had power to grant will not create an estoppel, though a statement that he was seised of the legal estate will, *General Finance Co.* v. *Liberator Soc.,* 10 Ch.D. 15; *Heath* v. *Crealock,* 10 Ch. App. 22; *Onward Building Soc.* v. *Smithson,* 1893, 1 Ch. 1; *cp. Poulton* v. *Moore,* 1915, 1 K.B. 400, C.A.); (*b*) a contract made with reference to such statement; and (*c*) an action founded upon, or brought to enforce the rights arising out of, the instrument (*Carpenter* v. *Buller,* 8 M. & W. 212; *Exp. Morgan, Re Simpson, sup.;* Tay. ss. 96-98). If these conditions concur,

indeed, a recital in an instrument *not* under seal will estop (*id.*). A recital, however, binds all the parties to the deed only when upon the construction of the instrument the statement appears to be one which all have agreed to admit as true; if it is intended to be the statement of one party only, he alone is estopped (*Stroughill* v. *Buck*, 14 Q.B. 781; *Young* v. *Raincock*, 7 C.B. 310; *Blackhall* v. *Gibson*, 2 L.R.I. 49; *Trinidad Co.* v. *Coryat*, 1896, A.C. 587). So, if a party has joined for a specific purpose he cannot be treated as having joined for a different purpose (*Re Horsfall*, 1911, 2 Ch. 63). Where a binding recital is of another deed or document, the recital is not secondary, but primary evidence of such deed, and constitutes a muniment of title which cannot be controverted (Tay. s. 98; *ante*, 538); but this applies only to so much of the deed as is actually recited; the other portions must be proved in the ordinary way (*Gillett* v. *Abbott*, 7 A. & E. 783). Married women are estopped by recitals in deeds duly executed and acknowledged by them (*Jones* v. *Frost*, L.R. 7 Ch. 773); but not infants by recitals in deeds executed by their guardians (*Milner* v. *Harewood*, 18 Ves. p. 274). The mere tender of the engrossment of a deed of execution is not, however, such an admission as amounts to an estoppel (*Bulley* v. *B.*, L.R. 9 Ch. 739).

(3) *No Estoppel where Deed is tainted by Fraud or Illegality.* As we have already seen, a party to a deed is not precluded from impeaching it on the ground of fraud, duress, infancy, or the like; so, where both parties know, or have the means of knowing, that it was executed for an immoral purpose, or in contravention of any statute or of public policy, neither party will be estopped from proving these facts, although the effect may be to enable either to take advantage of his own wrong (Tay. s. 93; *Birch* v. *B.*, and *Bonaparte* v. *B.*, *ante*, 406).

(4) *A Deed which can take Effect by Interest shall not be construed to take Effect by Estoppel* (*Doe* v. *Barton*, 11 A. & E. 311). Thus, if a party leases premises to another for a longer term than he himself possesses, it only ensures to the extent of his own interest and no further (*id.*; *Doe* v. *Seaton*, 2 C.M. & R. 732); but where he leases premises to which he has no title, this will estop the parties to the deed and their privies (*Dalton* v. *Fitzgerald*, 1897, 2 Ch. 86) from alleging his want of title—*i.e.* as the lease cannot enure by interest, it will by estoppel; should he, however, subsequently purchase the land, the lease which originally enured by *estoppel* will be converted into a lease *in interest*, and his heir or assignee will be bound thereby equally with the lessee and his assignee (Tay. s. 100; *Webb* v. *Austin*, 7 M. & G. 701; *Sturgeon* v. *Wingfield*, 15 M. & W. 224). It has been said that estoppels by deed do not bind the Crown, but that those by conduct do (*A.-G.* v. *Collom* 1916, 2 K.B. 193, 204).

Estoppels by Conduct. Estoppels by conduct, or as they are still sometimes called, estoppels by matter *in pais*, were anciently acts of notoriety not less solemn and formal than the execution of a deed, such as livery of seisin, entry, acceptance of an estate, and the like; and whether a party had or had not concurred in an act of this sort was deemed a matter which there could be no difficulty in ascertaining, and then the legal consequences followed (*Lyon* v. *Reed*, 13 M. & W. 285, 309). The doctrine has, however, in modern times, been extended so as to embrace practically any act or statement by a party which it would be unconscionable to permit him to deny. The rule has been

authoritatively stated as follows:—"Where one by his words or conduct *wilfully* causes another to believe the existence of a certain state of things and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time" (*Pickard* v. *Sears*, 6 A. & E. 469.) And whatever a man's real intention may be, he is deemed to act *willfully* "if he so conducts himself that a reasonable man would take the representation to be true and believe that it was meant that he should act upon it" (*Freeman* v. *Cooke*, 2 Ex. 654, 663; *McKenzie* v. *British Linen Co.*, 6 App. Cas. 82; *Carr* v. *L. & N.W.Ry.*, L.R. 10 C.P. 307; *Seton* v. *Lafone*, 19 Q.B.D. 68; *Coventry* v. *G. E. Ry.*, 12 Q.B.D. 776; and see *inf.*)

An estoppel by conduct may arise from agreement, misrepresentation, or negligence.

(*a*) *From Agreement.* The agreement may be *express—e.g.* where the plaintiff had obtained a reduction in the rate for the carriage of his horses by a declaration that their value did not exceed £10 each, he was estopped in an action against the defendants for injury to the horses, from asserting that their value was greater than that sum (*McCance* v. *L. & N.W. Ry.*, 34 L.J. Ex. 39); or it may be *implied* from the conduct of the parties, or the nature of the transaction, as in the following cases:

Share Certificates and Certifications. A company is precluded from denying the validity of its own share certificates, even though they have been obtained by means of a forged transfer (*Balkis Co.* v. *Tomlinson*, 1893, A.C. 396; *Re Ottos Kopje*, 1893, 1 Ch. 618); though this does not apply to a certificate forged by the secretary (*Ruben* v. *Great Fingall, &c.*, 1906, A.C. 439), nor to a certification indorsed by him on a transfer (*Whitechurch* v. *Cavanagh*, 1902, A.C. 117; *Peat* v. *Clayton*, 94 L.T. 465). A certificate that shares are fully paid will estop the company as to that fact, even against an allottee, if he has *bonâ fide* acted on the faith of the statement (*Bloomenthal* v. *Ford*, 1897, A.C. 156). The execution of a blank transfer by the owner of shares does not, however, estop him from proving his title as against a third party who has advanced money on the shares (*Colonial Bank* v. *Cady*, 15 App. Cas. 267).

Landlord and Tenant. A landlord is estopped from alleging his want of title to the premises (*Trevivan* v. *Lawrence*, 2 Smith's L.C., 11th ed. 742), or their structural instability (*Grosvenor Hotel* v. *Hamilton*, 1894, 2 Q.B. 836; *cp. Ramsden* v. *Dyson*, L.R. 1 H.L. 129), against his tenant; though not, it has been held, the invalidity of a lease granted by him in good faith, but without necessary consent (*Canterbury Co.* v. *Cooper*, 72 J.P. Rep. 465). And conversely, a tenant or lodger, or the alienee of either, cannot, during his possession of the premises, deny the title either of his landlord (*Balls* v. *Westwood*, 2 Camp. 11; *Doe* v. *Mills*, 2 A. & E. 17), or of the latter's heirs and privies in blood (*Weeks* v. *Birch*, cited, *ante*, 419). So, where A. devised land to B. for life with remainder to C., and B. purported to convey the fee to D. who took possession—in ejectment by the assignee of C., D. was held estopped from denying the validity of A.'s will (*Board* v. *B.*, L.R. 9 Q.B. 48; *Dalton* v. *Fitzgerald*, *ante*, 683; *cp.* however, *Re Anderson*, 1905, 2 Ch. 70, and *Re Tennant*, 1913, 1 I.R. 280). But the tenant may show that such title has expired (*England* v. *Slade*, 4 T.R. 682; *Serjeant* v. *Nash*, 1903, 2 K.B. 304); or that a parcel of land about which he and the lessor are disputing was

never comprised within the lease at all (*Clark* v. *Adie*, 2 App. Cas. 435, *per* Ld. Blackburn; Cababé, 24); or that he has been evicted by title paramount to his landlord's (*Gouldsworth* v. *Knights*, 11 M. & W. 337, 344). Mere receipt of payment of rent, however, though raising a strong presumption of tenancy, does not of itself operate as an estoppel (*Doe* v. *Francis*, 2 M. & R. 57; *Knight* v. *Cox*, 18 C.B. 645; *Crawford* v. *Gillmor*, 30 L.R.I. 238; *Serjeant* v. *Nash*, *sup.*), but only to an admission which may be explained. On the other hand, such estoppels do not bind strangers, *e.g.* where A., without title, lets to B., and C., and with B.'s license, brings goods on the premises on which A. distrains, C. is not estopped from disputing A.'s title to distrain, though B. would be (*Tadman* v. *Henman*, 1893, 2 Q.B. 168). [Tay. ss. 101-108; Steph. art. 103; Everest, Estoppel, 2nd ed. 267-99.]

Bailor and Bailee. A bailee is estopped from denying that his bailor had, at the time of his bailment, authority to make it (*Gosling* v. *Birnie*, 7 Bing. 339). So, he is estopped from disputing the title of a purchaser to whom he has attorned at the request of the bailor (*Henderson* v. *Williams*, 1895, 1 Q. B. 521). But when the bailee is evicted by title paramount he can, with the consent of the evictor, set up the latter's title against the bailor (*Biddle* v. *Bond*, 6 B. & S. 225; *Rogers* v. *Lambert*, 24 Q.B.D. 573).

Licensor and Licensee. A licensee of a patent cannot dispute the validity of the patent as against the licensor. But he may show its expiry (*Muirhead* v. *Commercial Cable Co.*, 29 L.Jo. 298), or that what he has done does not fall within the scope of the patent, and he may refer to former patents to show what is the proper construction of the patent in question (*Clark* v. *Adie*, *ante*, 393, 612, 620); and he is not estopped from disputing its validity against an assignee who has not bought on the faith of the statements in the patentee's petition to the Crown (*Cropper* v. *Smith*, 26 Ch.D. 700).

Principal and Agent. Similarly, an agent is estopped from disputing the title of his principal (*Dixon* v. *Hammond*, 2 B. & Ald. 310).

Election. So, an estoppel, or *quasi*-estoppel, may arise from a party's election to adopt one of two inconsistent remedies (see, *e.g.*, *ante*, 416).

As to estoppels between the *acceptor of a bill of exchange* and a *holder in due course*, see Bills of Exchange Act, 1882, ss. 54, 55.

(*b*) *From Misrepresentation or Negligence.* An estoppel by conduct may arise from an untrue representation of fact, not only when fraudulently, but even when mistakenly or innocently, made (*Vagliano* v. *Bank of England*, 1891, A.C. 107; *Law* v. *Bouverie*, 1891, 3 Ch. 82; *Colonial Bank* v. *Cady*, 15 App. Cas. 267; *Sarat Chunder Dey* v. *Gopal Chunder Lala*, 56 J.P. 741). And conduct by negligence, omission, or even silence, where there is a duty cast upon the person to disclose the truth, may often have the same effect (*id.* *Freeman* v. *Cooke*, *ante*, 685, and cases cited therewith; *Arnold* v. *Cheque Bank*, 1 C.P.D. 578; *Johnson* v. *Credit Lyonnaise*, 3 C.P.D. 32.) A person cannot, however, rely by way of estoppel upon a statement induced by his own misrepresentation or concealment (*Porter* v. *Moore*, 1904, 2 Ch. 367).

In order to raise such an estoppel the following conditions are necessary: —(1) There must be a representation of fact, a mere statement of intention or promise *de futuro* is insufficient (*Citizens' Bank* v. *Bank of N. Orleans*, L.R. 6 H.L. 352; *Whitechurch* v. *Cavanagh*, 1902, A.C. p. 130); and it must be precise and unambiguous (*Low* v. *Bouverie*, *sup*; *Re Lewis*, 1904, 2 Ch. 655,

C.A.). (2) There must have been an intention, or conduct raising a reasonable presumption thereof, that the injured party was meant to act upon the representation as true (*Freeman* v. *Cooke, McKenzie* v. *British Linen Co.*, and *Seton* v. *Lafone*, cited *ante*, 685). (3) The party relying on the representation must have acted on it to his own detriment (*McKenzie* v. *British Linen Co.*, and *Re Lewis, sup.*). And (4) The misstatement or negligence must have been the proximate cause of the detriment (*Re Lewis, sup.; Baxendale* v. *Bennett*, 3 Q.B.D. 525; *Staple of England* v. *Bank of England*, 21 Q.B.D. 160), or, perhaps, more strictly, of the error which caused the detriment (*Swan* v. *North British Australasian Co.*, 2 H. & C. 175; *Vagliano* v. *Bank* of *England, sup.* 686; Cababé, 145.) [Ewart, Estoppel by Representation; Cababé, Estoppel by Conduct; Everest, Estoppel, 2nd ed. 325-427; Tay. ss. 839-856; Ros. N.P. 77].

CHAPTER XLIX.

WRONGFUL ADMISSION OR REJECTION OF EVIDENCE AND REMEDIES THEREFOR.

CIVIL CASES. Trials by Judge and Jury. (1) *Admissible Evidence rejected.* If admissible evidence has been rejected by the judge, and *substantial* injustice thereby occasioned, the injured party is entitled to a new trial, *provided* he formally tendered such evidence to the judge at the trial, and requested the latter to make a note of the point, or, if that request be refused, to enter an exception upon the record (*Campbell* v. *Loader,* 34 L.J.Ex. 58; *Gibbs* v. *Pike,* 9 M. & W. 351; *Whitehouse* v. *Hemmant,* 27 L.J.Ex. 295; *Penn* v. *Bibby,* L.R. 2 Ch. 127). Where there is no record, as in the Probate Division, application must be made to the C.A. for leave to serve notice of appeal (*Cheese* v. *Lovejoy,* 2 P.D. 161). Rejected testimony may, if the witness falls ill pending the appeal, be taken *de bene esse* before a special commissioner (*Treasury Solicitor* v. *White,* 55 L.J.P. 79). [Tay. ss. 1881-1882.] If the admissible evidence has been rejected because tendered on an untenable ground, and a valid ground be subsequently discovered, redress can only be had upon proof that the valid ground could not, by due diligence, have been discovered at the time of the tender (*Doe* v. *Beviss,* 7 C.B. 456).

(2) *Inadmissible Evidence received.* The same relief as above is obtainable if inadmissible evidence has been received by the judge, *provided* it was formally objected to at the trial. But the grounds of objection must be distinctly stated, and no others can afterwards be raised (*Williams* v. *Wilcox,* 8 A. & E. 314; *Ferrand* v. *Milligan,* 7 Q.B. 730; *Bain* v. *Whitehaven Ry.,* 3 H.L.C. 1; *cp. McDougall* v. *Knight,* 14 App. Cas. 194). Moreover, even if the specific objections prevail, yet should the evidence be admissible for any other purpose, a new trial will not be granted; the proper course being for counsel at the trial to ask the judge to explain the limits of the evidence to the jury, and if he refuse, then to impeach his decision on the ground of misdirection (*Irish Society* v. *Derry,* 12 C. & F. 641; *Milne* v. *Leisler,* 7 H. & N. 786, *per* Pollock, C.B.; *Willis* v. *Bernard,* 8 Bing. 376, 282). The judge may, in his discretion, allow an objection to evidence to be withdrawn (*Barbat* v. *Allen,* 7 Ex. 609); and in practice, inadmissible evidence is sometimes received because it is not worth while to object.

Trials by Judge alone. If admissible evidence has been rejected, the same rule holds as above. Moreover, a party may insist on his evidence being taken, even though the judge is about to decide in his favour (*ante,* 39, 457). If inadmissible evidence has been received (whether with or without objection), it is the duty of the Judge to reject it when giving judgment; and if he has not done so, it will be rejected on appeal, as it is the duty of Courts to arrive at their decisions upon legal evidence only (*Jacker* v. *International*

Cable Co., 5 T.L.R. 13; *cp. Miller* v. *Babu Madho Das*, L.R. 23 Ind. App. 106); a party may, however, by his conduct at the trial, be precluded from objecting to such evidence (*Gilbert* v. *Endean*, 9 Ch. D. 259; *Bradshaw* v. *Widdrington*, 86 L.T. 726, 732; *ante*, 250.

County Courts. Similar rules apply to County Courts, appeals lying of right to the High Court as to sums over £20, and by leave as to sums under (C.C. Act, 1888, s. 120); or a new trial can be obtained.

Commercial Court. Arbitrators. Revising Barristers. Compensation Juries. Licensing Justices. Examiners. The Commercial Court is, like others, bound by the rules of evidence (*Baerlein* v. *Chartered Bank*, 1895, 2 Ch. 488). It has been held that arbitrators are not bound by the technical rules of evidence (*Re Keighley*, 1893, 1 Q.B. 405), but may act on documents, &c., which are not strictly admissible (*Re Keighley, sup.; Symes* v. *Goodfellow*, 2 Bing. N.C. 532), or even on unsworn (*Wakefield* v. *Llanelly Ry.*, 34 Beav. 245, 249), or other incompetent testimony, *e.g.* that of the parties before 1851 (14 Law Rev. 208-9.) But in a more recent case this position has been denied, and arbitrators held bound by the general rules of evidence, although great strictness will not be enforced (*Re Enoch*, 1910, 1 K.B. 327, C.A.; and see *Andrews* v. *Mitchell*, 1905, A.C. 78, 80; and *East & West India Docks* v. *Kirk*, 12 App. Cas. 738). Thus, they may not receive evidence in respect of heads of claim not within the legal scope of the reference (*Falkingham* v. *Victorian Rys. Commr.*, 1900, A.C. 452; *Re Gerard*, 1894, 2 Q.B. 915, where the submission was revoked on this ground); nor reject material evidence which is legally receivable (*Hart* v. *Duke*, 32 L.J.Q.B. 55, where the award was held invalid). And flagrant irregularities of procedure, *e.g.* wrongfully excluding a party, or delegating the award to an accountant, will be ground for setting it aside (*Haigh* v. *H.*, 31 L.J.Ch. 420). The mere fact, however, that an umpire has discussed the question with the arbitrators and heard their views will not invalidate his award (*Palmer* v. *Flack*, 39 Ir.L.T. Rep. 165.) [Russell on Arb., 8th ed. 140-145; Redman, 3rd ed. 140-149]. *Revising Barristers* have also been held bound by the rules of evidence (*Storey* v. *Bermondsey*, 1910, 1 K.B. 203 C.A.; though see *Kent* v. *Fittall*, 1906, 1 K.B. 60; 1908, 2 K.B. 933, 937). On the other hand, the verdict of a compensation jury cannot be impeached for wrongful admission of evidence as at *nisi prius* (*R.* v. *Eastern Counties Ry.*, 3 Rail. Cas. 466); nor are Licensing Justices bound by the strict rules of evidence (*R.* v. *Sharman*, 1898, 1 Q.B. 578; *ante*, 462-3). As to objections before *Examiners*, see *ante*, 498-9.

New Trials in the High Court (O. 39, r. 6), or in County Courts (O. 59, r. 7; Ann. C. C. Pr. 1910, 457), will not, however, under any circumstances be granted for the improper admission or rejection of evidence unless the Court to which the application is made is of opinion that some *substantial wrong or miscarriage* has been thereby occasioned in the trial. And this rule applies also to erroneous decisions as to the burden of proof or the right to begin or reply (*ante*, 32, 39). As to what does or does not amount to substantial wrong or miscarriage, see *Bray* v. *Ford*, 1896, A.C. 44; *Manley* v. *Palache*, 73 L.T. 98; *Johnson* v. *Lindsay*, 53 J.P. 599; *Tait* v. *Beggs*, 1905, 2 I.R. 525.

Moreover, a new trial *cannot* be granted for a wrongful decision as to a claim of privilege by a witness (*R.* v. *Kinglake,* 11 Cox, 499), or as to the sufficiency of a stamp (*ante,* 532; though *aliter* as to its insufficiency); and has been *refused* for the premature reception of admissible evidence (*Faund* v. *Wallace,* 35 L.T. 361), for the improper reception of a document which would not have affected the result (*Neave* v. *Halherley,* 2 T.L.R. 183), and for not allowing evidence improperly received to be rebutted (*ante,* 41); though granted for refusing to allow relevant evidence to be rebutted (*Maclaren* v. *Davis,* 6 T.L.R. 372). On new trials the case must be proved *de novo* (*ante,* 464).

CRIMINAL CASES. New Trials. The right to a new trial in criminal cases, even to the restricted extent formerly allowed with respect to convictions for misdemeanour (as to which see 4th ed. of this work, p. 638), is now wholly abolished by the Criminal Appeal Act, 1907 (7 Ed. VII. c. 23), s. 20 (1).

Crown Cases Reserved. In appeals upon questions of law alone the Court of Criminal Appeal may, however, if they think fit, still decide that the procedure under the Crown Cases Act, 1848 (11 & 12 Vict. c. 78), as to the statement of a case, should be followed, and require a case to be stated accordingly under that Act, in the same manner as if a question of law had been reserved [Cr. App. Act, 1907, s. 20 (4); as to Crown Cases Reserved, see 4th ed. of this work, pp. 638-9.] And a person appealing as above is deemed to be an appellant under the Cr. App. Act, 1907, s. 3 (*a*), *inf.* [C.A.R., 1908. r. 26 (*d*)].

CRIMINAL APPEAL ACT, 1907. Under s. 3 of this Act, a person convicted on indictment may appeal to the Court of Criminal Appeal (*a*) against his conviction on any ground involving a question of *law* alone; and (*b*) with the leave of the Court of Criminal Appeal, or upon the certificate of the judge who tried him that it is a fit case for appeal, on any ground involving a question of *fact* alone, or a question of *mixed law and fact,* or on *any other ground* which appears to the Court to be a sufficient ground of appeal; and (*c*) with the leave of the Court of Criminal Appeal, against the *sentence* passed on him, unless it is one fixed by law. Under s. 4, the Court may allow the appeal and quash the conviction if they think that the verdict of the jury was unreasonable or cannot be supported having regard to the evidence; or that the judgment was erroneous in point of law; or that, on any ground, there was a miscarriage of justice; and in any other case shall dismiss the appeal. Provided that the Court may, notwithstanding that they think the point raised might be decided in favour of the appellant, dismiss the appeal if they consider that *no substantial miscarriage of justice has actually occurred.* [This proviso only applies to the Court of Appeal, not to the H. L. on appeal therefrom (*Thompson* v. *R.,* 1918, A.C. 221, *per* Ld. Sumner).] Under s. 5, the Court has power either to affirm the sentence at the trial, or pass a substitutionary one, where they think that the appellant has been properly convicted on part of the charge, but not on some other part. Objections to evidence should be taken at the trial and when it is *tendered,* even though already taken during the opening speech of the prosecution (*R.* v. *Sanders,* 1919, 1 K. B. 550; see *R.* v. *Bridgewater, &c.,* cited *ante,* 454).

Appeals from Justices, &c. Except by statute, no appeal lies from the *dismissal* of a charge by justices (*R.* v. *London JJ.,* 25 Q.B.D. 357; *R.* v.

Antrim, 1895, 2 I.R. 603); nor will a *mandamus* lie to compel them to hear further evidence (*R.* v. *Knight,* 32 L.Jo. 76; *R.* v. *Yorkshire,* 53 L.T. 728), unless their rejection of evidence amounts to a refusal of jurisdiction (*R.* v. *Marsham,* 1892, 1 Q.B. 371). *Convictions* founded on erroneous evidence may, however, be impeached either by appeal to Quarter Sessions, which is a rehearing with right to adduce fresh evidence, or by case stated to the King's Bench, under 20 & 21 Vict. c. 43, or 42 & 43 Vict. c. 49, s. 33 (see Boulton Case Stated; and as to amendment, 68 J.P. 169), though not generally by certiorari (*R.* v. *Macrae,* 62 J.P. 729; *R.* v. *Sullivan,* 22 L.R.Ir. 504 *n; R.* v. *Kerry,* 35 Ir.L.T.R. 10; *R.* v. *Barnes,* 74 J.P.Rep. 231; *R.* v. *Waterford,* 43 Ir. L.T.R. 170), unless, perhaps, there be a complete absence of evidence on some material point (Wrottesley & Jacob on Cr. App., 105-7).

Under these Acts cases have been entertained as to whether there was *any* evidence to support a finding, though not whether the justices came to a right conclusion (*Green* v. *Pensam,* 22 J.P. 737; *R.* v. *Heapy,* 22 L.R.Ir. 500); or whether a rejection of evidence of custom was correct (*Watson* v. *Jaeger,* 13 T.L.R. 150; and see *Read* v. *Perrett,* 1 Ex.D. 349); so, where justices had based their decision of one charge partly on evidence given on a second, arising out of the same facts, both convictions were quashed, the former for that reason, and the latter because the defendant was thus deprived of his defence of *res judicata* (*Hamilton* v. *Walker,* 1892, 2 Q.B. 25; *cp. R.* v. *Fry,* 19 Cox, 135; *ante,* 29). So, also, where a question as to the prisoner's previous conviction had been put contrary to the Cr. Ev. Act, 1898, although the decision was not influenced by the answer (*Charnock* v. *Merchant,* 1900, 1 Q.B. 474). And where a conviction had on appeal been affirmed by the Recorder subject to a case stated, which itself showed that an incompetent witness had been admitted by him, the Court, though refusing to hear the appeal, quashed the conviction (*Connor* v. *Kent,* 1891, 2 Q.B. 545; 1891, Times, 30 Ap.). In Ireland, it has been held that the old rule that a conviction must be affirmed if supported by a *scintilla* of evidence, is gone; and that the King's Bench Division has inherent jurisdiction to quash convctions by inferior Courts where the evidence was unfit, or insufficient, reasonably to support them (*R.* v. *Waterford, sup.*). But, in general, the Court will not interfere where sufficient legal evidence remains to sustain the conviction (*Shortt* v. *Robinson,* 63 J.P. 295; *R.* v. *Macclesfield,* 2 L.T. N.S. 352; *R.* v. *Dwyer,* 24 Ir.T.L.R. 111); nor can a case be stated to determine the mere sufficiency of *particulars* (*ante,* 28).

Subject to the above, any point of law arising on the facts stated in the case can be taken and decided, whether raised before the justices, or reserved, or not (*Knight* v. *Halliwell,* L.R. 9 Q.B. 412; *Hamilton* v. *Walker, sup.*).

APPENDIX

CRIMINAL EVIDENCE ACT, 1898

(61 & 62 Vict. Ch. 36)

An Act to amend the Law of Evidence.

[12th August, 1898.]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament Assembled, and by the authority of the same, as follows:

Competency of witnesses in criminal cases.

1. Every person charged with an offence, and the wife or husband, as the case may be, of the person so charged, shall be a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person.[1] Provided as follows:

(*a*) A person so charged shall not be called as a witness in pursuance of this Act except upon his own application:[2]

(*b*) The failure of any person charged with an offence, or the wife or husband, as the case may be, of the person so charged, to give evidence shall not be made the subject of any comment by the prosecution:[3]

(*c*) The wife or husband of the person charged shall not, save as in this Act mentioned, be called as a witness in pursuance of this Act except upon the application of the person so charged:[4]

(*d*) Nothing in this Act shall make a husband compellable to disclose any communication made to him by his wife during the marriage, or a wife compellable to disclose any communication made to her by her husband during the marriage:[5]

(*e*) A person charged and being a witness in pursuance of this Act may be asked any question in cross-examination notwithstanding that it would tend to criminate him as to the offence charged:[6]

[1] See pp. 453-6.
[2] See p. 454.
[3] See pp. 43-4. 453.
[4] See pp. 455-7.
[5] See pp. 210-11, 455.
[6] See pp. 215-6. 454-5.

(*f*) A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is a bad character,[1] unless—

(i) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged;[2] or

(ii) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution;[3] or

(iii) he has given evidence against any other person charged with the same offence.[4]

(*g*) Every person called as a witness in pursuance of this Act shall, unless otherwise ordered by the Court, give his evidence from the witness-box or other place from which the other witnesses give their evidence:[5]

11 & 12 Vict. c. 42.

(*h*) Nothing in this Act shall affect the provisions of section eighteen of the Indictable Offences Act, 1848, or any right of the person charged to make a statement without being sworn.[6]

Evidence of persons charged.

2. Where the only witness to the facts of the case called by the defence is the person charged, he shall be called as a witness immediately after the close of the evidence for the prosecution.[7]

Right of reply.

3. In cases where the right of reply depends upon the question whether evidence has been called for the defence, the fact that the person charged has been called as a witness shall not of itself confer on the prosecution the right of reply.[8]

Calling of wife or husband in certain cases.

4. (1) The wife or husband of a person charged with an offence under any enactment mentioned in the schedule to this Act may be called as a witness either for the prosecution or defence and without the consent of the person charged.[9]

(2) Nothing in this Act shall affect a case where the

[1] See pp. 188-9, 215, 453.
[2] See p. 454.
[3] See pp. 454-5.
[4] See p. 455.
[5] See p. 453.
[6] See pp. 44-5, 455.
[7] See pp. 44, 455.
[8] See pp. 44-5, 455.
[9] See pp. 455-6.

wife or husband of a person charged with an offence may at common law be called as a witness without the consent of that person.[1]

Application of Act to Scotland.

5. In Scotland, in a case where a list of witnesses is required, the husband or wife of a person charged shall not be called as a witness for the defence, unless notice be given in the terms prescribed by section thirty-six of the Criminal Procedure (Scotland) Act, 1887.

50 & 51 Vict. c. 35.

Provision as to previous Acts.

6. (1) This Act shall apply to all criminal proceedings, notwithstanding any enactment in force at the commencement of this Act,[2] except that nothing in this Act shall affect the Evidence Act, 1877.

(2) But this Act shall not apply to proceedings in courts martial unless so applied[3]—

40 & 41 Vict. c. 14.

(*a*) as to courts martial under the Naval Discipline Act, by general orders made in pursuance of section sixty-five of that Act; and

29 & 30 Vict. c. 109.

(*b*) as to courts martial under the Army Act by rules made in pursuance of section seventy of that Act.

44 & 45 Vict. c. 58.

Extent, commencement, and short title.

7. (1) This Act shall not extend to Ireland.[4]

(2) This Act shall come into operation on the expiration of two months from the passing thereof.

(3) This Act may be cited as the Criminal Evidence Act, 1898.

SCHEDULE.[5]

Section 4.

ENACTMENTS REFERRED TO.

Session and Chap.	Short Title.	Enactments referred to.
5 Geo. IV. c. 83	The Vagrancy Act, 1824.	The enactment punishing a man for neglecting to maintain or deserting his wife or any of his family.
8 & 9 Vict. c. 83	The Poor Law (Scotland) Act, 1845.	Section eighty
24 & 25 Vict. c. 100	The Offences against the Person Act, 1861.	Sections forty-eight to fifty-five.
45 & 46 Vict. c. 75	The Married Women's Property Act, 1882.	Section twelve and section sixteen.
48 & 49 Vict. c. 69	The Criminal Law Amendment Act, 1885.	The whole Act.
57 & 58 Vict. c. 41	The Prevention of Cruelty to Children Act, 1894.	The whole Act.

[1] See p. 456.
[2] See p. 453.
[3] See p. 453.
[4] See p. 453.
[5] See pp. 455-6.

OATHS ACT, 1838 [1]

(1 & 2 VICT. CH. 105).

An Act to remove Doubts as to the Validity of certain Oaths.

[14th August, 1838.]

BE it declared and enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, That in all Cases in which an Oath may lawfully be and shall have been administered to any Person, either as a Juryman or a Witness, or a Deponent in any Proceeding, Civil or Criminal, in any Court of Law or Equity in the United Kingdom, or an Appointment to any Office or Employment, or on any Occasion whatever, such Person is bound by the Oath administered, provided the same shall have been administered in such Form and with such Ceremonies as such Person may declare to be binding; and every such Person, in case of wilful false swearing, may be convicted of the Crime of Perjury, in the same Manner as if the Oath had been administered in the Form and with the Ceremonies most commonly adopted.[2]

All Persons to be bound by the Oath administered in the Form, &c., which such Persons may declare binding.

[1] This title is given by the Short Ti
60 Vict. c. 14), s. 1, Sch. I.
[2] See p. 458.

OATHS ACT, 1888

(51 & 52 VICT. CH. 46).

An Act to amend the Law as to Oaths.

[24th December, 1888.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. Every person upon objecting to being sworn, and stating, as the ground of such objection, either that he has no religious belief,[1] or that the taking of an oath is contrary to his religious belief,[2] shall be permitted to make his solemn affirmation instead of taking an oath in all places and for all purposes where an oath is or shall be required by law, which affirmation shall be of the same force and effect as if he had taken the oath; and if any person making such affirmation shall wilfully, falsely, and corruptly affirm any matter or thing which, if deposed on oath, would have amounted to perjury, he shall be liable to prosecution, indictment, sentence, and punishment in all respects as if he had committed wilful and corrupt perjury

When affirmation may be made instead of oath.

2. Every such affirmation shall be as follows:

"I, A. B., do solemnly, sincerely, and truly declare and affirm," and then proceed with the words of the oath prescribed by law, omitting any words of imprecation or calling to witness.[3]

Form of affirmation.

3. Where an oath has been duly administered and taken, the fact that the person to whom the same was administered had, at the time of taking such oath, no religious belief, shall not for any purpose affect the validity of such oath.[4]

Validity of oath not affected by absence of religious belief.

4. Every affirmation in writing shall commence "I, , of , do solemnly and sincerely affirm." and the form in lieu of jurat shall be "Affirmed at , this day of , 18 . Before me"

Form of affirmation in writing.

5. If any person to whom an oath is administered desires to swear with uplifted hand, in the form and manner in which an oath is usually administered in Scotland, he shall be permitted to do so, and the oath shall be administered to him in such form and manner without further question.[5]

Swearing with uplifted hand.

6. The Acts mentioned in the schedule to this Act are hereby repealed to the extent in the third column of the schedule mentioned.

Repeal.

7. This Act may be cited as the Oaths Act, 1888.

Short title.

[1] See pp. 449, 451, 458.
[2] See pp. 449, 458.
[3] See pp. 459-60.
[4] See p. 458.
[5] See p. 459.

SCHEDULE.

Session and Chapter.	Title.	Extent of Repeal.
17 & 18 Vict. c. 125	The Common Law Procedure Act, 1854.	Section twenty.
19 & 20 Vict. c. 102	The Common Law Procedure Amendment Act (Ireland), 1856.	Sections twenty-three and twenty-four.
24 & 25 Vict. c. 66	An Act to give relief to persons who may refuse or be unwilling from alleged conscientious motives, to be sworn in criminal proceedings.	The entire Act.
28 & 29 Vict. c. 9	The Affirmation (Scotland) Act, 1865.	The entire Act.
30 & 31 Vict. c. 35	An Act to remove some defects in the administration of the Criminal Law.	Section eight.
31 & 32 Vict. c. 39	The Jurors' Affirmation (Scotland) Act, 1868.	The entire Act.
31 & 32 Vict. c. 75	The Juries Act (Ireland), 1868.	Section three.
32 & 33 Vict. c. 68	The Evidence Further Amendment Act, 1869.	Section four.
33 & 34 Vict. c. 49	The Evidence Amendment Act, 1870.	The entire Act.

OATHS ACT, 1909.

(9 EDWARD VII. CH. 39).

An Act to amend the Laws as to Oaths.

[25th November 1909.]

BE it enacted by the King's most Excellent Majesty, by and with the advice of the Lords Spiritual and Temporal and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. This Act may be cited for all purposes as the Oaths Act, 1909; and the Oaths Act, 1888, and this Act may be cited together as the Oaths Acts, 1888 and 1909. Short title. 51 & 52 Vic. c. 46.

2. (1) Any oath may be administered and taken in the form and manner following: Manner of administration of oaths.

The person taking the oath shall hold the New Testament, or in the case of a Jew, the Old Testament, in his uplifted hand, and shall say or repeat after the officer administering the oath the words "I swear by Almighty God that ," followed by the words of the oath prescribed by law.

(2) The officer shall (unless the person about to take the oath voluntarily objects thereto, or is physically incapable of taking the oath) administer the oath in the form and manner aforesaid without question:

Provided that, in the case of a person who is neither a Christian nor a Jew, the oath shall be administered in any manner which is now lawful.[1]

3. In this Act the word "officer" shall mean and include any and every person duly authorised to administer oaths. Definition.

4. (1) This Act shall come into operation on the first day of January nineteen hundred and ten. Commencement and extent.

(2) This Act shall not apply to Scotland.

[1] See pp. 458-60.

INDEX.

ABORTION, similar acts admissible to show prisoner's intent, on charges of procuring, 184-5
statements in presence of prisoner, when admissible on charges of procuring, 259
statements by the woman as to her symptoms and their cause, how far admissible, 84
statements of intention to procure, or of having procured, inadmissible, 80
dying declarations by the woman, not admissible on charges of, 321

'ABOUT,' 'MORE OR LESS.' Extrinsic evidence admissible to explain these terms in documents. 633-4, 663

ABSENCE, presumption of death from seven years', 7, 32, 680

ABSENT WITNESS, depositions of. *See* DEPOSITIONS

ABSTRACTS, when admissible as primary or secondary evidence, 538, 541

ABUSE OF PROCESS, protection of parties and witnesses from, 447-8, 484

ACCEPTANCE of written proposal, may be oral and the writing does not then require to be stamped, 531

ACCESS between husband and wife, presumed by law, 678
statements by parents as to, inadmissible when legitimacy of child is in issue, 198-9
principle of exclusion and scope of rule, 198-9
non-consummation of marriage is evidence of incapacity, 119
to documents, when implies a knowledge of their contents, 84, 145-6
when implies an admission of their accuracy, 258

ACCESSORY, confession of principal, not generally evidence against, 260, 269, 274-5
aliter when made in latter's presence and not denied by him, 269, 274
conviction of principal, not evidence of his guilt against, 428

ACCOMPANYING FACTS, when admissible as part of *res gesta*, or transaction, 55, 57-65, 70-87
Declarations accompanying acts, 57-65, 70-87
(1) only admissible if act is in issue, or relevant, 58
(2) must be contemporaneous, 58
(3) by whom made, 59
(4) documents, 59-60
(5) of what facts accompanying declarations are evidence, 60-61
(6) miscellaneous, 61
mental and physical conditions, 61-5, 82-7

ACCOMPLICE, confession of, not generally evidence against prisoner, 269, 274-5
testimony of, generally requires corroboration, 486-7. *See* CORROBORATION
except where he is an informer, or the offence is merely technical, 486
thief and receiver, or suborner and perjurer, are not within the rule, 487
nature and extent of corroboration required, 486

ACCOUNT (OR SHOP) BOOKS, judge may direct reception of party's, in taking accounts, 227. *See* BOOKS OF ACCOUNT, SHOP-BOOKS, TRADER
are admissions against writer, 229-30, 235.
but not generally evidence for him, 229, 235

ACCOUNT (OR SHOP) BOOKS—*Continued*
exceptions, 230
kept by servants, shopmen, &c., when admissions against master, 258
by bankers, 234, 375-7. *See* BANKERS' BOOKS
merchant's accounts are evidence for him when not objected to within reasonable time, 258.
of deceased agents, stewards, &c., admissibility of, 278, 285-6

ACCOUNT-SALES of foreign agent, are evidence of amounts realized, 248

ACCOUNT STATED, admission in order to support, must be made direct to creditor, 231

ACCUSED. *See* PRISONER

ACKNOWLEDGMENT of deeds by married women, proof of, 565
before 1883, proved by office copy of certificate of, 565
after 1882, by memo. of, indorsed on deed, 565
of debts by co-contractor, effect under Statute of Limitations, 244
by deceased creditor, of payment under Statute of Limitations, 279-80
by family is evidence of relationship, 117, 312
by family, friends and neighbours is evidence of marriage, 117, 135, 312, 384

ACQUIESCENCE by conduct or silence in another's statement, when an admission, 256-7, 259-61
in judgments, when an admission, 427, 429

ACQUITTAL of criminal charge is, in civil cases, evidence only of that fact, not of the correctness of the verdict, 404, 413, 418
does not, like a conviction, ascertain any precise fact, 407. *See* CONVICTION
effect of, as *res judicata*, 417, 424-5
proof of, by certificate, 367-8, 557-8

ACTING IN A CAPACITY, relevant to prove title thereto, 109-11, 127-9
rule confined to public or official capacities, 109, 127-9
not generally admissible to prove private appointments or relationships, 110-11, 127-8
exceptions, 110, 128
title to property may be proved by *ancient* leases, licences, and grants, 111-3. *See* ANCIENT POSSESSION
modern possession not provable by *modern* leases, 113

ACTS OF OWNERSHIP, admissible to prove title, 111-3, 128-33, 299
prior as well as subsequent, admissible to show identity or extent of land granted, 633-5. *See* TITLE

ACTS OF PARLIAMENT. *See* STATUTES

ADDRESS TO THE CROWN, admissibility of, 335

ADEMPTION, evidence to rebut or support presumption of, 668-9, 672-3. *See* LEGACIES
declarations of testators, how far admissible to prove, 668-9, 672-3.

ADMINISTRATION, LETTERS OF, are judgments *in rem*, 408, 431-2
of what facts are evidence, 429, 431-2
proof of, 560.

ADMIRAL. *See* LORD HIGH ADMIRAL

ADMIRALTY, seals of old court of, are judicially noticed, 23
general names of districts in charts issued by, are judicially noticed, 22, 378
log-books and official books of, admissible as public documents, 351, 553
proof of such books, when more than twenty years old, 553. LOG-BOOKS
navy list is admissible by statute in proof of facts stated, 353
affidavit evidence, when admissible in cases in, 496
testimony of experts not admissible in, when Court sits with Assessors, 385
judgments as to prize and lien are judgments *in rem*, 408

ADMIRALTY—*Continued*
judgments in cases of collision, when *res judicata*, 419-20
statements by ship's officers, &c., when evidence against owner, 251-2
statements by pilot and others, when part of *res gesta*, 66-7, 70, 251
depositions taken by Receiver of Wreck, are privileged, 207-8, 252

ADMISSIBILITY, defined, 50-3. *See* EVIDENCE
distinguished from relevancy, 50-3
questions affecting, are determinable by judge, 11, 193
facts showing, are determinable by judge, 193
judge should caution jury as to particular purpose and limits of, 12-13
arguments as to, may be heard in absence of the jury, 42, 83, 180

ADMISSIONS—
for purposes of trial may be made
in civil cases (1) by the pleadings; (2) pursuant to notice; or (3) by agreement, &c., 18
when such admissions are conclusive, and when not, 19
distinguisbable from admissions tendered as evidence, 18
in criminal cases, none allowed, except by plea of guilty, 19
by conduct, 116, 134, 255, 259-60
by silence, when statements made in party's presence, 255, 259-60
by statement, as evidence of truth of facts stated, 228-36
definition of such admissions, 228
principle of their reception, 228
self-harming distinguished from self-serving statements, 228-9
(1) when and to whom admissions may be made, 230-1
(2) circumstances of the admission, 231-2
conditional admissions, 231
offers without prejudice, 231
admissions under compulsion, or compulsory process, 215, 232
(3) whole statement must be taken, 232-3
though containing hearsay or opinions, 233
(4) matters provable by admission, 233-4
matters of law and fact, 233
contents and execution of documents, 234
(5) form of admissions, 234-5
examples of admissions, 235-6
persons whose admissions may be evidence against a party, 237-54
(*a*) nominal and real parties, 237-8
(*b*) predecessors in title, 238-41
(*c*) partners, joint-contractors, co-trustees and associates, 242-6
joint-tenants, but not tenants in common, 242
co-trustees and co-executors, but not mere co-defendants, 242-3
nor principal and surety, 243
(*d*) agents and referees, 246-54. *See* AGENTS
corporation and officers, contractor and workman, 247-8
trader and shopman, landlord and agent, consignor and consignee, 248
husband and wife, client and solicitor, counsel and witnesses, 248-9
ship-owner and ship's officers, referrer and referee, 251-3
(*e*) miscellaneous; bankrupt and creditors, 253
Sheriff, Under-Sheriff, and Bailiff, 253-4
bill of sale holder and execution creditor; arbitrator and parties, 254
of adultery by witnessea in divorce cases are privileged, 216-7
of contenta of documenta are generally primary evidence, 234, 470

ADULTERATION OF FOOD AND DRUGS, analyst's certificate as to, 368-9
See FOOD, DRUGS, CERTIFICATES
what standards of quality admissible, pharmacopœia, &c., 109, 380

ADULTERINE BASTARDY. *See* BASTARDY, LEGITIMACY

ADULTERY. *See* DIVORCE, ACCESS, AFFILIATION, BASTARDY, LEGITIMACY
when in issue on the pleadings is for jury, when not, for judge, 16
admissions of, for purposes of trial in divorce cases, not conclusive, 19

ADULTERY—*Continued*
facts relevant to prove, 104, 119, 121, 160-1, 166, 491
confessions of, made out of Court, when require corroboration, 233, 487, 491
entry as to venereal disease in military register, is evidence of, 119, 351
witnesses in divorce, but not in other, cases not bound to answer as to their own, 216-7
unless have already denied fact on examination in chief, 216, 217
character of co-respondent, is relevant to establish respondent's, 190
bad character of wife admissible in mitigation of damages for, 192
respondent may be found guilty of, and co-respondent not, or *vice-versâ*, 93, 243
conduct and testimony of parents, when admissible, or not, to bastardise child, 77-8, 198-9
conduct and statements of adulterer admissible to bastardise child, 77-8, 117, 312
declarations by wife and adulterer, and their entries in birth-register admissible as parts of *res gesta*, to bastardise child, 77-8
proof of marriage in bigamy and divorce cases, 384

ADVANCEMENT, evidence to rebut or support presumption of, 669, 674
declarations of parents, how far admissible, or conclusive, to prove amount of, 603, 670, 674

ADVANCES, by parents, &c., evidence of. *See* ADVANCEMENT

ADVERSE WITNESS, when witness may be so considered, 469, 472
party calling, may lead or cross-examine, 469
or contradict by other evidence, 471-2
or, by leave of judge, prove prior inconsistent statements by, 472
but not give general evidence of bad character of, 471-2

ADVOWSON, collation by bishop is evidence of title to, 133

AFFAIRS OF STATE, evidence as to, excluded by public policy, 194
scope of rule, 194
objection to disclosure, how taken, 195
effect of exclusion, 195

AFFIDAVIT. *See* COMMISSIONER
evidence by, may, in civil cases, be given:
(1) by agreement, 495
(2) in certain Admiralty cases, 496
(3) in Bankruptcy, 496, 502, 561
(4) by order of Court, 496-7
who may administer oaths to deponent, in or out of England, 460-1
sworn out of England, when requires verification, 24, 461
certificates of foreign officials when admissible to verify, 364, 366
must not be sworn before solicitor in cause, or interested, 461
witness refusing to make, procedure as to, 495, 498
statements in, by party, are receivable as admissions, 234
so also party's refusals to reply to, 257
or his user of such affidavit in other trials, 261
statements in, by deceased relatives, when admissible in pedigree cases, 313
alterations, omissions and mistakes in, 496
information and belief, hearsay and secondary evidence, when allowable in, 227, 401, 499-500
grounds of such information and belief must be stated, 500
proof of, 562-3
statutory declarations not admissible in place of, 501-2
in support of bills of sale, 122, 564

AFFILIATION. *See* BASTARD AND BASTARDISING OFFSPRING
in proceedings for, testimony of mother must be corroborated, 485
what facts admissible to corroborate, 490
testimony of mother, if married, admissible after independent proof of non-access, to prove who was father, 199
defendant may prove misconduct of woman with other men, 139
dismissal of summons for, no bar to second application, 411

AFFILIATION—*Continued*
but order against defendant in, is *res judicata* to certain extent, 411, 419
woman when witness, may be contradicted by previous order of justices, 404-5

AFFIRMATION, 458, 460. *See* OATHS

AGE, atrict proof of when required, 47. *See* CHILD, BIRTH, BAPTISM, INFANT
proof of, by appearance and inspection, 7-8, 118
by X-Ray examination of bones, 119
by party's own admission, 233, 236
by certificates of birth and baptism, 341-2, 344, 366-7
by testimony of parents and others present at birth, 342
by testimony of person himself, inadmissible, 219, 225, 466-7
by treatment and opinions of witnesses, 117, 400, 403
on questions of pedigree, but on no others, may be proved by declarations of deceased relatives, 225, 308, 318

AGENCY. *See* AGENT, SERVANT
proof of, as against principal, may be *express*, or by conduct (*eg.* holding out, ratification, adoption of similar acts), or principal's admission, 69, 88-90, 160, 166
as against the agent or third persons, 127, 128
by parol, when document silent as to, 90, 517, 581-2
what facts admissible to corroborate testimony as to, 490-1
retainer of solicitor requires corroboration. 487

AGENT, acts, contracts, and representations of, when principal bound by, in civil cases, 88-9, 94-8
principle of rule, 88
knowledge of, and notice to, when principal bound by, 89
notice to principal's solicitor, &c., 89
in criminal cases, party not generally bound by acts, &c., of, 89
exceptions, 89, 92-4, 95-6, 99-101
proof of agency. *See* AGENCY
proof that drivers of vehicles or those in charge of ships, &c., are owner's servants, 97, 225, 236
declarations by, when part of *res gesta*, 70-2, 245
when signing document, admissible to prove writer an agent, 75, 517, 581-2
admissions by, when receivable against principal, 246. *See* ADMISSIONS
as to past transactions, 246
reports to principal (though not privileged, 208-9) not generally receivable either for, or against principal, as, 246-7
by corporation and officers, or contractor and workman, 247-8
by trader and shopman, or landlord and tenant, 248
by consignor and consignee, or husband and wife, 248-9
by solicitor, counsel, witnesses, depositions, pleadings, &c., 249-51
by shipowner and officers, 70, 251-2
by referrer and referee, 252-3
by conduct or silence of the agent, 255, 259
judgment against master, how far admissible in evidence against servant, 404
estoppels between principal and, 686
parol evidence admissible to prove party signed contract as, 75, 517, 581-2

AGREEMENTS. *See* CONTRACTS

AGRICULTURE, Board of, copies of official documents by, 552
customs of, admissible to annex incidents to contracts, 105-7, 123-4
or to explain technical or local terms in contracts, 107, 629-30, 661-4

AIR-COUNCIL, documents issued by, how proved, 368, 552

ALIBI, relevant to disprove party's connection with an act, 137
similar facts admissible to rebut, 137, 163
evidence in rebuttal of, must not confirm main facts, 40

ALMANAC annexed to Book of Common Prayer is judicially noticed, 25, 380
matters not contained therein, not so noticed, 25, 380

ALTERATIONS AND ERASURES IN DOCUMENTS, rules as to, 528
in deeds, contracts, bills, notes, and wills, 528-30
presumptions as to, 529-30, 681
extrinsic evidence not generally admissible to vary document, 574
exceptions, 577-88
examples, 588-604

AMBASSADOR. how far name of, judicially noticed, 24
may administer oaths out of England, 461
not compellable witness, 457
registers kept by, 346; certificates of, 365, 389

AMBIGUITIES, patent and latent, defined, 613
distinction discussed, 613-4
extrinsic evidence when admissible to explain, 615-65. *See* EXTRINSIC EVIDENCE, INTERPRETATION

AMENDMENT, POWER OF COURT AS TO, in civil cases, 28
in criminal cases, 28-9

AMOUNT OF EVIDENCE required, on issues resting on prosecution and defence respectively, 34. *See* WEIGHT OF EVIDENCE

ANALYST, certificate of, admissible to prove adulteration of food, 368-9

ANCIENT DOCUMENTS, *i.e.*, *thirty* (or, between Vendor and Purchaser, *twenty*) years old, prove themselves, 523. *See* PUBLIC REGISTERS, AND RECORDS, PUBLIC INQUISITIONS, &C., HISTORIES, &C.
principle and exceptions, 524.
thirty years is computed from date of execution, 523-4
must come from proper custody; meaning and examples of this, 524
admissible to prove ancient possession, 112-3, 129-33
ancient reports of trials, how far admissible, 347-8

ANCIENT POSSESSION may be proved by ancient leases, licences, &c., 112-3, 129-33
ancient documents must constitute transaction; prior directions and subsequent narratives inadmissible, 112
must come from proper custody, 113, 524
corroboration essential to weight, but not to admissibility, 113
must be distinguished from ancient documents admissible to prove *reputation*, 113
modern possession not so provable, 113

ANIMALS, character and propensities of, admissible when their conduct is in dispute, 162, 169, 186, 192
liability of owner for acts of, 162
owner's knowledge of propensities of, how proved, 95, 152
similar conduct by, admissible to prove conduct in question, 162, 169, 186, 192
cruelty to, usage of locality admissible to rebut charge of, 126

ANSWERS IN CHANCERY. *See* BILLS.

ANTE LITEM MOTAM, declarations by deceased persons as to public rights or pedigree must have been made, 295, 300-1, 310-1, 317
but not declarations that are part of *res gesta*, 61, 72-3, 77

APOTHECARIES, seal of Apothecaries Co., is judicially noticed, 24
when have *onus* of proving their qualification, 36
certificate of Company, is evidence of qualification of, 371
register of chemists, is evidence of contents, 354
practising without certificate by, cumulative instances admissible to prove, 57

APPEAL for wrongful admission, &c., of evidence, 688-91
evidence on, (civil cases) 500, (criminal cases), 513
pendency of, does not prevent judgment binding, 405-6

APPOINTMENT to public office, may be proved by acting therein, 109, 127-8
to private office, not generally so provable, 109-10, 127-8

APPRENTICE, acting as, is proof of apprenticeship, 110-1, 128
and also of existence and terms of indenture of apprenticeship, 128, 521, 541, 547

APPROVERS, old law as to, 486

ARBITRATOR. *See* AWARD
how far bound by rules of evidence, 686
flagrant irregularities vitiate award, 686
is competent witness touching his award, 196, 449
disclosures by, how far privileged, 196
admissions by, do not bind parties, 254
admissibility of award of, as evidence of facts found, 433-4
proof of award of, 562
extrinsic evidence, how far admissible to affect award, 196, 576

ARMORIAL BEARINGS, admissible to prove matters of pedigree, 312. *See* VISITATIONS, HERALDS

ARMY, regimental registers and records, when evidence of facts recorded, 119, 351
List or Gazette, admissible to show rank and service of officers, 353
so, also, letters, &c., of Secretary of State or commanding officers, 371
at common law, Secretary of State's, but not officer's, certificates allowed, 365

ARREST, when witness privileged from, 448
confession obtained when defendant under, admissible, 266-7
fact, time and place of, how far provable by certificate of deceased Sheriff's officer, 292-3

ARSON, on charges of, similar facts are admissible, 70, 183-4

ART, opinions of experts, admissible on questions of, 387
artistic tests may be undertaken before court, 9

ARTICLES OF WAR, and Rules under Army Act superseding them, judicially noticed, 20
but judge may require production of, 26

ASSAULT, declarations at time of, when admissible, 79, 81
proof of conviction, or acquittal of, 368, 558-9
effect of acquittal of, 368, 407

ASSESSORS, when Court assisted by, expert evidence inadmissible, 385

ASSOCIATES, admissions by, when receivable, 242-6
by co-partners, co-contractors, co-trustees, co-representatives, co-defendants, &c., when admissible against each other, 242-6
by co-conspirators and co-trespassers, when admissible, 92-4, 99-102, 269

ASSURANCE. *See* POLICY

ASTROLOGY, &c., how far evidence of good faith of practitioner of, is admissible, 126, 155. *See* PALMISTRY

ATHEISTS, TESTIMONY OF—
formerly inadmissible, 451
when now receivable, 449, 458

ATTEMPTS, prior and subsequent, admissible to show identity of accused, though completed act might not be, 137, 141, 154, 163
to rebut defence of accident, 175, 180
to show animosity, 140-1, 172
to corroborate testimony as to the main act, 163, 490-4
facts admissible to show, 102, 181

ATTENDANCE OF WITNESSES. *See* WITNESS

ATTESTATION—
documents requiring, must be proved by calling attesting witness, 519
principle and history of this requirement, 519
proof of, is original evidence and not hearsay, 277
when several attesting witnesses, only one need be called (except to prove will of realty), 519-20
and even this not necessary if execution already proved in former trial between same parties, 440, 519
who may be attesting witnesses, competency and credit, 520
grantor's solicitor may not attest a bill of sale, 461, 554. *See* BILL OF SALE
witness must sign *animo attestandi*, 326, 517, 520
and his declarations when part of the *res gesta* are admissible to show this, 277, 326
quære whether attesting witness may be discredited by party calling him, 472
when witness dead, absent, &c., his handwriting may be proved, 520-1
declarations by deceased witness not admissible to impeach, 83, 225, 277
when attested document lost, &c., witness must, if possible, be called, 521
when witness forgets, denies, or refuses to prove, 521-2
identity of party, witness and document must be established, 523
when attesting witness need not be called
(1) on applications for probate, in certain cases, 522
(2) if document is *ancient* (*i.e. thirty years old*), 522, 523-5
(3) if document in possession of opponent, 522
(4) if opponent claims interest under document, 522
(5) if opponent admits execution for purpose of trial, 18, 522
(6) if opponent is public officer bound to procure execution, 522
(7) under Merchant Shipping Act, 1894, 523
documents not requiring attestation may, though attested, be proved, as if no attesting witness, 523
except in proceedings *ex parte*, 523

ATTORNEY-GENERAL has right to reply, though no evidence called for prisoner, 44
signature of, is not judicially noticed, 23-4

AUCTIONEER may sue as principal, 582
statements by, at time of sale, admissible, 572, 597

AUTOMATIC MACHINES AND REGISTERS. *See* MECHANICAL INSTRUMENTS

AUTREFOIS ACQUIT OR CONVICT, effect of, 517, 524-5

AVERAGE ADJUSTMENT, rules of, judicially noticed, 21

AWARDS. *See* ARBITRATOR
admissibility of, as evidence of facts found, 433-4
proof of, 562
extrinsic evidence not admissible to supersede, or vary, 196, 576
but admissible to show that matters outside scope of, were considered, 196
how far arbitrator may be examined to explain, 196-7
or bound by rules of evidence, 689

BAILEE, estoppel by, 686

BAILIFF, admissions by, when bind the sheriff, 254. *See* SHERIFF

BANK OF ENGLAND, books of, are admissible as public documents, to prove transfer of stock, 348, 375

BANKER not compellable to produce books except by judge's order for special cause, 202, 375. *See* BANKERS' BOOKS

BANKERS' BOOKS, entries in, are *primâ facie* evidence of contents, for or against all persons, 375
how proved, 375, 555
where bank not a party, original books only producible by special order, 202, 375, 543
inspection of, how and when obtainable, 375
meaning of "bank," 376
admissibility of pass-book, &c., between bank and customer, 376

BANKRUPT. *See* BANKRUPTCY
is a competent witness to prove the petitioning creditor's debt, 215, 449
may be compelled to answer criminating questions, subject to qualified protection, 215
contradictory statements by, may be proved even by party calling him, 472
admissions by, made *before* bankruptcy, are evidence to prove petitioning creditor's debt, 235, 253
made in statement of affairs, or *after* bankruptcy, are evidence against himself, but not against his trustee or creditors, 235, 253
statements by, are admissible to prove his knowledge of his affairs, 86-7, 153
or as part of *res gesta* to prove his intention on leaving home, 59, 75-7
or on executing deeds, 75, 152
deceased, are not receivable as being against interest, 283
official receiver's or Board of Trade's report is evidence of conduct of, 434
on charges of obtaining credit without disclosing bankruptcy, intent of, is immaterial, 27

BANKRUPTCY. *See* BANKRUPT
rules and seal of Court of, judicially noticed, 20, 23
Gazette is evidence of facts notified, in cases of, 337-8
general proof of proceedings in, 561-2
attendance of witness in, procured by subpœna, 441
affidavits in, can only be cross-examined on if read, 473
witness in, other than debtor, need not answer criminating questions, 215
private examinations in, privileged from disclosure, 198
depositions of deceased persons in, are admissible, 502
adjudications of, are judgments *in rem*, 408, 409
judgments are *primâ facie*, but not conclusive, evidence of debts in, 426, 429
and consideration for such judgments may always be inquired into, 411, 426
Registrar's decisions, and file of proceedings in, do not generally estop, 441
dismissal of petitions in, no bar to fresh petition, 411

BAPTISM, register of, is evidence of baptism, but not of birth, 342, 344-5
except presumptively, 342. *See* AGE
entries as to, by deceased priests in course of duty, how far admissible, 290

BARGAIN AND SALE, proof of deeds of, 565

BARRISTERS. *See* COUNSEL

BASTARD. *See* AFFILIATION, ADULTERY, LEGITIMACY
resemblance of child may be proved to show paternity, 118
declarations by deceased, not receivable to prove pedigree, 309
except against himself, as to own illegitimacy, 233-4, 236, 309, 315
statements by parents showing their child is a, generally inadmissible, 198-9
mid-wife may testify as expert in cases of adulterine bastardy, 84. *See* BASTARDISING OFFSPRING

BASTARDISING OFFSPRING, statements by parents, generally inadmissible, 198-200, 309
except as part of *res gesta*, 77-8, 199
principle of exclusion, 198
scope of rule, 199
conduct of parents and adulterer relevant for purpose of, 77-8, 117, 199, 312

BEER, quality of, provable by declarations of customers, 75. *See* PUBLICAN, BREWER
or other samples from same brewing, 167

BEGIN, right to, 37-8. *See* RIGHT TO BEGIN

BELIEF. *See* MENTAL CONDITIONS, OPINION, AFFIDAVITS

BELIEVERS of all creeds are competent witnesses, 449
different forms of oath for different sects of, 458-60
affirmation by, 458, 460

BEST EVIDENCE must be given, rule that, 45-8. *See* STRICT PROOF
history of the rule, 45-6
present scope, strict proof not generally necessary, 47
exceptions, 47-8
rule now chiefly confined to documents, 49
the "best evidence" principle not the true ground of the rules—
(1) demanding primary evidence of contents of documents, 46, 534
(2) nor of the rule requiring attesting witnesses to be called, 48, 519
(3) nor of the rules excluding evidence in substitution, or in variation, of documents, 48, 568, 574

BETTING, user of premises for, may be proved by cumulative instances, 57, 69
acts of servants when evidence against proprietor, 160, 166

BIAS of witness may be proved to discredit him, 481-2

BIBLE, entries in family, are evidence of pedigree, 311. *See* OATHS, 459
what is proper custody of family, 311, 525

BIGAMY, strict proof of marriage required on charges of, 47, 384, 573
prisoner's admission is evidence of former marriage, 233
presumptions in cases of, 34, 679
proof of prisoner's knowledge in cases of, 87, 146
first wife or husband, now admissible witness, in cases of, 456

BILLS AND ANSWERS in chancery, effect of, 435, 451. *See* PLEADINGS
receivable to show what matters were in dispute, 435
but not as admissions, unless sworn to, 235, 435
receivable as acts or assertions of ownership, 132, 435
or, when declarants are deceased, to prove ancient public rights, 299
or matters of pedigree, 312

BILLS OF EXCHANGE AND PROMISSORY NOTES—
burden of proof in actions on, 32
drawing, indorsing and acceptance by agent, how far binds principal, 97, 167
alterations and blanks in, 528-9, 530, 613
where words and figures differ, former prevail, 614; and see cases, 602, 654
conditional delivery of, 584
extrinsic facts admissible to show true relation and liability of parties, 582-3, 598-9
contemporaneous agreements in writing, but not by parol, admissible, to vary, &c., 578, 592
admissions by prior parties to, 239-40
letter enclosing admissible to show *purpose*, but not *fact*, of enclosure, 74, 82
fraud of holder, or predecessor in title, is provable, 239-40, 584, 601
mistake in, whether provable, 586, 602, 654
consideration is presumed to have been given for, 32
but want or failure of consideration is provable, 586-7, 603
subsequent agreement in discharge, when may be proved, 588
indorsements on, by deceased holder, admissible as against interest, 285
forgery of, similar forgeries when admissible to show, 167, 177
declarations by acceptor, when admissible, 74
possession of, after maturity, is evidence of payment of, 117
when giving of, amounts to payment, 66
in cases relating to, what facts admissible as part of transaction, 66, 68, 82

BILLS OF LADING, how far incorporate charter-party, 147, 575, 612
when inconsistent with charter-party, former prevails, 147, 526
are declarations against interest of deceased master, 282
receipts in, may be contradicted by parol, 557, 589

BILLS OF SALE, proof of, 564
affidavits in support, requirements of, 461, 496, 564
must not be sworn before grantee's solicitor, 461
attesting witness to, must not be grantor's solicitor, 564
omission of Commissioner's description will not invalidate, 496
though *aliter* as to that of attesting witness, 564
certificate of registration no evidence that affidavit was filed, 122, 370
admissions by grantor when receivable against execution creditor, 241
consideration of, may be impeached by parol evidence, 587
extrinsic evidence in substitution or variation of, inadmissible, 570, 604
declarations by grantor of, when in possession, admissible to show true ownership, 73

BIRTH register, and certified copy of, are evidence of age, 342, 344-7
so also army registers of, among officers abroad, 351
registers of, do not exclude other evidence of, 571
and may be contradicted, 577
fact of, may be proved by testimony of those present, 342. *See* AGE
when provable by declarations of deceased relatives, 309, 312

BISHOP, registers of, are proof of facts contained, 347
register of chapter-leases granted by, is evidence of reputation as to parish limits, 296-7
returns by, made under canon law, are evidence of facts stated, 359
collations by, are proof of right to advowson, 133
certificates of, were formerly evidence of marriage, &c., 363, 365
admissions by, are evidence against successor, 240

BLACK-MAIL, similar acts admissible to show accused's intent in cases of, 184

BLANKS IN DOCUMENTS, rules as to filling in of, 530
in deeds, 530
in other instruments, 530
parol evidence when admissible to supply total or partial, in deeds or wills, 613, 627, 632, 639, 661
when may be supplied by construction, 624

BONA FIDES, what facts relevant to show, 149, 154-6
facts showing good or bad faith of party's case are relevant, though such good faith not in issue, 113, 133

BOARD OF AGRICULTURE, seal of, judicially noticed, 24
orders of, how proved, 552

BOARD OF TRADE, seal of, judicially noticed, 24
admissibility of orders or certificates of, 561
reports of, as to Trustee in Bankruptcy, evidence of facts reported, 434

BOOKMAKER, betting slips admissible to show premises used for gambling, 69
and similar transactions, to show owner agent of, 69

BOOKS OF ACCOUNT, are *primâ facie* evidence in taking accounts. 227. *See* ACCOUNT-BOOKS, SHOP-BOOKS
kept between master and servant, trader and shopman, or in clubroom sometimes admissible on ground of *access* and *acquiescence*, 145, 258
so, also, those of partners, or company, 258

BOOKS OF BANK. *See* BANKER'S BOOKS

BOOKS OF CORPORATION OR COMPANY. *See* CORPORATION AND COMPANY'S BOOKS

BOOKS OF HISTORY. *See* HISTORIES

BOOKS OF MANOR. *See* MANOR BOOKS

BOOKS OF PARISH. *See* PARISH BOOKS

BOOK OF RATES. *See* RATE BOOKS

BOOKS OF REFERENCE, may be consulted by judge to refresh his memory, 26
or by experts to confirm their opinions, 392-3
but not read to jury, 39

BOOKS OF SCIENCE. *See* SCIENTIFIC WORKS

BOOKS OF SHOPS. *See* SHOP BOOKS

BOOKS OF UNIVERSITY COLLEGE. *See* UNIVERSITY COLLEGE BOOKS

BOOKS OF VESTRY. *See* VESTRY BOOKS

BOROUGH ENGLISH, custom of, judicially noticed, 21

BOUNDARIES, presumptions as to, 671, 675
stones placed so as to mark, are evidence of, 129
declarations of deceased persons admissible as reputation to prove public, 294, 299, 301
expired leases, &c., when evidence of, 296, 302
maps and surveys, when evidence of, 297, 303-5, 359-60

BREACH OF PROMISE, plaintiff is compellable witness in actions for, 457
plaintiff cannot testify directly to the promise, only to what defendant said or wrote, 66; plaintiff's evidence must be corroborated, 485
what facts and statements amount to corroboration, 119, 259, 261, 489
plaintiff's bad character admissible to mitigate damages in cases of, 191

BREACH OF TRUST. *See* TRUST

BREWER, fraud of drayman, &c., when affects, 95, 183. *See* BEER, PUBLICAN

BRIDGES, evidence on claims to repair, 132-3, 305

BROKER, usage admissible to determine liability of, 123. *See* AGENT
or to interpret contract with, 661
extrinsic evidence, how far admissible to prove agency, 581-2
bought and sold notes are primary evidence of contract with, 536
broker's slips when admissible, 536-7, 612, 633. *See* SLIP
trustees and executors not liable for default of, 90-1

BUDDHISTS, how sworn, 460

BURDEN OF PROOF lies on party who asserts affirmative of issue, 30
principle, meaning and scope of rule, 30
Two burdens:—(1) burden of proof on the pleadings, and (2) burden of adducing evidence, 30-1
Exceptions to rule:—(1) where disputable presumption of law, or *primâ facie* case exists in favour of party, 32-6, 678
(2) where fact asserted is peculiarly within opponent's knowledge, 36-7
new trials obtainable for erroneous decisions as to, 32

BURGLARY, declarations by witness for prosecution admissible to explain his concealment of the crime, 82
similar acts committed with non-burglarious object, not admissible to rebut accused's burglarious intent, 185

BURIAL registers, and certified copies thereof, are evidence of death and burial, 343, 344
but not age or date of death, 343

BUSINESS. *See* COURSE OF BUSINESS
facts relevant to show business genuine or sham, 120, 181-2
usages of, admissible to annex terms to, or to construe, contracts, &c., 105, 629, 661-3. *See* CUSTOM AND USAGE

BY-LAWS, proof of, 555-6
validity of, may be presumed from long user, 556

CAMERA, hearings in, 464

CANALS, seal of commissioners of railways and, judicially noticed, 24

CAR, CARRIAGE. *See* MOTOR-CAR, SERVANT, DRIVER, COLLISION

CATTLE. *See* ANIMALS
evidence that painful operations on, were customary, admissible to rebut charge of cruelty, 126
to show that dogs have injured, 162, 169
character of, when relevant, 162, 186, 192

CERTIFICATES of public officers are, by statute, but not generally at common law, evidence of the facts certified, 363-71
and copies of documents certified by the proper officer are secondary evidence of the originals, 363, 540. *See* CERTIFIED COPIES
principle of admission, and history, 363
common law certificates, 364-6
of King, Secretary of State, ambassadors, heralds, bishops, judges, military officers, &c., 364-5
of notaries and consuls, 365
statutory certificates, 366-71
of Speaker of House of Commons as to Parliamentary matters, 366
of birth, marriage, death, &c., which are copies of registers, 366
of naturalization, 367
of trial, conviction or acquittal of indictable offence, 367, 557
of summary conviction, 367, 558
of dismissal of charges at Petty Sessions and of assault, 367-8
of Ministers of Pensions, Labour, Food, Shipping, Air Council, &c., are evidence that their official documents were duly issued, 368
of adulteration of food, 368
of incorporation of companies, 369. *See* COMPANY
of proprietorship of shares, 369
of patents, designs, and trade-marks, 370
of registration and enrolment of deeds and wills, 370
of deeds of arrangement, bargains and sale, conveyances in mortmain, &c., 370
of bills of sale, 122, 370, 564
of British ships, 370
of title to land, or rules of building societies, 371
of rules of Building Society, 371
of qualification of apothecaries, 371
of service of naval and military officers, 350-1, 353, 371
of age and fitness of factory children, 371
proof of, 553, 556

CERTIFICATIONS of shares, company not estopped by secretary's, 685. *See* COMPANY

CERTIFIED COPIES, definition of, 540. *See* CERTIFICATES, COPIES
are admissible as secondary evidence of originals, 363, 540
mere certified extracts not generally admissible, 363
nor certificates of the effect or result of documents, 363
the following *public* documents may be proved by:
Colonial Statutes, Patents, Proclamations and Orders in Council, Records in custody of M. R., public registers and inquisitions, Corporation books and by-laws, 549-55
the following *judicial* documents may be proved by:
old civil records in custody of M. R., probates, proceedings in County Courts, criminal convictions or acquittals, orders of justices, foreign and colonial judgments, and depositions in former trials, 556-63

CESTUI QUE TRUST. *See* TRUSTEE
admissions by, are evidence against trustee, and *vice versâ*, 242

CHAMBERS, evidence in, 500
proof of proceedings in, 560

CHANCERY, history of evidence in, 450-1, 495
practice in, now uniform with that in other divisions of High Court, 495
seal of old court of, judicially noticed, 23
practice as to marking documents put in evidence, 41, 433-4, 476-7
judge in, may order reports by accountants, &c., and act on their certificates, 385

CHANCERY—*Continued*
bills and answers, how far admissible, 435, 451. *See* BILLS AND ANSWERS
Chancery visitors, reports of, under Lunacy Act, are privileged from inspection in, 198, 435

CHANNEL ISLANDS (Jersey and Guernsey), who may administer oaths, &c., in, 461
Registers of marriages in, admissible, 345-6

CHAPLAIN. *See* CLERGY

CHARACTER, of people, places, things or animals, when *in issue*, necessarily admissible, 186
may be proved by direct evidence, 186
including opinion of witnesses, 188, 401, 482
previous convictions against former occupier, admissible to show character of licensed premises, 186 (*cp.* 163, 171)
when *not in issue*, generally inadmissible, 186
exceptions—
(*a*) character of prisoner, 187
good character of prisoner admissible to show innocence, 187
history of this exception, 187-8
must be of kind impeached, 188
should, in strictness, relate to his general *reputation*, not the individual *opinion* of the witness, 188
evidence may be negative as well as positive, 188
must relate to time proximate to charge, 188
bad character admissible under Vagrancy Act to show intent, 189
rebutting evidence, 188
(*b*) character of prosecutrix and third persons, 190
bad character of prosecutrix admissible in cases of rape, 190
of mother in cases of legitimacy, 190
of co-respondent in cases of divorce, 190
of deceased in cases of murder, 190
other cases, 190
(*c*) character as affecting states of mind, 190
how far character admissible to show states of mind, or reasonable and probable cause in malicious prosecutions, 190-1
(*d*) character as affecting damages, 191
bad, admissible in mitigation of damages, in cases of
(1) defamation, 191
(2) breach of promise, 191
(3) seduction, 191
(4) petitions for damages for adultery, 192
good, not admissible in aggravation of damages, 191
except to rebut evidence of bad, 191
(*e*) character of witnesses, 192, 478, 482
(*f*) character of places, things, and animals, 135, 162-3, 169, 171, 186

CHARITABLE TRUSTS, proof of deeds of, 330, 565
office copies of deeds of, admissible, in cases of, 530, 565
reports of commissioners under, are evidence of facts stated, 361. 434
seal of commissioners of, is judicially noticed, 24

CHARITY COMMISSIONERS, report of, is evidence of facts and documents stated, 361, 434

CHARTER-PARTY, how far incorporated in Bill of Lading, 147. *See* BILL OF LADING
telegrams between parties before execution of, admissible to show meaning of phrases in, 637
usage admissible to show meaning of phrases in, 662
cannot be contradicted or varied by parol, 590

CHARTERS, proof of, 549

CHARTS. *See* MAPS

CHEMIST. *See* APOTHECARIES

CHEQUE. *See* BILLS OF EXCHANGE

CHILD, proof of age of, by appearance, testimony of parents, &c., present at birth, 7-8, 118, 342. *See* AGE
by register of birth (or copy of), 342, 344-7. *See* BIRTH
by register of baptism, how far admissible, 342, 344-6. *See* BAPTISM
by appearance and inspection, 7-8, 118
by opinion evidence, 401, 403
by treatment as, 117 (*cp.* 312)
on questions of pedigree (only), statements of deceased relatives admissible to prove age, &c., of, 225, 308, 314
proof of legitimacy of, by conduct and statements of parents, 77, 199
by resemblance to parent, 118
by family conduct and repute, 117, 312
by conduct and statements of adulterer, 77, 117, 312
testimony, &c., by parents as to *access*, inadmissible, 198-9
presumptions as to legitimacy and access, 678
competency of, as witness, 452
unsworn statements by, receivable in cases of cruelty to, if corroborated, 462
depositions by, admissible in cases of cruelty to, 511
dying declarations by, admissible, how far, in cases of homicide, 319
preaumption affecting: under seven, incapable of crime, 7, 681
over seven and under fourteen, is rebuttably presumed incapable, 681
legitimacy of, 678-9.
in wills, "children" means legitimates, 623; when extrinsic evidence admissible to show illegitimates intended, 623, 643
erroneous enumeration of "children" as a class, 625, 653. *See* MISTAKE
on charge of cruelty to, how far former cruelty admissible, 68, 185

CHINESE, how sworn, 460

CHURCH, user of building as, is evidence of due consecration, 109. *See* PARISH, VESTRY, VICAR
books of vestry and, admissible to prove parish matters, 347

CHURCHWARDENS, acting as, is evidence of due appointment, 110
custom of electing, may be proved by reputation, 290

CINEMA FILM, is not a "document" whose contents are provable by production, the exhibition must be proved by witness who saw it, 47, 533

CIRCUMSTANTIAL EVIDENCE, defined, 3, 681-2. *See* RELEVANCY, RELEVANT FACTS, PRESUMPTIONS OF FACT
weight of, as compared with direct, 3. *See* WEIGHT OF EVIDENCE

CLAIMS AGAINST ESTATES OF DECEASED, should be corroborated, 485
facts held not admissible in corroboration of, 490

CLERGY, communications to, not privileged, 201. *See* VICAR, CHURCH, PARISH, VESTRY
chaplain of gaol not *person in authority* in cases of confession, 265, 272

CLIENT. *See* SOLICITOR

CLOCKS, &c., accuracy of, may be presumed, 162-3. *See* WATCHES
are evidence of speed of car, 170-1

CO-CONTRACTORS, admissions by, are evidence against rest, 242-6
judgments for and against, 414-5

CO-DEBTORS, judgments against one, how far bind others, 414-5
parol evidence may be given to prove joint or common interest in subject-matter of document, 581, 599

CO-DEFENDANTS, right to reply when some call witnesses, and others not, 43
admissions by, 242-3. *See* PARTIES, PRISONER, CO-RESPONDENT, CO-TRESPASS, CONSPIRACY
statements by, in presence of each other, how far evidence against, 259-61
confessions by, how far admissible against each other, 269, 274-5

CO-DEFENDANTS—*Continued*
judgments for and against, 414-5
when competent as witnesses in criminal cases, 453, 457
when may cross-examine each other, 457, 474
where several defendants jointly charged, jury must, failing proof of common design, ascertain guilty party, or acquit all, 93

CODICIL, intent with which executed, may be proved by parol, 326, 330, 333 *See* WILL
witness who attests cannot benefit by, but may by the will, 520
admissible to construe will, 613
evidence to rebut repetition of legacy by, 672-3
revoked, may be admissible as a declaration, 235, 281

CO-HABITATION is evidence of valid marriage, 110, 679

COLLATERAL AGREEMENTS, when may be added to written contracts by parol, 578-9, 593-7. *See* WARRANTIES

COLLATION by Bishop is evidence of title to advowson, 133. *See* BISHOP

COLLECTOR. *See* RECEIVER

COLLEGE, books of, admissible as public registers, 354. *See* CORPORATION

COLLISION, what facts are part of the *res gesta* in cases of, 70, 71-2. *See* SHIP, MOTOR-CAR, SERVANT, DRIVER
injuries to *person* and to *property* by, give rise to different rights, 422
and judgments for either are not *res judicata* in action for other, 422

COLONY, seals and signatures of judges, courts and notaries in, are judicially noticed, 24
law of, must be proved by experts, except before Privy Council, 20
statutes of, provable by certified, or Government Printer's, copies, 549
proclamations and legislative acts of, provable by examined or sealed copies, 549-50
judgments, orders, affidavits, pleadings, &c., filed in, how proved, 561-2
reciprocal admissibility of documents in England, Ireland, and, 561-2. *See* APPENDIX
probates of, proof and effect of, 560
registers of, how proved, 554
who may administer oaths in, 461
copies of documents printed by authority of colonial legislatures, 539

COMMISSIONERS FOR OATHS, who are competent as, in England, 460-1. *See* AFFIDAVITS
and out of England, 461
seals of, when judicially noticed, 24

COMMERCIAL COURT is bound by rules of evidence, 689

COMMON, rights of, provable by declarations of deceased persons, 300, 301

COMMON CHEAT, cumulative instances admissible to show accused is a, 56

COMMON DESIGN, acts committed with. *See* CONSPIRACY, CO-TRESPASS
where not proved, jury must ascertain guilty party and acquit rest, 93

COMMORIENTES, presumption as to survival of, 680

COMMUNICATIONS to jury, what matters must not be stated, 38. *See* JURY
to solicitor, husband and wife, &c., 201-211. *See* PRIVILEGE

COMPANY, proof of incorporation of, by trading as, 109. *See* CORPORATION
by certificate, 369
of proprietorship of shares in, 369
liability of, for acts and representations of secretary and other officers, 91-2, 98-9. *See* DIRECTORS
for knowledge of, and notice to secretary and officers, 91-2
personal liability of directors, &c., of, for acts of each other, 92
acts, &c., of officers of, where not binding on, 92

COMPANY—*Continued*
admissions by officers and servants of, when binding on, 247-8
when directors affected with knowledge of company's books, 145-6, 151, 258
admissibility of registers, minutes and books of, 373-5
proof of company books, 555
private examinations in winding-up of, privileged, 198
verified notes of examinations in winding-up of, when admissible, 502
depositions in former trials between company and other shareholders, though on same matter, not admissible, 439
nor do judgments against an old company bind its transferee, 414
report of inspector of, to Board of Trade, how far evidence, 434
not estopped by secretary's certification of shares, 685
construction of prospectus is question for the Court, not the witnesses, 66, 390

COMPARISON of handwriting, 8 108, 125, 515. *See* HANDWRITING
of trade-marks, engravings, &c., 8-9, 47. *See* RESEMBLANCE

COMPELLABILITY OF WITNESSES. *See* WITNESS.
to attend, 441, 446-7
to be sworn, distinguishable from compulsion to answer when sworn, 457, 479. *See* COMPULSION
all competent witnesses in general compellable to be sworn, 457
except the sovereign and foreign ambassadors, 457
or prisoners, their consorts, and co-defendants in certain cases, 453-7
when prisoner's wife or husband compellable, 455-7
party may *insist* on his evidence being heard, 39, 457

COMPETENCY OF WITNESSES. *See* WITNESS
former disqualifications for interest, atheism, crime; history of, 449-51
all persons now competent to be sworn, with two exceptions, 449, 452-3
(1) exceptions as to defective intellect, 452
infants, lunatics, drunkards, &c., incompetent during such states, 452-3
(2) exception as to criminal proceedings, 453-7
accused persons, their wives or husbands, and those jointly indicted and tried with them, but not those separately indicted or tried, generally incompetent, for *prosecution* but not for *defence*, 453
competency of experts, 386
of attesting witnesses, 520

COMPLAINTS, admissible as part of *res gesta*, or to show present suffering, not to prove truth, but as conduct, whether complainant testifies or not:
of bad quality of beer, &c., 75
of alarm, in cases of riot, &c., 84
of physical pain by injured person, 83; of hunger, by children, 84
admissible, though not part of *res gesta*, when made by prosecutrix in cases of rape, &c., 113-6, 488-9
history of rule as to, 113
particulars of, may be given, not to prove their truth, but to confirm testimony and disprove consent, 113, 488-9.
how proved, 116
admissible to show party's knowledge of matter complained of, 95, 152-3

COMPROMISE, offers of, how far protected from disclosure, 231 (*cp.* 208)
solicitors and counsel have authority to, 249-50

COMPULSION OF WITNESS TO ANSWER, 457, 479 *See* COMPELLABILITY
compulsion to answer distinguishable from compellability to be sworn, 479
when witness protected from answering on grounds of public policy, 194-9 *See* PUBLIC POLICY
when on grounds of privilege, 200-17, 454-5. *See* PRIVILEGE
to answer questions put in cross-examination, 479

COMPURGATION and Wager of law, 211

CONCEALMENT OF MATERIAL FACTS when evidence of fraud, 150

CONCLUSIVE EVIDENCE, Government Gazette, when, 337-8
certificates of registration of Company, and proprietorship of shares, when, 369-70, 685. *See* COMPANY

CONCLUSIVE EVIDENCE—*Continued*
of Registrar of Building Society, when, 371
must be distinguished from *exclusive* evidence, 566
history of rules as to, 566-8
estoppels, distinguished from, 682

CONCLUSIVE PRESUMPTIONS, 7, 676-7

CONDITION OF PLACES AND THINGS, provable by their condition at other times, 103-5, 163, 171, 186. *See* CHARACTER
declarations by persons when inspecting, not admissible, 135

CONDITIONAL execution of deeds and contracts as escrows, &c., 517, 583, 599-601. *See* ESCROWS
of wills, 327, 333, 583. *See* WILL

CONDITIONS, mental and physical, how provable, 61-5, 82-9, 145-57, 172-85

CONDITIONS AND PARTICULARS OF SALE, when extinguished by subsequent conveyance, 590
how far may be supplemented by auctioneer, 572, 597
not generally admissible to interpret conveyance, 633
but may be received to show what were known or reputed parcels, or if referred to in the deed, 634
or to rebut presumptions, 675

CONDUCT, previous and subsequent, relevant to connect party with acts, 136-43
to show states of mind, 145-57
conduct of parents and adulterer, relevant to bastardise child, 77-8, 199
admissions by conduct, 116, 134
estoppel by, 684-7
conduct and propensities of animals, when admissible, 162, 169, 186, 192. *See* ANIMALS

CONFESSIONS, rules as to, peculiar to criminal cases, 10
when voluntary, are admissible against accused, 263-75
if induced by promise or threat from person in authority, inadmissible, 263
principles of reception and exclusion, 263
history of the rule, 263-4
burden of proving confession voluntary, is on prosecution, 264
corroboration of, 264
who are persons in authority, 265-6, 270
the inducement, 266-8, 270-3
removal of the inducement, 267-8, 273-4
whole confession must be taken together, 268-9
to and by whom confessions may be made, 269, 274-5
facts discovered in consequence of inadmissible confessions, 270, 275

CONFIDENTIAL communications. *See* PRIVILEGE

CONFIRMATORY EVIDENCE. *See* CORROBORATION

CONFRONTATION, 465-6

CONNECTED DOCUMENTS. *See* INCORPORATION

CONNECTION OF PARTY with transaction, facts relevant to prove, 136-44. *See* IDENTITY
previous and subsequent conduct relevant to prove, 136-7, 140-3
alibi, relevant to disprove, 40, 137, 163. *See* ALIBI
possession of property and documents relevant to prove, 138, 142, 257, 261
conduct and declarations of others, when relevant to show, 138-9, 143-4
similar or dissimilar facts generally irrelevant to prove or disprove, 158
See SIMILAR FACTS
exceptions, 160, 163
character generally irrelevant to show, 186-7. *See* CHARACTER
exceptions, 187-92

CONSENT, rules of evidence may be relaxed by, in civil but not in criminal cases, 10
inadmissible evidence sometimes receivable by, 10.

CONSENT—*Continued*
to prove or disprove, person consenting need not necessarily be called, 46, 106
party's prior and subsequent statements when part of the alleged consent, 66
judgments by, when binding, 406
of prosecutrix in cases of rape, complaints admissible to disprove, 113-6, 488-9. *See* COMPLAINTS
defence of, whether lets in accused's bad character, 453
of Public Prosecutor and Attorney-General, how proved, 23-4, 189-90, 559. *See* PUBLIC PROSECUTOR, ATTORNEY-GENERAL
of Judge under Vexatious Indictments Act, 190, 559
of Corporate Body must be in writing, 91, 190
of prisoner to wife, &c., giving evidence, 455-6
of female in cases of incest, 487

CONSIDERATION of deed, &c., when may be impeached by parol, 586-7, 603
burden of proof as to, is on party impeaching, 32

CONSIGNOR AND CONSIGNEE, admissions by, 248

CONSISTENT AND INCONSISTENT FACTS, when admissible to prove, or disprove, main fact, 89, 117-20, 487-8

CONSPIRACY. *See* CONSPIRATORS

CONSPIRATORS, acts and declarations of, in furtherance of common object, admissible against each other, 92-4, 99-102
immaterial whether *existence* of conspiracy or *participation* of members shown first, but either nugatory without the other, 92
admissions, and narratives of past transactions by, inadmissible, 93, 101, 269
rules as to, apply in the case of co-trespassers, 94

CONSTITUENT FACTS, admissible as part of *res gesta*. 56-7, 66-7

CONSTITUTIONAL MATTERS, are judicially noticed, 21. *See* JUDICIAL NOTICE

CONSTRUCTION OF DOCUMENTS. *See* INTERPRETATION
construction and interpretation distinguished, 605
rules of, distinguished from legal presumptions, 666
when for judge, jury, or witness, 14-15, 390, 394, 630, 665
extrinsic evidence, when admissible in aid of, 605-665
opinion of experts when admissible as to, 390, 394, 630, 665
party bound by judgment as to construction he has acquiesced in, 427, 430

CONSTRUCTIVE NOTICE, definition of, 146
rules as to, and examples of, 146-8

CONSULS, when seals and signatures of British, are judicially noticed, 24, 563
registers of marriages before, when evidence as public documents, 346
certificates of, when evidence of facts certified, 366

CONSUMMATION OF MARRIAGE. *See* ACCESS

CONTEMPORANEA EXPOSITIO, rules as to, 629-30

CONTEMPORANEOUSNESS of declarations which are part of *res gesta*, 58-9, 71-2, 75-7, 80-81
of declarations made in course of duty, 288, 292
of declarations as to pedigree, 310
by deceased as to homicide, 319
by testators as to their wills, 324
of entries in public registers, 341
of documents used to refresh memory, 470

CONTINUANCE, of states of mind, persons and things, is presumed, 103-5, 120-1, 680
previous existence of facts, is evidence of their subsequent existence and *vice versâ*, 103-5, 120-1

CONTINUANCE—*Continued*
of life, 34, 104, 680
of cause of action, 421

CONTINUOUS FACTS and transactions, how proved, 56-7, 67-9

CONTRACT, inadmissible evidence receivable if contemplated in the, 10, 225, 243, 248, 427
written proposal may be orally accepted, and does not require stamp, 531

CONTRACTS IN WRITING, onus on plaintiff to show proposal and acceptance, 608
whether contract reduced to writing and what were its terms, are questions of fact, 566
proof of execution of, 514-25
documents incorporated by reference in, 525-8, 575, 612
when preliminary, are merged in subsequent conveyance, 575, 590
alterations and blanks in, 528-30
contents of must be proved by primary evidence, except in certain cases, 533. *See* PRIMARY AND SECONDARY EVIDENCE
extrinsic evidence not admissible in substitution of, 566-73
cannot generally be contradicted, varied or added to, by parol, 574-7
exceptions, 577-88
when may be rectified for mistake, 584-6, 601-3
when may be supplemented, or added to, by parol, 578-9, 587-97
when informal, and not required to be in writing, 577, 588-9
or, when supplemental agreement is collateral, 578-9, 593-7
impeachable for fraud, want of consideration, &c., 586, 601
may be proved to have been conditional, or delivered as escrow, 583, 599-601
may be wholly, but not partially, rescinded by parol, 587-8, 603-4
construction of, when for judge, jury, or witness, 14-15, 390, 394, 630, 665
effect of, when partly written and partly printed, 614
when partly in words and partly in figures, 602, 614, 654
meaning of technical terms in, is for the jury, 15
evidence of experts when admissible to explain such terms, 387, 390, 612, 630, 665
how far may be interpreted by parol, 616-7, 629-39, 641, 649, 653-4. *See* INTERPRETATION, PRELIMINARY CONTRACT
kinds of evidence admissible to interpret, 612, *cp.* 575
declarations of intention generally inadmissible, 606-9, 611, 613

CONTRADICTION of adversary's witnesses, allowed on all matters relevant to issue, 479-81
his own previous contradictory statements when relevant, may be proved, 479-81
allowed on irrelevant matters only in two cases,
(1) bias, or partiality, 481-2
(2) previous conviction, 482
of party's own witness, when allowed, 471-3

CONTRADICTORY STATEMENTS by witnesses, 479-81. *See* CONTRADICTION, INCONSISTENT STATEMENTS
by deceased declarants, 276-7, 281, 288, 293, 319

CONVEYANCE, when preliminary contract merges in, and when not, 575, 590
collateral oral agreement or warranty, when may be added to, 578-9, 593-4
how far may be interpreted by conditions and particulars of sale, 633. *See* CONDITIONS OF SALE

CONVEYANCERS not bound by strict rules of evidence, 227, 523
hearsay and other inadmissible forms permissible between vendor and purchaser, 227
statutory declarations receivable as evidence by, 501
recitals in deeds, &c., twenty years old prove themselves, 524

CONVICTION comprises both verdict and judgment, 559
of party, when amounts to *res judicata*, 417, 424-5. *See* PREVIOUS CONVICTION, AUTREFOIS ACQUIT, OR CONVICT
previous, when may be opened to the jury, 38

CONVICTION—*Continued*
previous, generally inadmissible till *after* verdict, 41-2, 174-5, 189
of witness, admissible to discredit him, 482
of accused, when he may be cross-examined as to, 454
proof of, 367-8, 482, 557-9

COPIES, are *primary* evidence of contents of documents when delivered by opponent, or made under Public authority, 538. *See* PRIMARY EVIDENCE
but are generally only *secondary* evidence
different kinds of, 539-42. *See* SECONDARY EVIDENCE
(1) Government printer's copies, 539
(2) Government Gazette's copies, 337-8, 539
(3) copies sealed by foreign States, courts, officials, and notaries, 538, 539, 548, 560
(4) exemplifications, 539
(5) examined copies, 539
(6) office copies, 540
(7) certified copies, 540
(8) machine, printed, and photographic copies, 540
(9) counterparts, drafts, abstracts, recitals, memorials, 541
(10) entries in public registers, 542
(11) notarial copies, 366, 539, 548, 560. *See* NOTARY
copies of copies not generally admissible, 542

COPYRIGHT, entry in register of, is evidence to prove, 348
infringement of, may be proved by comparison of genuine and disputed works, 8, 47, 573

CO-RESPONDENT, admissions of respondent not evidence against, nor *vice versâ*, 242-3. *See* DIVORCE, RESPONDENT
conduct and declarations of when admissible to bastardise child, 77-8, 117, 199, 312. *See* ADULTERY, BASTARDISING OFFSPRING
cross-examination of, by respondent, when allowed, 474
may be found guilty, though respondent not, and *vice versâ*, 93
may take advantage of judgments against petitioner, 427, 429

CORONERS' inquisitions, *qu.* whether evidence of facts found, 356
depositions before, admissibility of, 511-12
proof of such depositions, 512

CORPORATION. *See* COMPANY
seals of, when judicially noticed, 23
proof of seals of, when not so noticed, 518, 553, 555
execution of documents by, 518
by-laws of, how proved, 555-6
acts of agents and servants of, when binding, 91-2, 98-9
appointment of agents by, how proved, 69, 89, 91, 109-10, 121, 127-8, 592
consent of, to legal proceedings, must be in writing, 91, 190. *See* CONSENT
admissions by agents and servants of, when binding, 247-8
admissibility of books of, 372-5. *See* CORPORATION BOOKS
proof of books of, 553, 555

CORPORATION BOOKS. *See* CORPORATION, COMPANY, BANKERS' BOOKS
knowledge of, not imputed to directors or shareholders, 145-6, 151, 258
admissibility of, 372-5
are at common law evidence of the public acts of the corporation, 372
and by statute evidence of various private matters as well, 373
entries must have been made by proper officer, 372
unsigned entries, when admissible, 372
proof of such books, 553, 555
informalities and errors in, 373
correction of, 373
bankers' books, 375-6. *See* BANKERS' BOOKS

CORPUS DELICTI, may be proved by defendant's confession, 47, 264
evidence of, is generally separable from evidence of identity of accused, 136-7

CORROBORATION, testimony of witnesses *must* be corroborated in treason, perjury, breach of promise, bastardy, removal cases, and under Criminal Law Amendment Act, and Children Act, 484-7

CORROBORATION—*Continued*
and *should* be in claims against estates of deceased persons, or where witness is accomplice, or circumstances suspicious, 487
what facts admissible in, 487-94
may sometimes, to save expense, be given by affidavit, 487
self-corroboration; previous similar statements by witness generally inadmissible as, 488
except, (1) in cases of rape, or (2) where recent fabrication alleged, 488-9
statements when part of *res gesta* are admissible in, 60, 74
confessions, how far require, 47, 264
ancient documents, showing ancient possession, how far require, 113, 524

CO-TRESPASSERS, acts and admissions by, when bind each other, 94. *See* CONSPIRACY, ACCOMPLICE, CO-DEFENDANT

COUNSEL, opening case to jury, and right to begin, 37-9
matters not to be opened, or stated to jury, 38-9
must not open facts he cannot prove, 39
speeches by, and right of, to reply, 42-5
failure to object by, how far lets in evidence, 454, 688
authority of, over suit, 250
admissions by, when bind client, 18, 183, 250-1. *See* ADMISSIONS
facts may be proved, though admitted by opposite, 18, 183
confidential communications of, with client, privileged, 201-9. *See* PRIVILEGE
knowledge of, when not privileged, 206
cannot be compelled to disclose statements made by him in court, 197
is competent witness for or against client, 449
when testimony of, may be given without oath, 462

COUNTERPARTS, when admissible as primary evidence, 112, 536
when as secondary evidence, 536
when admissible to explain discrepancies between, or construe, original deeds, 536, 612
when to prove ancient possession, 112

COUNTY COURT,
seals of, judicially noticed, 23
inspection before trial may be ordered in, 9
attendance of witnesses in, procured by summons, 443
service of summons, 445
penalty for disobedience to summons of, 446-7
powers of amendment in, 28
plaintiff may not split cause of action, 39, 416
judgments in, effect of, as *res judicata*, 410, 420, 422-3
memorials of proceedings in, cannot be varied, &c., by notes of judge or registrar, 576
nor proved otherwise than by the memorials themselves, 561, 569
remedies for wrongful admission, &c., of evidence in, 689

COURSE OF BUSINESS, in public or private office, admissible to prove act done in pursuance thereof, 105, 122. *See* COURSE OF DEALING

COURSE OF DEALING between parties admissible, to prove existence of lost document, 128, 541, 546-7. *See* COURSE OF BUSINESS
to supplement terms of written contract, 575, 590
or to interpret meaning of written contracts, 612, 630, 634
but not generally to vary or contradict them, 590

COURSE OF DUTY, declarations by deceased persons in, 287-93. *See* DECLARATIONS

COURSE OF EVIDENCE, parties' evidence must be heard, 89
where one issue, or several issues; splitting a case, 39, 416
evidence in reply, or rebuttal, must not be confirmatory, 40
except where plaintiff misled or surprised, 40
anticipating and interposing evidence, 41
recalling witnesses, recrimination, 41
putting in documents, 41, 43-4, 473, 476-7

COURSE OF EVIDENCE—*Continued*
proof of previous conviction, at what stage of trial, 41
reopening case for omitted evidence, 42
reswearing witnesses before fresh judge or juror, 42
remedy for erroneous decisions as to, 32, 39, 689
arguments in absence of the jury as to admissibility of evidence, 42, 83, 108

COURT ROLLS AND MANOR BOOKS, admissibility of, as acts of ownership, 112, *See* MANOR BOOKS
as reputation, 298, 305
as public documents, 354
proof of, 297, 556
proper custody of, 525

COVENANT in Restraint of Trade, reasonableness of, is question for judge not jury, 14
opinion of witnesses when admissible on this question, 394
distances, how measured, in cases of, 379
Ordnance Survey is evidence on question of limits of, 360, 379

CREDIBILITY of witness, what facts admissible to affect, 193, 477-83. *See* CREDIT
of absent deponent, or deceased declarant, 193, 276-7

CREDIT for goods sold, to whom given, cannot be proved by direct statement of witness, 65-6

CREDIT of witness, modes of impeaching
(1) by cross-examination as to his knowledge, observation and memory; his errors, omissions, or inconsistencies; his antecedents, associations, and mode of life. 477-9; compulsion to answer such questions, 479
(2) by calling witnesses to contradict him on *relevant* matters, 479-81, but not on *irrelevant* ones, 481, except in the cases of (*a*) bias, or (*b*) previous conviction for crime, 481-2
(3) by proof that the witness bears a general reputation for untruthfulness, 482
witness's attention must first be called to discrediting facts, so that he may explain them, 476, 479-80
what facts admissible, or not, as affecting, 477-82
party may discredit his own witness, when latter is adverse, 471-3, 480-1. *See* ADVERSE WITNESS
re-establishing credit, 482
recrimination, 483

CRIM. CON., declarations of wife, when were admissible in actions of, 78, 83

CRIME, information as to, protected on ground of public policy, 195-6
scope of this protection, 196
protection only applies in public, not private, prosecutions, 196
previous conviction for, when admissible to discredit witness, 482. See PREVIOUS CONVICTION, CREDIT
previous acquittal or conviction for, when *res judicata*, 417, 424-5. *See* ACQUITTAL, CONVICTION, AUTREFOIS ACQUIT OR CONVICT

CRIMINAL CASES, rules of proof generally same as in civil cases, 10
exceptions, 10-11
inspection in, 9
power to view locality in, 9
when police may detain documents and articles, in, 9
or open letters and telegrams, 9
how far accused may be physically examined in, 9
burden of proof in, distinction when on prosecution or prisoner, 34
matters not to be opened to jury in, *e.g.*, accused's previous convictions, 38-9, 41-2
right to reply in special rules as to, 43-5
witnesses' attendance obtained in, by *subpœna* or recognizance, 441, 443
documents obtained in, by *subpœna duces tecum*, 537
depositions in, 502-13

CRIMINAL APPEAL ACT, 1907
wrongful admission or rejection of evidence may be remedied under, 690-1
depositions of absent witness may be ordered to be taken, under, 513

CRIMINAL EVIDENCE ACT, 1898. For annotated text of Act, *see* Appendix
competency of accused, &c., under, 453-7; and *see* Appendix and references therein

CRIMINATING QUESTIONS, witnesses privileged from answering, 211-6
principle and history of protection, 211-3
scope of rule, 213
oath of witness necessary but not conclusive, 213
claim must be *bonâ fide*, 214
privilege ceases with liability, 214
exceptions to protection—
by statute, under Criminal Evidence, Bankruptcy, Lunacy Acts, &c., 215-6
by witness's own contract or conduct, 216

CROSS-EXAMINATION, liability to, and exemptions from, 473-5
of accused, 188-9, 453-7; co-defendants, 474
of party's own witness, not generally allowed, 474, *cp.* 471-2
exceptions: where witness adverse, 469, 472. *See* ADVERSE WITNESS
where recalled by opponent, 474
of attesting witness, 472, 474
death or illness, &c., of witness before, 475. *See* DEPOSITIONS
object and scope of, 475
omission to cross-examine, effect, 475-6
notice must be given to witness, before can be contradicted, 475-6, 479-80. *See* CREDIT
what cross-examination lets in, 476
leading questions in, 476
as to documents, 476-7
as to credit, 477-83. *See* CREDIT
witness compelled to answer relevant, and sometimes irrelevant, questions, 479
special rules as to contradictory statements, bias, previous conviction, and reputation for untruthfulness, 475-6, 479-82
facts admissible or not in, 477-82
various modes of impeaching credit. *See* CREDIT

CROWN. *See* SOVEREIGN.
admissions and reputation are receivable against, 228, 294
inquisitions under authority of, are public documents, 355-62
has right of reply, though prisoner calls no witnesses, 43-5

CRUELTY, character for humanity not admissible to disprove in divorce cases, 162
evidence on charges of cruelty to cattle, 126, 162, 169. *See* ANIMALS, CATTLE
custom admissible to rebut such charges, 126
on charges of cruelty to children, how far prior and later acts are admissible, 68, 185
age of child, how proved, on such charges, 403. *See* CHILD, AGE

CUMULATIVE FACTS and offences, evidence of, 56-7, 67-8

CUSTODY OF DOCUMENTS, what is proper, 524-5

CUSTOM AND USAGE, are judicially noticed when either settled by judicial decision or certified to the High Court, 21
party may be bound by, though ignorant of, 106
admissible (*a*) to annex incidents to contracts, 105, 579
(*b*) to explain technical terms or construe documents, 107, 629, 661
(*c*) to furnish standards of comparison, 107, 125-7
(*d*) as test of negligence, 107, 126
(*e*) to fix party with knowledge of the subject of the custom, 107, 146
proof of custom and usage may be given,—

CUSTOM AND USAGE—*Continued*
(1) by direct testimony, 106
(2) by a series of particular instances, 56, 67, 106
(3) by similar customs elsewhere, 106, 161-2, 169
(4) when ancient, by reputation and declarations of deceased persons as to, 106, 299-301, 304-5
loss of, how proved, 48. *See* CUSTOMERS

CUSTOMERS, loss of, must generally be proved by calling the customers, 48
but sometimes provable by their statements as part of *res gesta*, 75

DAMAGE, malicious, to property, meaning of, 151
on charges of, opinions even of non-experts receivable, 403

DAMAGES, amount of claimed, not to be stated to the jury, 38
admissibility of character to affect, 191-2
whether sum is liquidated damages or penalty may be shown by parol, 583
plaintiff seeking substantial and unliquidated, begins, 37. *See* RIGHT TO BEGIN

DATE, documents presumed to be made on date named, 515, 681
but independent evidence of this is required where fraud or collusion suspected, 63, 83, 681
or where instrument is used to defeat statute of limitations, 280, 681
or to obtain a receiving order in bankruptcy, 681
mistakes in date of documents may be corrected by parol, 585-6, 602
of execution of documents may generally be proved or contradicted by parol, 585, 602
of alterations and interlineations in documents, presumptions as to, and proof of, 372, 528-30. *See* ALTERATIONS
alteration of date, in bills and notes, is a "material" alteration under the Bills of Exchange Act, 529
postmarks are evidence of, 122, 348

DEATH, presumption of, from seven years' absence, 7, 32, 680
proof of, by parish registers and certified copies thereof, 343
proof of, by nonconformist registers, 339, 344
on questions of pedigree, fact and date of may be proved by statements of deceased relations, 308, 312
symptoms of illness provable by statements of deceased, 61-2, 83-4
but not *cause* of illness, except on charges of homicide, 318, 320
probates and letters, how far evidence of, 409-10, 432
of declarants must be proved to admit their statements as exceptions to the hearsay rule, 276, 281, 288

DEBTOR. *See* BANKRUPT

DECEASED PERSONS, statements by, *see infra*, DECLARATIONS BY

DECLARATIONS ACCOMPANYING ACTS, 58-87. *See* RES GESTA
declarations as to mental or physical condition, 61-5, 82-7. *See* MENTAL AND PHYSICAL CONDITIONS
as to (1) health and feelings, 61-3, 83-4
as to (2) intention, motive, or opinions, 63-4, 84-6; *cp.* 148, 153-4
as to (3) knowledge, 65, 86-7; *cp.* 146

DECLARATIONS BY DECEASED PERSONS, when admissible, 276-334
extrinsic proof must be given of death, identity, &c., 276, 281, 288
competency and credit, &c., of the declarant, 276-7, and *see* Sub-headings
miscellaneous conditions, 277
admissible as secondary evidence of the contents of lost documents, 542. *See* SECONDARY EVIDENCE
(*a*) **against Interest**, 278-86
principle and history, 278
the interest must be pecuniary or proprietary, 278-9, 281-5
statutes of limitations, acknowledgments under, 279
personal knowledge, competency, contemporaneousness, and absence of motive to mistake, not necessary, 280, 285
collateral facts and contradiction of documents, 280-1, 285-6
extrinsic proof of conditions, 281, 286

DECLARATIONS BY DECEASED PERSONS—*Continued*
examples, 281-6
(*b*) **in the Course of Duty**, 287-93
principle and history, 287
the duty, 287, 289-92
contemporaneousness, 288, 292
collateral facts, personal knowledge, motive to misstate, contradiction, 288, 292-3
extrinsic proof of conditions, 288
examples, 289-93
(*c*) **as to Public and General Rights**, 294-306
principle and history, 294
what are matters of public and general interest, 294, 299-10
competency and identity of declarants, 295, 300
lis mota and interest, 295, 300-1
particular facts, corroboration, 296, 301-2
form of the declarations, 296-9, 302-6
examples, 299-306
(*d*) **as to Pedigree**, 307-17
principle and history, 307
what are matters of pedigree, 308, 312-5
declarants must be legitimately related, which must be proved independently, 309, 315-6
competent knowledge, hearsay upon hearsay, contemporaneousness, 310, 316
lis mota and interest, 310, 317
form of the declarations, 311-3, 317
examples, 313-17
(*e*) **in Cases of Homicide**, 318-23
principle and history, 318
homicide must be that of the declarant, 318-9, 320-1
condition at time of declaration, 319, 321-2
competency and credibility of declarant, 319
subject-matter and form, &c., of the declarations, 319, 322-3
miscellaneous conditions, 320
examples, 320-3
(*f*) **by Testators**, 324-34. *See* DECLARATIONS OF INTENTION, INTERPRETATION
principle, 324
considered as original, hearsay, or parol evidence, 324-6
admissible to show,—
(1) factum of will, *e.g.* its execution, identity, constitutent papers and validity, 326, 329-30
(2) contents, alterations, mistakes, secret trusts, 327, 331-3
(3) construction and rebut presumptions, 328, 613, 627, 666
(4) revocation, 328, 333-4
examples, 329-34

DECLARATIONS OF INTENTION. *See* INTENTION, INTERPRETATION
admissible (1) to show existence of intention, 63-4, 84-6, 148-9, 153-4, 325-6, 329-31
(2) to explain as part of the *res gesta*, the act they accompany, 63-4, 324. *See* RES GESTA
(3) to show the object for, or capacity in, which a document was executed, 325-6, 329-31, 517; and the true nature of the transaction, 579-81
(4) to identify an instrument, or its constituent papers, 326, 329-30
(5) to establish fraud as to the document, 584, 601; or trusts, 580, 598
(6) to show mistake in cases of rectification of the document, but not generally otherwise, 584, 601-2, 621, 651-7
(7) to rebut presumptions as to documents, 666-75
not admissible, save as above, to vary documents, 575, 581
nor to interpret them, 328, 606-9, 611, 613
examples, 640, 644, 652-3, 656
except in cases of equivocation, 613, 627-9

DEDICATION OF HIGHWAY, facts relevant to establish or rebut, 72-3, 130-1. *See* ROAD, WAY, RIGHT OF

DEED, definition of, 517
execution, signature, sealing and delivery of, how proved, 517-9
declarations by party at time of execution, admissible to show intent, or capacity, in which he signed, 75, 326-7, 581-3, 599
conditional delivery in escrow, may be proved by parol, 317, 583, 599
construction of documents showing such delivery is for judge, 15
when requiring attestation, how proved, 519-23
when not requiring attestation, 523
identity of party, attesting witness, and document, must be shown, 523
date of execution of. *See* DATE
ancient deeds and proper custody, 523-5
alterations and blanks in, 528-30; mistakes in, 585
registration, enrolment, and acknowledgment of, 530-1
operative words in, are original evidence, recitals are hearsay, 216
estoppel by recitals and descriptions in, 683-4. *See* RECITALS, ESTOPPELS
stamps on, 531-2. *See* STAMPS
may be discharged or varied, but not released, by subsequent oral agreement, 587-8, 603-4
construction and interpretation of. *See* CONSTRUCTION, INTERPRETATION
judgments or awards as to construction of, when binding on strangers, 430, 433
forgery of. *See* FORGERY

DEFAMATION. *See* LIBEL

DEFENDANT. *See* PARTIES, PRISONER, CO-DEFENDANTS, CO-RESPONDENT, CONSPIRACY

DELIVERY OF DEEDS, 517-9. *See* DEED

DEPENDENCY. *See* PATERNITY

DEPOSITIONS IN FORMER TRIALS, 436-40
admissible in subsequent cases to prove facts stated if parties and issues are same and witness incapable of being called, 436
principle of admission, 436
(1) former trials, what within the rule, 437
(2) same parties or privies, 437
(3) same issues, 437
(4) opportunity of cross-examination, 437-8, *cp.* 505-6
(5) when witness deemed incapable of being called, *i.e.*, when dead, insane, ill, kept away by opponent, &c., 438, *cp.* 506-8
(6) proof of such former testimony, 438-9
(7) objections to the evidence, 439, 498-9
examples, 439-40

DEPOSITIONS IN EARLIER STAGES OF SAME TRIAL,
CIVIL CASES—
before examiners or on commission, 497-9
objections to such depositions, 498-9, *cp.* 439
in bankruptcy and winding-up, 198, 253, 502
under Merchant Shipping Act, 502. *See* SHIP
before receiver of wrecks, 252
in actions to perpetuate testimony, 502
CRIMINAL CASES—
depositions before magistrates, 464, 502
are primary not secondary evidence of oral testimony, 436-7, 504
proof of statutory conditions, 503
of caption and identity of charge, 504-5
of presence of magistrate and accused, 505
of oath or affirmation, 505
of opportunity of cross-examination, 505, *cp.* 437
old rules as to cross-examination as to, 504
of whole statement having been read over and signed by witness and magistrate, 506
exhibits to, how proved, 503
admissible if witness incapable of being called, 506-8, *cp.* 438
various other grounds of admissibility, 508
extrinsic evidence in substitution, contradiction, variation of, and addition to, when admissible, 504, 569-70, 576

DEPOSITIONS IN EARLIER STAGES OF SAME TRIAL—*Continued*
to perpetuate testimony, where witness dangerously ill, 510
of children and young persons, 511
before coroners, 511-12
of witnesses going abroad, 512
taken in India, abroad, and at sea, 512-13
statutory examination of prisoner, *not* on oath, 508-10
evidence after trial in mitigation, or on appeal, under Cr. App. Act, 1907, 513

DETENTION of property by police, 9

DICTIONARIES, are admissible to refresh memory of judge, 26, 379-80
are evidence of the meaning of words, 379-80, 630
not reliable guides to meaning of statutory, technical, legal or foreign terms, 380

DIPLOMATIC CORRESPONDENCE, admissible as public documents, 335

DIRECT EVIDENCE defined, and distinguished from presumptive or circumstantial, 3-4
direct *testimony* of witness as to his own mental or physical conditions, admissible to prove the *truth* of these facts, 61
direct statements by him, *out of court*, are merely presumptive evidence, and not receivable to prove their *truth*, 62

DIRECTOR OF PUBLIC PROSECUTIONS. *See* PUBLIC PROSECUTOR

DIRECTORS, when company bound by acts, &c., of, or notice to, 91-2, 98-9. *See* COMPANY, CORPORATION
acting as, is evidence of due appointment, 109
signing as, how far personally liable, 581-2
when company bound by admissions of, 247-8
not presumed to know contents of company's books, 145-6, 258
but may be bound by resolutions of board, though absent, 151
not generally liable for acts of co-directors, 91

DISCHARGE of Bills and Notes, must generally be in writing, 588

DISCLOSURES to jury, what matters not to be opened or stated, 38. *See* JURY

DISCREDITING WITNESSES. *See* CREDIT

DISMISSAL of criminal charges. *See* ACQUITTAL

DISOBEDIENCE TO PROCESS, 446-7. *See* WITNESS

DISPOSITION of persons or animals when evidence of their having done particular acts. *See* SIMILAR FACTS, CHARACTER

DISSIMILAR FACTS, not generally admissible to disprove main fact, 120, 159, 165, 167, 187

DISTANCE, measurement of, by Ordnance Maps, &c., 379

DISTURBED DISTRICT, *qu.* whether opinion of police admissible to prove, 67
complaints of alarm by inhabitants admissible, 84

DIVIDED STATEMENTS, when part of statement is admissible and part not, 79; *cp.* verbal facts and their particulars, 220-1
in case of admissions and confession, whole statements must be taken, 232, 268.

DIVORCE, strict proof of marriage required in cases of, 47, 384
adultery when pleaded is for jury, when not, for judge, 16
proof of adultery in cases of. *See* ADULTERY
admissions for purpose of dispensing with proof, not conclusive in cases of, 19
questions as to witness's adultery, when admissible, 216-7
admissions and confessions of adultery, made out of court, 233, 487, 491. *See* ADULTERY

DIVORCE—*Continued*
communications between husband and wife, privileged even after, 210
judgments in cases of, rules as to, 408, 427, 429

DOCTORS. *See* MEDICAL MEN, EXPERTS

DOCUMENTS, definition of, 514
classification of, as *public, judicial,* or *private,* 514
production of original documents, when necessary, 535
production of, how obtained: notice to produce, *subpœna, duces* and judge's order, 442-3, 537
when notice to produce unnecessary, 545-6. *See* NOTICE TO PRODUCE
PROOF OF AUTHORSHIP AND EXECUTION of, 515-25
of handwriting and signature, 515. *See* HANDWRITING
of sealing and delivery, 517-19
of documents requiring attestation, 519-23. *See* ATTESTATION
of documents not requiring attestation, 523
of date of execution, 515. *See* DATE, PRESUMPTIONS
of identity of party, witness and document, 523
ancient documents, generally prove themselves, 524-5
if produced from proper custody, 525-6
connected documents, and incorporation by reference, 525-8
alterations, erasures, interlineations, and blanks in, 528-30
registration, enrolment and acknowledgment of, 530-1, 563-5
stamps, 531-2
PROOF OF CONTENTS of: public and judicial documents may generally be proved by primary or secondary evidence, 533
private documents must be proved by primary evidence, except in certain cases, 533
principle, history, and scope of rule, 534
primary evidence, forms of, 535-9. *See* PRIMARY EVIDENCE
production of original, how procured, 537
secondary evidence, forms and degrees of, 539-43. *See* SECONDARY EVIDENCE
cases in which secondary evidence is admissible, 543-9
notice to produce in criminal and civil cases, 442, 537, 544. *See* NOTICE TO PRODUCE
proof of public documents, 549-56. *See* PUBLIC DOCUMENTS
of judicial documents, 556-63. *See* JUDICIAL DOCUMENTS
of private documents when registered or enrolled, 563-5
of private documents when not registered, &c., 533, 543-9
ADMISSIBILITY OF, AS ORIGINAL OR HEARSAY EVIDENCE, 218-20
of public documents, to prove truth of contents. *See* PUBLIC DOCUMENTS
of judicial documents to prove truth of contents. *See* JUDGMENTS
of private documents to prove truth of contents. *See* HEARSAY
ADMISSIBILITY OF EXTRINSIC EVIDENCE TO AFFECT. *See* EXTRINSIC EVIDENCE
not generally admissible in substitution of, 566-73
nor to contradict, vary, or add to, 574-604
but admissible in aid of interpretation, 605-665
or to rebut an equity or presumption, 666-75
examination in chief as to, 467
cannot be put in *en bloc,* 473
what, admissible to refresh memory, 469-71. *See* REFRESHING MEMORY
what, admissible as part of *res gesta,* 57, 59, 69. *See* RES GESTA
cross-examination as to, 476-7
admissibility of, when produced, or referred to, by witness, 477
presumptions affecting. *See* PRESUMPTIONS

DOGS, character and propensities of, when may be proved, 162, 169, 186, 192. *See* ANIMALS, CATTLE
similar conduct and injuries by, admissible, 162, 169, 186, 192
proof of *scienter* of owner of, 95, 152

DOMICIL, party may testify to his own intent as to, 82
declarations out of Court, by either *living* or *deceased* persons, admissible to prove intent, 63, 77
probate and letters, how far evidence of testator's, 409, 431, 432

DRAFTS, when admissible as secondary evidence, 331, 541
signed, admissible to ascertain true contract, when lease (not by deed), and counterpart differ, 536

DRIVER, of carts, cars, &c., how proved servant of owner, 97, 225, 235-6, 352. *See* SERVANT, MOTOR-CAR

DRUGS, the pharmacopœia is evidence, but not conclusive, as standard of proper composition of, 109, 380
analyst's certificate is admissible under Sale of Food and Drugs Act, 368-9. *See* FOOD

DRUNKENNESS, when relevant to rebut intent, 154
statements in party's presence, when he is drunk, not evidence against him, 257
renders witness incompetent, 452
publican responsible if barman permits, 96

DUTY, declarations by deceased persons in course of, 287-93. *See* DECLARATIONS

DYING DECLARATIONS, admissible in cases of homicide, 318-23. *See* DECLARATIONS in cases of homicide

EDUCATION DEPARTMENT, orders, &c., of, how proved, 551

ELECTION, as to two remedies, party when estopped by, 416, 420, 686
to sue on foreign judgment, or original cause of action, 411
in case of legacies by will, parol evidence not admissible to raise, 625-6
voting-paper in parliamentary, may be corrected by parol, 649-50
of Member of Parliament, how proved, 48, 335-6

ENGINE, proof that same, or similarly constructed, had caused other fires, when relevant, 170

ENGRAVINGS. *See* PICTURES
in cases of piracy of, comparison between rival specimens allowed, 8
when evidence, as public documents, of truth of matters depicted, 381
not admissible as evidence of reputation, 305

ENROLMENT of documents, 530, 563
secondary evidence generally admissible of documents requiring, 530, 563
certificate or memorandum of, is evidence of fact and date of, 530, 563

ENVELOPE and letter may form sufficient memo. in writing under statute, 526

EQUITY, history of competency of witnesses, &c., in, 450, 495. *See* CHANCERY
evidence formerly taken by affidavit in, 495
rules of evidence in, have superseded common law rules, in certain cases, 582, 585-6, 588
presumptions in, may be rebutted by parol, 666-75

EQUIVOCATION in documents, definition of, and rule as to, 626-9, 657-61
parol evidence, including direct declarations of intention by the writer, admissible to solve, 611, 613, 626-9, 657-61

ERASURES in documents, 528-30. *See* ALTERATIONS

ESCROW, documents may be proved to have been delivered in, 517, 533, 599. *See* DEED, DELIVERY
construction of documents showing such delivery is for judge, 15

ESTOPPELS, 682-7
definition of, 682
by record, deed, and conduct, distinguished, 682
(1) by record, 683. *See* JUDGMENTS
(2) by deed, 683
applies only between parties and privies, and in actions on the deed, 683
none as to recitals if immaterial or not intended to bind, 683-4
none where deed fraudulent or illegal, 684

ESTOPPELS—*Continued*
none if deed can take effect by interest, 684
(3) by conduct, may arise by agreement, misrepresentation, or negligence, 684
(*a*) agreement express or implied, 685
share certificates and certifications, 685
landlord and tenant, 685
bailor and bailee, 686
licensor and licensee, 686
principal and agent, 686
election, 686
acceptor and holder of bill, 686
(*b*) misrepresentation or negligence, 686
there must have been a clear statement of fact, 686-7
intended to be acted on, 687
and a detriment directly flowing therefrom, 687

EVIDENCE, definitions, 1-3. *See* PROOF
admissibility of, is for judge, sufficiency for jury, 11, 13, 676
may be admissible though illegally obtained, 201
classifications:
direct, circumstantial, and real, defined and distinguished, 3
original and hearsay, defined and distinguished, 5-6, 218
primary and secondary, defined and distinguished, 6
conclusive and exclusive, distinguished, 566; *cp.* 369, 676, 685. *See* CONCLUSIVE EVIDENCE
conclusive and sufficient, distinguished, 364
self-harming evidence, 228
self-serving evidence, shop-books, 229-30
making evidence for oneself, 230
judge's caution to jury as to effect of, 42. *See* JUDGE
Commercial Court, arbitrators, compensation juries, licensing justices, revising barristers, and examiners, how far bound by rules of, 689
rules of, relaxed among conveyancers, 227, 523
wrongful admission, &c., of, and remedies therefor, 688-91

BOOK I.—PRODUCTION OF EVIDENCE, 1-46
proof in civil and criminal cases, differences in, 10-11
lex fori governs, 11
functions of judge and jury as to; law and fact, 11-17
evidence unnecessary of matters which are—(*a*) admitted for purposes of trial, 18-19; (*b*) or judicially noticed, 19-26
must be directed and confined to the issue, 27-9
variance and amendment, 28-9
facts in other cases excluded, 29
burden of proof, rules as to, 30-7
right to begin; matters not to be opened or stated to jury, 37-9
new trials, when granted, for erroneous decisions as to burden of proof, right to begin or reply, or as to course of evidence, 32, 39. *See* NEW TRIALS
course of, at trial, 39-42
parties' evidence must be heard, 13, 39
where single, or several issues; splitting case, 39
evidence in reply, and rebuttal, 40-1
anticipating and interposing evidence, 41
recalling witnesses; examination by judge; recrimination, 41, 483
practice as to putting in documents, 41, 43-4, 473, 476-7
proof of previous convictions, at what stage allowed, 41-2. *Cp.* 38-9
reopening case to add or correct evidence, 42
arguments as to evidence, when should be heard in absence of jury, 42, 83, 180
speeches; summing up evidence by counsel; reply, 42-5
fresh, on new trials and appeals, when allowed, 501, 513
the best evidence, strict proof, 45-8
history and former scope of the rule, 45-6
its present scope; strict proof not generally necessary, 47
exceptions, 47-8

BOOK II.—ADMISSIBILITY OF EVIDENCE, 49-675
Part I.—FACTS.
facts in issue; relevancy; admissibility, 49-54

EVIDENCE—*Continued*
the fact or transaction in issue: *res gesta*, 55-87
agency, partnership, company, conspiracy, 88-102
facts relevant to prove the main fact, 103-35
to show identity or connect the party with the transaction, 136-44
to prove states of mind, 145-57
similar facts, generally inadmissible to prove main fact, or identity or connection of parties; exceptions, 158-71
admissible to prove states of mind, 179-85
character, generally inadmissible, 186-7
exceptions, 187-92
facts affecting witnesses, documents, or the admissibility of evidence, 193. *See* WITNESSES, DOCUMENTS
facts excluded by public policy, 194-9. *See* PUBLIC POLICY
by privilege, 200-17. *See* PRIVILEGE
HEARSAY AS TO FACTS generally inadmissible, 218-26. *See* HEARSAY
examples, 225-6
exceptions—
(*a*) admissions; statements in presence of parties; confessions, 227-275. *See* ADMISSIONS, STATEMENTS IN PRESENCE. CONFESSIONS
(*b*) statements by deceased persons, 276-334. *See* DECLARATIONS BY DECEASED PERSONS
(*c*) statements in public documents, 335-81
reputation, opinion and belief, generally inadmissible, 382-403. *See* REPUTATION, OPINIONS
judgments, when admissible, 404-30. *See* JUDGMENTS
probates, verdicts, awards, reports, inquisitions, when, 431-40. *See* PROBATES, VERDICTS, AWARDS, &C.
pleadings, writs and depositions, in former trials, when, 435-40. *See* PLEADINGS, DEPOSITIONS, &C.
Part II.—WITNESSES, 441-513. *See* WITNESS
attendance, &c., of, 441-8
competency and compellability of; oaths, affirmations and declarations by, 449-63
evidence taken at the trial, 464-94
examination, cross-examination, re-examination, &c., 464-83
examination by judge or jury; recalling witnesses, 41, 483-4
number of witnesses and corroboration, 484-94
evidence taken before or after trial in civil and criminal cases, 495-513
Part III.—DOCUMENTS, 514-675. *See* DOCUMENTS
authorship, execution, attestation, ancient documents, incorporation, alterations, blanks, registration, stamps, &c., 514-32. *See* these several Heads.
contents; primary and secondary evidence; proof of public, judicial, and private documents, 533-65. *See* DOCUMENTS
admissibility of extrinsic evidence to affect documents, 566-675
in substitution of documents, 566-73
to contradict, vary, or add to documents, 574-604
to interpret documents, 605-665
to rebut presumptions affecting documents, 666-75
BOOK III.—EFFECT OF EVIDENCE, 676-87
weight of evidence, 676. *See* WEIGHT OF EVIDENCE
presumptions, 676-81. *See* PRESUMPTIONS
estoppels, 681-7. *See* ESTOPPELS
wrongful admission or rejection of evidence and remedies therefor, 688-91

EXAMINATION, when medical examination of party allowable, 9. *See* INSPECTION
when examination of objects or places, 8-9. *See* VIEW
of witnesses at trial must generally be *viva voce* and in open court, 464
when hearings may be *in camera*, 464
exclusion and separation of unexamined witnesses, 464-5
confrontation, 465-6

EXAMINATION IN CHIEF, object and scope of, 466
name, &c., of witness sometimes protected, 207. *See* PRIVILEGE
personal knowledge by witness required, 466-7

EXAMINATION IN CHIEF—*Continued*
as to documents, 467
leading questions generally inadmissible, 468-71
ground of exclusion of, 468
allowed in certain cases, 468-9. *See* LEADING QUESTIONS
refreshing memory of witness in, 469. *See* REFRESHING MEMORY
principle of, 469
what documents may be used for, 469-71
discrediting party's own witness, 471-2
adverse or hostile witness, 472. *See* ADVERSE WITNESS

EXAMINATION OF PRISONER, before magistrate, 508-10

EXAMINATION OF WITNESSES BY JUDGE AND JURY, 41, 483-4

EXAMINED COPIES of documents, 539. *See* COPIES

EXAMINERS, attendance before, procured by *subpœna*, 441
may administer oaths, 461
when witnesses may be examined before, 497-8
objections to evidence given before, 498-9
remedies for evidence wrongfully admitted by, 499

EXCLUSIVE EVIDENCE, 566. *See* EVIDENCE, CONCLUSIVE EVIDENCE

EXECUTION OF DOCUMENTS, 515-25. *See* DOCUMENTS

EXECUTOR, when acts of, or notice to, bind co-executors, 90-1
when admissions of one are evidence against rest, 242-6
when admissions of, bind testator and *vice versâ*, 239
when bind devisee and *vice versâ*, 242
judgments for or against, 413
presumptions in favour of, in will, may be rebutted by parol, 670-1, 674-5

EXEMPLIFICATIONS, 539. See COPIES

EXHIBITS to depositions, how proved, 503

EXPERIMENTS, may be ordered by judge, 9, 385, 392, 398
or tried in or out of court by experts, 392, 398

EXPERTS, opinions, of, admissible when subject involves special study or experience, 385-6
not admissible when jury equally capable of forming opinion as, 385
court may order independent reports or experiments by, 9, 385, 392, 398
(1) competency, credit and value of evidence of, 386
(2) subjects of expert testimony: science, art, trade, technical terms, handwriting, foreign law, &c., 386-90, 630, 665
court may require translation or explanation of foreign documents by, 390
subjects on which opinions of experts not admissible; construction of documents, professional conduct, legal and moral obligations, &c., 390-1, 665
(3) scope, grounds, and form, of opinion, hypothetical questions, 391-2
(4) corroboration, illustration, experiments, impeachment, 392, 397-8
statements by patients to medical men, 62, 83-4
(5) reference to text-books, price-lists, &c., by, 392
examples of opinion evidence by, 393-8, 630, 665

EXPLOSIVES, evidence to show action of, 70, 171

EXTENTS, ancient, admissible as public documents, 355, 358

EXTRADITION, depositions for purposes of, 513

EXTRINSIC EVIDENCE AS TO DOCUMENTS. *See* DOCUMENTS
admissible to prove execution, authorship, attestation, and identity of party, attesting witness and document, 326-7, 514-23
also to show what documents constitute the transaction, or are so connected as to be incorporated therein, 326, 329, 525-8. *See* INCORPORATION

EXTRINSIC EVIDENCE AS TO DOCUMENTS—*Continued*
not generally admissible:
(*a*) IN SUBSTITUTION of documents, 566-73
history of this rule, 566-8
principle of exclusion, 568
burden of proof, 568-9
rule applies to judicial and private formal documents, 569-71
exceptions to rule—
(1) public documents, 571
(2) private informal documents, 571
(3) existence, as distinct from terms, of transaction, 572-3
or (*b*) TO CONTRADICT, vary, or add to documents, 574-605
principle of exclusion, 574
forms of excluded evidence, 575
rule applies to judicial and formal private documents, *inter partes*, 576
exceptions to rule—
(1) public documents, 577, 588
(2) private documents, when informal or *inter alios*, 577, 589
(3) private documents; terms of transaction, 578-9, 589-97
additional terms, collateral agreements, usage, 578-9, 589-97
(4) true nature of transaction and relationship of parties, 579-83, 598-9
sale or mortgage; merger; trust; joint and common interests; agency; suretyship; bills and notes; penalty or liquidated damages, 580-83, 598-9
(5) invalid or conditional execution; fraud; mistake; want of consideration, &c., 583-7, 599-603
(6) subsequent modification or rescission of transaction, 587-8, 603-4
but admissible (*c*) TO INTERPRET Documents, 605-665. *See* INTERPRETATION; and (*d*) TO REBUT an equity or presumption, 665-75. *See* REBUTTING PRESUMPTIONS

FABRICATION or suppression of evidence, relevant to connect party with crime, 138

FACT, definition of, 2. *See* FACTS
classification, 3
matters of, generally determinable by jury, 13-7
when matters of, determinable by judge, 16-7

FACTS. *See* FACT, EVIDENCE, SIMILAR FACTS
in issue, defined, 49
when in issue, direct testimony to, not generally admissible, 55, 65-6
constitutent, cumulative, continuous, and accompanying, 56-7
relevant to the issue, defined, 49
relevancy and admissibility of, distinguished, 49-53. *See* RELEVANCY
Stephen's rules as to relevancy, 50-1
views of Thayer, Wigmore and Chamberlayne, 52-3
what; relevant to prove main fact, 103-135. *cp.* 158-71
to show identity, or connect the parties with the transaction. 136-44, *cp.* 163-4
to prove states of mind, 145-57, 172-6
previous, subsequent and similar facts when admissible, 103, 120, 158, 172
material facts defined, 53

FACTUM, of will. *See* WILL

FAILURE OF ISSUE, is question of pedigree, 308
proof of, by declarations of deceased relatives, 308
presumptions as to, 679

FALSA DEMONSTRATIO NON NOCET, application of maxim to the interpretation of documents, 624-6, 649-57. *See* MISTAKE

FALSE IMPRISONMENT. *See* MALICIOUS PROSECUTION

FALSE PRETENCE, similar transactions relevant to show intent of accused, 175, 181-2. *See* GENUINENESS, SIMILAR FACTS

FAMILY treatment and repute, relevant to prove relationship, 116-7, 134-5, 312. *See* TREATMENT, REPUTATION, PEDIGREE
Bibles and portraits preserved in the, admissible on questions of pedigree, 312, 317

FEELINGS, MENTAL AND BODILY, statements as to, when admissible, 61-5, 82-7, 145-57, 172-85. *See* MENTAL AND PHYSICAL CONDITIONS

FERRY, right to, is question of public interest, 294. *See* PUBLIC RIGHTS
is provable by reputation, 294, 384

FIGURES, effect of sums expressed in words (written or printed), and, 614
admissibility of evidence, where these conflict, 602, 614

FINES AND RECOVERIES, proof of, 562

FINGER-PRINTS, prisoner may be compulsorily examined to obtain, 9
are evidence of identity, 137

FIRE. *See* ARSON, POLICY

FIRST-FRUITS, bishop's returns as to, are admissible as public documents, 359
books of, are secondary evidence of such returns, 359

FISHERY, acts of ownership, admissible to prove right to, 111, 132
right to, in tidal rivers, is public right, 294
of which reputation is evidence, 294, 299
but mere claims, not followed by verdict or judgment, inadmissible to prove, 305-6
right to several, is presumptive evidence of ownership of bed of river, 671
but may be rebutted by evidence, 675

FLAGS AND BANNERS, inscriptions on, when part of *res gesta*, 79
nature of such evidence, whether flags, &c., are "documents," 533, 548
inscriptions on, how provable, 533, 548

FOOD, analyst's certificate is evidence of adulteration of, 368. *See* ADULTERATION, CERTIFICATES, DRUGS
adulteration of, master when liable for servant's, 95

FOOTPRINTS, when are evidence of identity, 137, 141

FOREIGN AFFIDAVITS, verification of, 24, 364, 366, 461, 563. *See* AFFIDAVITS

FOREIGN CONTRACTS, construction of, is for judge, 15, 390

FOREIGN DOCUMENTS, construction of, is for judge, 15, 390
but court may first require translation or explanation of, from experts, 390

FOREIGN JUDGMENTS, *in rem.*, admissibility of, 408
in personam, 411-2
on what grounds impeachable, 406-7
proof of, 549, 560-2

FOREIGN LAW, unlike English, is regarded as a question of *fact*, 14, 20
is not, by statute, to be decided by judge, 16. *See* ADDENDA
must be proved by experts, 14, 16, 20, 388-90, 549
who may testify as experts in, 388-9. *See* FOREIGN STATUTES
previous decisions on, inadmissible even between same parties, 390

FOREIGN NOTARY. *See* NOTARY

FOREIGN PROBATES, proof of, 560. *See* PROBATES

FOREIGN REGISTERS, admissibility of, to prove facts stated, 340
proof of, 554

FOREIGN SOVEREIGNS, existence and titles of, judicially noticed, 21
must give discovery on oath, 463

FOREIGN STATUTES, proof of, 388, 549. *See* FOREIGN LAW

FOREIGN TREATIES, proclamations and acts of State, how provable, 549-50

FORFEITURES AND PENALTY, witness need not answer questions exposing him to, 211-3. *See* PRIVILEGE, CRIMINATING QUESTIONS, PENALTY
but privilege ceases with liability, 213

FORGERY AND UTTERING OF DOCUMENTS. *See* HANDWRITING
errors in recitals, spelling, watermark, etc., relevant to prove comparison with genuine specimens, admissible, 108, 125
other forgeries, when admissible as part of *res gesta*, 68-9, 167
when to show identity of accused, 167
when to show intent, 176-7; or corroborate, 163, 492
poverty of accused at time, admissible, 68-9, 118, 120
how far forged will is conclusive until revoked, 409, 431
declarations of testator admissible on question of forged will, 327, 330-1
conviction for, not admissible to prove forgery in a civil trial, 413, 418.
acceptor's refusal to pay on ground of, admissible as part of *res gesta*, 74

FORMER TRIALS, depositions in, 436-40. *See* DEPOSITIONS
judgments in, 404-30. *See* JUDGMENTS
pleadings, affidavits, and writs in, 251, 435. *See* PLEADINGS, AFFIDAVITS, WRITS

FRAUD, facts relevant to prove, 149-50, 154-6
concealment or misrepresentation of facts when evidence of, 149-50
similar facts admissible to prove, 175, 181-3
wills, deeds, &c., may be impeached by extrinsic evidence of, 327, 330-1, 584, 601
judgments may be impeached for 406

FRESH EVIDENCE, re-opening case for, 42
on new trials and appeals, in civil or criminal cases, when allowable, 501, 513. *See* NEW TRIALS, APPEAL

FUNCTIONS OF JUDGE AND JURY as to evidence, 11-17, 193, 483-4. *See* JUDGE, JURY

FURTHER CONSIDERATION, evidence on, when allowable, 501, 513

GAS, on charge of stealing, evidence of, continuous taking admissible, 98. *See* CONTINUOUS FACTS

GAS INSPECTOR, report of, how far evidence, 435

GAS METER, is *primâ facie* evidence of gas consumed, 163

GAVELKIND, custom of, is judicially noticed, 21

GAZETTES, Government, when at common law, and when by statute, admissible to prove public matters contained therein, 337-8, 550
are judicially noticed without proof, 22, 337-8

GENUINENESS, of party's signature, how proved, 515
of wills, deeds, &c. *See* FORGERY, FRAUD
of representations, by vendors, &c., 149, 154-5
of business alleged to have been carried on by accused, 181-2
of party's claim or defence, facts relevant to show, 113, 133

GEOGRAPHICAL MATTERS, when judicially noticed, 22, 378. *See* MAPS

GIFT, declarations at time of advance, admissible to show gift or loan, 73-4. *See* LOAN
poverty of donor or lender, admissible to rebut gift or loan, 118
purchase by father, &c., in name of child, presumed to be, 669, 674

GOOD FAITH of parties, though not in issue, may sometimes be proved in support of their claim or defence, 113, 133
facts relevant to prove, 149, 154-5

GOOD FAITH—*Continued*
similar facts, when relevant to prove, 175, 181-2
declarations showing, are original evidence, not hearsay, 218

GRAND JURORS, disclosures by, excluded, 197

GRETNA GREEN, registers of marriages not admissible as public documents, 345

GUARDIAN and ward, burden of proof in transactions between, 33
admissions by, how far binding on infant, 238

GUARANTEE. *See* SURETY
parol evidence admissible to identify subject-matter of, 617, 636
to show if continuing, &c., 617, 636

GUERNSEY, registers of marriages in, 345-6. *See* CHANNEL ISLANDS

GUILTY KNOWLEDGE. *See* KNOWLEDGE, SIMILAR FACTS, RECEIVER

HABITS, party's, admissible to show his personal identity, 136
but not generally his commission of the act itself, 137, 158, 165, 167
of deceased, admissible to show cause of death, 138-9
of speech of writer, admissible to interpret documents, 607, 611, 620-4, 641-9
of animals admissible, when their conduct in issue, 162, 169, 186, 192. *See* ANIMALS, CATTLE, DOGS

HABITUAL CRIMINAL, previous convictions admissible to show that prisoner is, 47-8, 189-90. *See* PREVIOUS CONVICTION

HANDWRITING, ancient and modern, may be proved by comparison, 108, 125, 515
ancient, produced from proper custody, generally presumed genuine, 109, 523-4 (*Cp.* 276, 281, 288)
except where necessary to show identity of writer, 109, 281, 288
may be proved by opinions of experts, 388, 397
or comparison, 108, 125
modern, how may be proved, 515
by calling the writer, 515
or a witness who saw the document written, 515
by admission, 515
by comparison, 108, 125, 515
by opinion of experts, 397, 515
by opinions of non-experts familiar therewith, even though document lost, or not produced, 399, 402, 515
witnesses' familiarity with, may be acquired by—
having seen the party write, 399-400
or having received letters, &c., from him, 399-400
or having observed his writing in course of business, 399-400
signature of documents, different modes of, 515. *See* SIGNATURE

HANSARD'S debates, not admissible as Parliamentary Journals, 552. *See* PARLIAMENTARY JOURNALS

HATCHMENTS are evidence of pedigree, 311

HEARSAY evidence generally inadmissible, 218
original evidence and hearsay distinguished, 5-6, 218-9
conditions of admissibility of original evidence, 60, 103, 218-9
verbal facts may be admissible as original evidence, though particulars excluded as hearsay, 220-1
wide and narrow meaning of hearsay, 218-9
testimony based on hearsay, and not on personal knowledge, inadmissible, 219, 466-7; rule as to, does not apply to *conduct*, 219-20
principle of exclusion of, 221-2
history of the rule, and of the exceptions thereto, 222-4
scope of the rule, 222
examples: receipts; statements by agents; statements by parents as to age, birth, &c., of children; letters in party's possession; death-bed declarations, &c., 225-6

HEARSAY—*Continued*
exceptions to the hearsay rule:
spurious exceptions, 227
interlocutory proceedings, 227, 499
(*a*) admissions by party, or persons connected with him, 223-54. *See* ADMISSIONS
statements in presence, and documents in possession, of a party, 255-62
confessions, 263-75. *See* CONFESSIONS
(*b*) statements by deceased persons, 276-7. *See* DECLARATIONS BY DECEASED PERSONS
extrinsic proof of death and special conditions of admissibility, must be given, 276
competency and credibility of declarants, 276-7
miscellaneous conditions, 277
(1) against interest, 278-86. *See* DECLARATIONS AGAINST INTEREST
(2) in the course of duty, 287-93. *See* DECLARATIONS IN COURSE OF DUTY
(3) as to public or general rights, 294-306. *See* DECLARATIONS AS TO PUBLIC RIGHTS
(4) as to pedigree, 307-17. *See* DECLARATIONS AS TO PEDIGREE
(5) dying declarations as to homicide, 318-23. *See* DECLARATIONS AS TO HOMICIDE
(6) declaration by testators as to their wills, 324-33. *See* DECLARATIONS BY TESTATORS
(*c*) statements in public documents, 335-81
(1) statutes, State papers, and gazettes, 335-8
(2) public registers and records, 339-54. *See* PUBLIC REGISTERS
(3) public inquisitions, surveys, assessments, and reports, 340-62. *See* PUBLIC INQUISITIONS
(4) official certificates, 363-71. *See* CERTIFICATES
(5) corporation, company and bankers' books, 372-7. *See* CORPORATION, COMPANY
(6) published histories, maps, dictionaries, and scientific works, 378-81. *See* HISTORIES

HEARSAY UPON HEARSAY, receivable in the case of admissions, 233.
and of declarations as to pedigree, 310

HEATHEN, various sects of, how sworn. 459-60

HERALDS VISITATION BOOKS, admissible as public documents to prove pedigrees, 360

HIGHWAY. *See* ROAD

HINDUS, how sworn, 460

HISTORICAL FACTS OF PUBLIC NATURE, are judicially noticed, 21, 26

HISTORIES, accredited, are evidence of ancient facts of a public, but not of a private or local nature, 378
also admissible to refresh memory of judge, 26, 378

HISTORY OF THE RULES OF EVIDENCE,
of the rule as to inspection, 7
as to preponderance of evidence, and proof beyond reasonable doubt, 10
as to the best evidence requirement, 45-6
as to *re gesta*, 55
as to comparison of handwriting and seals, 108
as to complaints in cases of rape, &c., 114, 488-9
as to *res inter alios acta*, 159-60
as to prisoner's character, 187-8
as to criminating questions, 211-3
as to hearsay, 222-4
as to exceptions (generally) to the hearsay rule, 224. *See* the SPECIFIC EXCEPTIONS, *infra*.

HISTORY OF THE RULES OF EVIDENCE—*Continued*
as to self-serving statements, making evidence for oneself, and shop-books, 229-30
as to confessions by accused, 263-4
as to declarations by deceased persons against interest, 278
in course of duty, 287
as to public or general rights, 294
as to pedigree, 307
as to homicide, 318
as to official certificates, 363
as to bankers' books, 375
as to reputation and opinion, 382-3
as to disqualification of witnesses for interest, atheism, and crime, 449-51
as to affidavits, and other evidence in equity, 450-1, 495
as to kissing the book, 459
as to exclusion and separation of unexamined witnesses, 464-5
as to number of witnesses required, 484
as to similar statements to corroborate witnesses, 488-9
as to proof of attested documents, 519
as to production of original document, 534-5
as to parol evidence in substitution of documents, 566-8
as to parol evidence to contradict documents, 566-8
as to excluding declarations of intention by the writer, 608-9
as to presumptions of law respecting documents, 666
as to presumption of innocence, 680-1

HOMICIDE, burden on prisoner to justify negligence causing, 33. *See* MURDER
dying declarations as to, 318-23
depositions before coroner in cases of, 511-2
before magistrates in criminal cases generally, 502-11

HOUSES OF PARLIAMENT, procedure and privileges of, judicially noticed, 20
but not orders in council, nor journals of, 20
orders in council, how proved, 550
effect and proof of journals of, 335, 552
judgments of House of Lords, how proved, 557
address to Crown from, is evidence of matters contained, 335

HUSBAND AND WIFE. *See* MARRIAGE, MARRIED WOMAN, DIVORCE, ACCESS
communications between, privileged from disclosure, 210-11
when wife's admissions are evidence against husband, 248-9
when competent as witnesses for or against each other, 449, 453, 455-6
first wife or husband now an admissible witness on bigamy charges, 456
competent, but not bound, to answer as to their adultery, in divorce cases, 216-7
identity of wife, misdescribed in will, may be proved by parol, 642, 651
purchase in name of either, by other, is presumed to be gift, 669
charge of property in favour of husband, entitles wife to exoneration from his estate, 671
when presumption of marital coercion arises, 33

ID CERTUM EST QUOD CERTUM REDDI POTEST, 616

IDENTITY, IDENTIFICATION, direct testimony admissible to prove, 65, 136
(1) *personal*: facts relevant to prove, 136
opinions of witnesses, though not experts, admissible to prove, 398-9
leading questions admissible in examining witnesses as to, 468
general reputation in community, admissible to prove, 384
photographs admissible to prove, 399, 540-1
of child by resemblance to party, 118
(2) of party *as the doer of an act*, facts relevant to show, 136-7
previous conduct and declarations; special capacity or skill, 136-7
subsequent conduct: possession of property, &c., 9, 138, 142-3
alibi, 40, 137
conduct and declarations of the injured party or others, 138-9, 143-4
similar facts not generally admissible to show; exceptions, 158-71
compulsory examination of accused to show his, 9
character not generally admissible to show, except in reply, 186-91
of person who took prior proceedings, 136

IDENTITY, IDENTIFICATION—*Continued*
or who acted in an official capacity, 136
of deceased declarants, &c., 136, 276, 281, 288, 295
of party who has executed document, 136, 523
of witness who has attested documents, 136, 523
(3) of *persons*, &c., *referred to* in documents; *e.g.* in registers, 343-4; in libels or threats, 384-5, 399, 401, 620. *See* LIBEL, THREATS
in wills and contracts, 328, 332, 615-8, 623, 625-6, 630, 639, 643-7, 649,-53, 658-61
(4) of *documents sued upon*, *e.g.* a disputed contract, 108, 125, 523
of papers alleged to constitute a will, 326, 329
of infringing picture, or trade mark, 8, 47, 548, 573
(5) of *physical objects*, production when compulsory, 8, 47, 548
by marks, inscriptions, &c., upon, 8, 47, 533, 548
(6) of *handwriting*, 515. *See* HANDWRITING
(7) of parties to, and issues in, judgments and depositions, 412-6, 417-22

INCITEMENT TO MURDER, facts admissible or not, to prove, 102

INCLOSURE ACTS, how far admissible as reputation, 297, 302. *See* PRIVATE ACTS
maps made under, when admissible, 297
awards under, when evidence of title, 434

INCONSISTENT STATEMENTS, may be proved to discredit adversary's witness, 479-81. *See* CONTRADICTORY STATEMENTS
or party's own witness when hostile, 471-3
or dying declarants in cases of homicide, 276-7, 319
but not deceased declarants in other cases, 83, 276-7
nor deceased attesting witness, 83, 276-7

INCORPORATED LAW SOCIETY. *See* LAW SOCIETY

INCORPORATION of documents by reference, 147, 525-8. *See* DOCUMENTS
interpretation of documents so incorporated, 612
of company, provable by certificate, 369. *See* COMPANY, CERTIFICATE
or by trading as such, 109

INDIA, legislative acts in, how proved, 549
depositions taken in, admissibility of, 512-3
admissibility of registers of birth, marriage, &c., in, 340, 346
proof of these registers, 554

INDUCEMENT. *See* CONFESSIONS

INFANCY. *See* AGE, BIRTH

INFANT, under seven, incapable of committing crime, 681. *See* CHILD
over seven and under fourteen, is only rebuttably presumed incapable, 681
not estopped by misrepresentation as to age, 682
when competent as witness, 452-3
when need not be sworn, but requires corroboration, 461-2, 485
admissions by, or by guardians of, 238. *Cp.* 233, 236
depositions by, when too ill to attend trial, 511
judgments for, or against, 412
recognizance by, 443
age of, how proved. *See* AGE

INFIDEL, testimony of, formerly inadmissible, 451, 458. *See* ATHEIST
when now receivable, 449, 451, 458

INFORMATION AND BELIEF, admissible in affidavits in interlocutory proceedings, 227, 401, 499-500

INFORMATION FOR DETECTION OF CRIME, evidence as to, excluded in public prosecutions on ground of public policy, 195
scope of rule, 196
but not generally in private prosecutions, 196
reports by police to superiors as to, protected, 195-6, 473

INFORMER, evidence of, does not need corroboration, 486

INITIALS, signature by, when valid, 515

INK, signatures, &c., in pencil or, effect of, 516, 529. *See* SIGNATURE

INNKEEPER, lien of, on goods of guest, custom of, judicially noticed, 21
licence of, must be proved by its production, 573. *See* LICENCE, LICENSING
when liable for acts, knowledge and declarations of barman, &c., 96. *See* PUBLICAN

INNOCENCE, presumption of, 33-6, 680-1. *See* BURDEN OF PROOF
formerly guilt, not innocence, was presumed, 212, 680

INNUENDO, reputation and opinion of witnesses admissible to prove, 384, 399, 401-2. *See* LIBEL
surrounding circumstances admissible to prove, 620

INQUISITIONS, public, admissible to prove public matters, 355-62. *See* PUBLIC INQUISITIONS
private, admissible only between parties and privies, 356

INSANITY, presumption is against, 32, 680. *See* SANITY, LUNATIC, LUNACY
but when once proved, presumed to continue, 104, 680
similar conduct of party at other times admissible to prove his, 104, 161, 167
and other parties' knowledge thereof, 152
of ancestors and collaterals admissible, 167
treatment of friends how far admissible to prove, 134-5
quære whether party may testify on subject of his own, 400
opinion of experts, admissible as to other people's, 386, 395
but opinions of non-experts not generally, 400-1
how far affects competency of witness, 452
declarations, even *post*-testamentary, receivable on questions of testator's, 324, 330. *See* DECLARATIONS BY TESTATORS

INSCRIPTIONS on rings, banners, &c., proof and effect of, 8, 47, 533, 548
on tombstones, hatchments, &c., are evidence in cases of pedigree, 311

INSPECTION AND VIEW, defined, 7
history of, 7
before trial, when allowed in civil and criminal cases, 9-10
during trial,
when allowed, 7-8
when compelled, 8
court may adjourn trial to permit, 8

INSURANCE. *See* POLICY

INTENTION. *See* DECLARATIONS OF INTENTION
party's own testimony admissible to prove his, 61, 82
party's declarations out of Court, when admissible to prove his own, 61-5, 82-6, 148-53, 325-6, 329-31, 517, 579-81, 611-3, 627, 657-61. *See* DECLARATIONS OF INTENTION, TESTATORS
collateral facts, when admissible to show party's, 148, 153
previous and subsequent *intent*, when relevant, 148
previous and subsequent *declarations*, how far admissible to prove. *See supra*.
relevancy of to identify the doer of an act, 137, 140
to rebut defence of accident, mistake, &c., 175, 180. *See* SIMILAR FACTS
to prove intent to commit felony, under Vagrancy Act, 189

INTERCEPTED LETTERS. *See* LETTERS, POST OFFICE
power of police as to, 9, 138
effect of, in cases of conspiracy, 102
of false pretences, 181

INTEREST, in result of case, formerly rendered witness incompetent, 449-51
now only goes to credit, 451
declarations against, by party, 228. *See* ADMISSIONS

INTEREST—*Continued*
declarations against, by living persons not parties, 228
by deceased persons, 278-86. *See* DECLARATIONS AGAINST INTEREST
how far effects admissibility of declarations by deceased persons, made in course of duty, 288
or as to public rights, 295
or as to pedigree, 310
of officer, does not exclude entries made by him in public registers, 341

INTERLINEATIONS, 528-9. *See* ALTERATIONS

INTERLOCUTORY PROCEEDINGS
hearsay and secondary evidence, when admissible in, 227, 401, 499-50
affidavits admissible in, 496. *See* AFFIDAVITS
depositions before examiners in, 497
evidence on motion, further consideration, appeal, and in chambers, in, 500
statutory declarations in, 501. *See* STATUTORY DECLARATIONS

INTERPRETATION OF DOCUMENTS, 605-665
definition of, construction distinguished from, 605
a question of substantive law, evidence, or logic? 605-6
object of; the meaning of the words, or the intent of the writer? 606-9
these two theories explained and criticised, 606-9
limits of, 609
Wigram's division of explanatory evidence and evidence of intention, criticised, 610-11
forms of extrinsic evidence which are admissible: general forms, 611-13
declarations of intent generally inadmissible, 611, 613, 615, 621, 624
exception in cases of equivocation, 626-9
ambiguities, blanks, equivocation, inaccuracies, 613-4
print, writing, figures, punctuation, marginal notes, 614-5
rules as to admission of extrinsic evidence:
Rule I. (surrounding circumstances), 615-20
examples, 630-41
Rule II. (primary and secondary meanings, correct and less correct names and descriptions), 620-4
examples, 641-9
Rule III. (incorrect names, descriptions, &c.), 624-6
examples, 649-57
Rule IV. (equivocations), 625-30
examples, 657-61
Rule V. (usage, course of dealing, experts, dictionaries), 629-30
examples, 661-5
Rule VI. (documents, when void for uncertainty), 630

INTERROGATORIES, receivable as admissions against the deponent, 234
rules as to admissibility of, 499-500

INTESTACY. *See* PEDIGREE, ADMINISTRATION, JUDGMENTS
is matter of pedigree, which declarations by deceased relatives are admissible to prove, 308, 313
grant of administration, in cases of, is judgment *in rem*, 408
effect of judgments in cases of, 409-10, 413, 415, 426, 429

IOU is evidence of account stated, but not of money lent, 234

ISSUE, evidence must be confined to, meaning of rule that, 27
facts in, defined, 49
facts relevant to, defined, 49
what facts admissible as parts of the fact or transaction in issue, 55-87
statements by parents bastardising their, inadmissible, 198-9
failure of, is question of pedigree, 308
possibility and failure of, presumptions as to, 679

JERSEY, registers of marriages, &c., in, 345. *See* CHANNEL ISLANDS

JEWS, how sworn when witnesses, 459
marriage of, provable by registers, 340, 344
except in cases of bigamy, 344, 384, 573

JEWS—*Continued*
register of circumcision kept by deceased rabbi, not evidence of age, 291
marriage customs of, how proved, 390

JOINT CONTRACTORS. *See* CO-CONTRACTORS

JOINT DEBTORS. *See* CO-DEBTORS

JOINT DEFENDANTS. *See* CO-DEFENDANTS

JUDGE, acting as, is evidence of due appointment, 110, 128
functions of, with respect to evidence, 11
duty of is 4-fold: (1) to decide as to the *admissibility* of evidence, 11
(2) to instruct jury as to its production and effect, 11-12
should caution jury against considering previous convictions of accused, 38-9, 41
should explain limited purpose for which complaints in cases of rape are admissible, 113-4
should warn jury that admissions or confessions are in general only evidence against maker, and not against co-defendants, co-respondents, or co-accused, 242-3, 269-70. *See* CONSPIRACY
should caution them as to need of corroboration, 486-487
(3) should determine if *any evidence* has been given fit to be considered by jury, 11, 13
(4) should explain the *law* applicable to the case, distinguishing between questions of *law* and of *fact*, 11, 13-17
questions of law, which include production and admissibility of evidence, and the construction of documents, are determinable by, 11
questions of fact determinable by, in three instances, 16
(1) facts on which admissibility of evidence depends, 11-2, 193, 487
(2) what is reasonable in certain cases, 16
(3) foreign law. *See* ADDENDA
notice of facts by, 19-26. *See* JUDICIAL NOTICE
refreshing memory of, 26
may act on general, but not private knowledge, 19
is competent as witness, 19, 196, 449
but not compelled to disclose what passed in Court, 196
should, but is not compelled to, advise witness of privileges, 200, 453
may comment on failure of prisoner to give evidence, 44, 453
may read document to see if it be privileged, 200. *See* PRIVILEGE
notes of, are not, except by consent, evidence of witness's testimony, 438
examination of witnesses by, how far allowable, 483
may call witnesses himself, when, 484
may order independent reports and experiments to be made, 385-6
but may not generally decide question on his own view without evidence, 8
or on counsel's opening without evidence, 13, 39, 457

JUDGMENT debtor, what questions may be put to, 215
creditor, in interpleader issues, may be bound by admissions of, 253

JUDGMENTS, five general rules applicable to, 404
(1) are conclusive of existence as distinguished from truth, 404-5
(2) are conclusive of truth in favour of judge, 405
(3) are always impeachable on certain grounds, 405-6, 584
(4) are never evidence of collateral matters, 407
(5) effect of, for or against party; convictions, dismissals, acquittals, 407
judgments *in rem*, definition and list of chief, 407-9
conclusive against all the world of matter actually decided, 407
foreign judgments, *in rem*, effect of, 408
principle of conclusiveness, 409
conflicting judgments *in rem*, 409
judgments *in personam* as affecting parties and privies, 410
conclusive of matters decided and ground of decision, 410
scope of rule, 410-1
foreign judgments *in personam*; merger; election, 411
effect of; as plea, evidence, or stay, 412; as estoppel, 683

JUDGMENTS—*Continued*
judgments, principle of conclusiveness, 412
conditions of admissibility—
(1) same parties or their privies: mutuality, 412-15
examples, 417-19
(2) same subject-matter and object, 415-16
cases of election and fresh evidence, distinguished from present rule, 416
examples, 419-22
(3) whole case, 416-17
examples, 422-4
in criminal cases, 417, 424-5
judgments *in personam*, as affecting strangers, 425
generally inadmissible, 425, 428
principle of exclusion, 426
exceptions in cases of—
(1) public rights, and as acts of ownership, 113, 426, 428
(2) bankruptcy, administration, divorce and patents, 426, 429
(3) judgments operating by contract, admission, or acquiescence, 427, 429-30
proof of judgments and judicial documents, 556-62
complete record, when necessary, 550
in proceedings on appeal, or in chambers, 560
in old civil actions, 556-7
in Probate Division, 560
in bankruptcy, 560
of County Court proceedings, 561
of criminal proceedings, 557-9
of foreign and colonial proceedings, 561
reciprocal admission of, in England, Ireland and Colonies, 561
of verdicts and awards, 433, 562
of fines and recoveries, 562
of affidavits, depositions, pleadings and writs, 562-3
minutes of judgments in House of Lords. are primary evidence, and provable by examined copies, 557
those of other judgments are secondary. 541
records cannot generally be proved by parol, 543, 569
nor varied or contradicted thereby. 576
exception in cases of fraud, &c., 405, 584
mistakes in, when and how rectified, 584
judgments as estoppels, 683

JUDICIAL DISCLOSURES, protected on grounds of public policy, 196-8
by judge, 196
arbitrators, 196
barristers, 197
grand and petty jurors, 197-8
private examinations in bankruptcy, winding-up, lunacy, &c., 198

JUDICIAL DOCUMENTS, other than JUDGMENTS
admissibility of, to prove the truth of the matters contained—
probates and letters of administration, 431-3
verdicts, awards, reports, 433-5
inquisitions, 355-62, 435
pleadings and writs, 235, 251, 435
depositions in former trials, 436-40
proof of judgments and other, 556-62. *See* JUDGMENTS

JUDICIAL NOTICE, defined, 7, 19
no evidence required of facts so noticed, 7, 19
scope of rule, 19
matters of which notice will be taken—
(1) law, procedure, and custom, 20-1
(2) constitutional, political, and administrative matters, 21-2
(3) territorial and geographical divisions, 22, 378
(4) official gazettes, 22, 337-8
(5) official seals and signatures, 22-4
(6) matters notified in and companies incorporated by, statute, 24-5
(7) notorious matters, 25
refreshing memory of judge as to such matters, 26, 379-80

JURISDICTION, extent of British, judicially noticed, 22, 364
when doubtful, statement of Sec. of State as to, is conclusive, 22, 364
acts done without the jurisdiction, when receivable, 56, 93, 99-100

JURY, functions of, with regard to evidence, 11-17. *See* JUDGE
originally were witnesses, 222
matters of fact generally determinable by, 11
including weight of evidence, 11, 676
and meaning of peculiar or technical terms, 16
matters not to be opened or stated to,
(1) amount of damages claimed in any action, 38
(2) fact of payment into Court, 38
(3) previous conviction of accused, 38, 41-2. *See* PREVIOUS CONVICTIONS
(4) confessions, *quære?*, 38
(5) facts of which no proof is intended to be given, 38-9
(6) addresses on matters of law, 39
(7) quotations from scientific works, 39
(8) facts in other cases, 39
if disclosures of (1), (2), or (3) made, fresh jury should be had, 38
may notice matters of common knowledge without proof, 19
may ask admissible but not inadmissible questions of the witnesses, 483
disclosures by grand or petty, when excluded by public policy, 197
objections to evidence sometimes argued in absence of, 42, 83, 108
verdict of compensation, not impeachable for wrongful admission of evidence, 689

KISSING THE BOOK, former requirement of, when taking oath, 459
history of, 459

KNOWLEDGE AND NOTICE, may be shown by party's direct testimony, 61
or his declarations out of Court, 65, 86-7
or circumstantially, by his means of knowledge, 145-8, 151-3
or by statements made in his presence, 255
or by possession of documents, 142-3, 145, 257
or by execution, but not attestation, of documents, 145
or by previous course of business, 145
or by access to, but not mere right to inspect, documents, 145-6
or by duty to know fact, 146
or by notoriety of fact, but not mere rumour or reputation, 146
or by recitals in public, but not in private Acts, 336
or by publication in Gazette or newspaper, 146, 337
or by previous, but not subsequent, knowledge, 87
or by similar facts, 174-5, 176-9
or by similar documents, 612
constructive notice defined, and when arises, 146-8. *See* CONSTRUCTIVE NOTICE
by claiming under instrument, 146-7
of conditions on passengers' tickets, 147
of documents incorporated by reference, 147, 525-8. *See* INCORPORATION
of agents, solicitors, partners, trustees, executors, when affects principal, 89-93, 95-7, 100
of directors, when affects company, 91-2, 151. *See* COMPANY DIRECTORS
of debtor as to his insolvency, 86-7, 152
of consignor or shippers as to terms of contracts, 152
of character of ship, by owner, 143, 152
of insanity of one party to contract, by other party, 152
of poisons, by accused in murder trial, 142, 153
by owner, of animals' propensities, 95, 152. *See* ANIMALS
by bigamist, that first wife was alive, 87, 146. *See* BIGAMY
of parties, not admissible to vary or contradict contracts, 590-1
when admissible to interpret contracts, 616
of testator of contents of *will*, 327-8, 586
generally admissible to interpret wills, 612, 617-18, 639-40
but not to vary or contradict them, 639-40
witness can only testify to facts within personal knowledge, 219, 446-7
admissibility and sufficiency of evidence of, distinguished, 147

LAND TAX ASSESSMENTS, admissible as public documents,
to show assessment on person and for property named, 361
but not to show his seisin, 361

LANDLORD AND TENANT, admissions by either, how far evidence against the other, 239-40. *See* TENANT, LEASE, ADMISSIONS BY PREDECESSORS
declarations by deceased against his proprietary interest, how far evidence against successor, 279
estoppels between, 685
receipt or payment of rent is evidence, but not conclusive, of tenancy, 685
acts of ownership by, when admissible to show title, 111-2, 129-33

LAPSE of legacy, extrinsic evidence, how far admissible to rebut, 618, 623, 639, 647

LAW, substantive and adjective, defined, 1
of the land is judicially noticed, 20-1
questions of, are determinable by judge, 11. *See* JUDGE
and fact distinguished, 11.
foreign, is treated as question of fact, 14, 16, 20. *See* FOREIGN LAW AND STATUTES
foreign, how provable, 14, 20, 388

LAW LIST, is admissible as public document, 353

LAW SOCIETY, reports of committee of, as to conduct of solicitor, are evidence of facts stated, 434-5
rules of, are not judicially noticed, 21

LEADING QUESTIONS, not admissible in chief, or on re-examination, 468
grounds of exclusion, 468
exceptions (1), introductory or undisputed matter; (2) identification; (3) assisting memory; (4) contradiction; and (5) adverse witnesses, 468-9
admissible in cross-examination, 476

LEASE. *See* LANDLORD, TENANT, RECITALS
expired leases, or counterparts, admissible to prove ancient, but not modern possession, 112-3, 129-30
custody of expired, 525. *See* PROPER CUSTODY
counterparts of, are primary evidence against party executing, but secondary against others, 112, 535, 541. *See* COUNTERPARTS
terms of written, cannot be proved by parol, even between strangers, 570
how far contradicted, varied, or added to by parol. 594-6, 602
when parol evidence admissible in interpretation of, 632, 634-5, 642, 653-4, 661-4
when to show intent to merge lease in fee, 85, 153-4
usage, when admissible to annex incidents to oral or written, 105, 123-4
when to interpret meaning of, 661-4. *See* USAGE

LEGACIES, when parol evidence admissible to show whether cumulative or substitutional, 326, 669, 672-3
when to identify persons taking, 328, 332, 615-18, 623, 625-6, 639, 643-7, 650-53, 658-61. *See* IDENTITY
when to show extent of subject-matter of, 618, 623, 625-6, 640-1, 647-9, 653-6
when to construe specific, as general, 625-6, 656-7
extrinsic evidence, how far admissible to rebut lapse, 618, 623. *See* LAPSE

LEGITIMACY. *See* ACCESS, AFFILIATION, BASTARD
of child born during wedlock, and access of its parents, are presumed, 678
proof of non-access of parents will rebut. 678
but their direct statements as to access not admissible, 77, 199, 309
conduct and declarations of adulterer will, however, rebut, 77, 117, 199, 309, 312
as also family treatment and reputation, 117, 199, 312

LETTERS, proof of posting and delivery of, from course of office, 105, 122
from entries by deceased clerks, &c., made in course of duty, 291
postmarks on, are evidence of dates and places named, 122, 348. *See* DATE
party's possession of, when evidence of knowledge of their contents, 84, 142-3, 145, 257. *See* KNOWLEDGE
failure to answer, when an admission of truth of assertions in, 257-8, 261-2

LETTERS—*Continued*
admissible to show terms on which writers lived, 77-8, 84, 491
police may intercept, 9, 138, 181. *See* INTERCEPTED LETTERS
admissibility of intercepted, 102, 181. *See* POSTING, POST OFFICE
construction of, when for judge or jury, 14-15

LETTERS OF ADMINISTRATION. *See* PROBATES
conclusive of title of administrator against all persons, 409-10, 419, 420, 431
but are no evidence of the death or domicil of intestate, 409-10, 431-2
are, in general, only impeachable in Probate Court, 431
proof of, 560

LETTERS PATENT, are judicially noticed without proof, 24, 549. *See* PATENT
creates estoppel by record, 683
judgments as to construction of, bind strangers, 427
registers of, are evidence of matters contained, 348

LEX FORI, evidence is determined by, not by *lex loci contractus*, 11
interpretation of wills and contracts affecting realty, is determined by *lex situs*, 11
of wills of personalty by *lex domicilii*, 11
of contracts affecting personalty, by *lex loci contractus*, 11

LIBEL, province of judge and jury as to, 15. *See* SLANDER
proof of authorship of, by handwriting, 108-9, 125, 515; by other libels, 169, 491
of reference to plaintiff, by evidence of surrounding circumstances, 620
by opinion of friends, &c., 399, 401
by reputation, 384, 401-2
by exclamations of spectators at caricature, 384, 401-2
of meaning of words, by surrounding circumstances, 620
by opinion of witnesses, 399, 401-2
by similar libels, 176, 612, 620
of defendant's malice, by his previous and subsequent conduct, in relation to, 151, 166
by similar libels, 176
loss of customers, through libel, customers must be called, 48, 75
names of defendant's informants, when privileged, 207, 468
bad character of plaintiff admissible in mitigation of damages, either in chief, or cross-examination, 191-2
as to justification and particulars thereof, 28, 182-3, 191
what questions admissible in cross-examination of plaintiff, 191, 478-9
plaintiff's abstention from suing for similar libels, is not admission by conduct of truth of libel, 134, 262
reports about plaintiff to same effect as libel, when provable, 6, 133, 262

LICENCE, must be proved by production of, 573
when lost, indorsements may be proved by course of office, 122
when estoppel is raised by, 686

LICENSING CASES, rules of evidence, how far observed in, 689. *See* INN-KEEPER, PUBLICAN
unsworn testimony when receivable in, 462-3
evidence of character of licensed premises, 186
dismissal of application for licence, is not *res judicata*, 419
report of licensing justices, effect of, in, 435
register of beer and spirit licences admissible in, 348
to show premises licensed, licence must be produced, 573
publican liable, if potman permits drunkenness on licensed premises, 96

LIEN, when production of documents can be resisted on ground of, 210

LIFE, continuance of, may be presumed in fact, but not in law, 104, 680

LIMITATION, statutes of, acknowledgments and part payment by agents and partners, when binding under, 244
by deceased creditors when binding under, 279
how far date of occurrence of facts affects their admissibility in evidence, 176. *See* TIME

LIQUIDATED DAMAGES or penalty, whether sum due under written contract is, may be proved by parol evidence of parties' intention, 583

LIS MOTA, declarations as to public and general rights must have been made before, 295-6, 300-1. *See* PUBLIC RIGHTS
so, also, those relating to pedigree, 310, 317. *See* PEDIGREE

LLOYD'S LIST, underwriters presumed to know contents of, 146
whether admissible as public register, 352

LOCAL GOVERNMENT BOARD, orders, &c., by, how proved, 551

LOCOMOTIVE, evidence as to sparks from same, or similar, 162, 170

LOG-BOOK, naval, admissible as public registers, 351. *See* SHIP
of merchant vessels, evidence against, but not for, owners, 251-2, 351-2
entries in, by deceased mate not admissible, as made in course of duty, 290

LORD HIGH ADMIRAL, orders, &c., by commissioners of office of, how proved, 551

LORDS, House of. *See* HOUSES OF PARLIAMENT

LOSS OF CUSTOMERS, in consequence of libel, &c., customers must be called to prove, 48, 75

LOST DOCUMENTS, when presumed to be duly stamped, 532. *See* SEARCH
secondary evidence of stamped, but not of unstamped, admissible, 532, 547
proof of existence and execution of, required before secondary evidence admissible, 546-7
such proof addressed to judge, not jury, 11-12, 193
what is sufficient evidence of existence and execution of, 128, 546-7
what of loss and search for, 546-7
notice to produce unnecessary, when adversary has admitted the loss, 545
proof of, when attested, 521

LUNACY, public inquisitions in, are *primâ facie* evidence of, 357
aliter as to confidential reports of Chancery visitors in, 435

LUNATIC, may testify during lucid interval 452. *See* INSANITY
except, perhaps, as to his own sanity, 400
admissions by committees of, 238

MACHINES, evidence of action of, 162, 170. *See* LOCOMOTIVE, MOTOR-CAR

MAKING EVIDENCE FOR ONESELF, rule against, 229-30. *See* SELF-SERVING EVIDENCE

MALICE, facts relevant to prove, 151, 156-7, 175
proof of, in cases of libel, 151, 156-7, 175
similar facts admissible to show, 175
Corporation liable for malicious act of servants, 91
children under seven, presumed incapable of, 681

MALICIOUS PROSECUTION. *See* MALICE
functions of judge and jury as to, 16
burden of proof in is, contrary to false imprisonment, on the plaintiff, 31
what is evidence of malice in, 151, 156-7
bad character of plaintiff not relevant in, 191
plaintiff must prove acquittal and put in depositions, 558

MANOR, ownership of, may be proved by holding courts in, making perambulations of, &c., 111, 133
customs of, provable by particular instances in which were acted on, 67
also by similar customs in other manors, 161-2, 169
customs and boundaries of, are *public* or *general* matters, provable by reputation, 294, 296, 300-5
books and presentments of, are admissible as reputation, 297-8, 305
as public documents, 298, 354
and sometimes as acts of ownership, 112, 298
proof of court-rolls and books of, 297, 556

MANSLAUGHTER. *See* MURDER, HOMICIDE

MAPS, SURVEYS, AND CHARTS
publio surveys, when admissible as public documents to prove public matters, 355, 357-60
ancient, but *quære* modern, public surveys, admissible as reputation, 297
admiralty charts, general positions and names of places in, judicially noticed, 22, 378
tithe and ordnance survey maps, when admissible, as reputation, 297, 304-5
when as public surveys, 355, 357-60
published maps are evidence of general geographical matters, 378
private, receivable against party by whom prepared, or his privies, as admissions, 234, 239, 357-8
are evidence, even against strangers, on question of public or general interest, if made by deceased persons of competent knowledge, 297, 303-5
how far restrictive of deeds to which they are annexed, 623-4, 648-9
verified models and plans may be inspected by jury, 8. *See* INSPECTION

MARGINAL NOTES, may be looked at to construe documents, 614-5

MARKET, customs and usages of, when admissible, 105-7, 123-5, 579, 629, 661-2
See CUSTOM, TRADE-CUSTOM, USAGE
value, provable by experts, 387. *See* VALUE
reasons for expert's opinion as to value, usually reserved for cross-examination, 399

MARKS, signature by marksman is valid, 515-6. *See* TRADE-MARKS

MARRIAGE, proof of by registers, or copies thereof, 340, 342-7
by reputation, 312, 384
by treatment of friends and neighbours, 116-7, 134-5, 312
by admission, 233
by statements of deceased relatives, if in a case involving family pedigree, 312
strict proof of, required in cases of bigamy and divorce, 47, 233, 384
cohabitation, or *de facto* ceremony, raises presumption of, 110, 679
non-consummation of, is evidence of incapacity, 119. *See* ACCESS
communications between husband and wife during, are privileged, 210, 455
meaning of 'marriage' and 'wife,' how far may be interpreted by parol, 642, 651-2
as to proof of colonial or foreign marriages, 110, 233, 345-7, 679

MARRIED WOMAN, when husband's agent, 248-9. *See* HUSBAND, WIFE
when estopped by her own representations, 682
joint judgment against husband and, effect of, 414-15

MASTER. *See* AGENTS AND SERVANTS

MATERIAL FACTS defined, 53

MATHEMATICAL TABLES, admissibility of, 380

MATRIMONIAL COMMUNICATIONS protected from disclosure, 210, 455
principle of protection, 210
scope of rule, 210-11

MEANING OF WORDS, when question for jury, 16. *See* INTERPRETATION
experts may explain technical terms, 387-8, 393-4, 399, 630, 665
non-experts may explain words of libel, or threat, 399, 401-2
forms of extrinsic evidence admissible to explain words in document, 611-13
dictionaries and grammars admissible to show, 379-80

MEDICAL MEN, qualification of, provable by medical register, 354
or, except in action for fees, by acting as such, 110
competency of, as experts, 386
may, as experts, testify to medical facts, inferences, or usages, 386, 393, 395-7

MEDICAL MEN—*Continued*
medical sheets of army medical service, are evidence of facts stated, 351
certificate of medical men admissible under certain statutes, 371
scope of opinion of, and hypothetical questions to, 391, 395-7
when may give opinion on precise point in issue, 391-2, 395-6
grounds of opinion and experiments by, may be proved, 391, 395-7
how far may base opinion on notes and statements made out of Court, 391, 395-7
statements of patients to, are proof of symptoms, 62, 83
communications from patients to, are not privileged, 202
proof of patient's consent to operation by, 66
confessions induced by, are inadmissible against prisoners, 265, 271-2
burden of proof in transactions between patient and, 33

MEMORIALS of deeds when evidence, primary or secondary. 538, 541
enrolment of, 530-1; *cp.* 564-5

MEMORY, powers of, provable, to enhance or impeach credit of witness, 466, 477
refreshing memory of judge, 21, 26, 378. *See* REFRESHING MEMORY
of expert, 392-3
of ordinary witness, 469-71

MENS REA, proof of, 89, 149, 172, 174-85. *See* SIMILAR FACTS

MENTAL AND PHYSICAL CONDITIONS, direct testimony as to witness's own, but not others', may be given, 61, 82-3. *See* STATES OF MIND
declarations out of Court when admissible—
(1) as to health, feelings, and mental capacity, 61-3, 83-4
(2) as to intention, motive, or opinion, 63-4, 84-6
(3) as to knowledge, 64-5, 86-7
presumed to continue, 103-4, 121, 324, 327, 329
collateral facts and statements, when relevant to prove, 145-57
similar facts relevant to prove, 172-85
opinions of experts admissible as to, 386, 395
of non-experts when admissible as to, 400-1, 403

MERGER of oral negotiations in written contract, 575, 616
of lease in fee, 85, 153-4
of loan in covenant to pay, 572
of covenant to pay interest, in judgment for principal, 421
of equity of redemption, and intervening charge, 85, 153-4, 580, 671. *See* MORTGAGE
of cause of action in domestic judgments, 411, 415, 421
none in foreign judgments, 411

METERS, gas and water, presumed correct, 162-3
evidence of what are "daily" testings of, 664

METHODISTS, how sworn, 459

MILITARY registers and army list are evidence of matters recorded, 350, 353. *See* ARMY, WAR
certificates of service on, also admissible, 371

MIND, STATES OF. *See* MENTAL AND PHYSICAL CONDITIONS

MINISTERS' ACCOUNTS of Crown lands are public documents, 358

MINUTES of judgments, how far admissible to prove the judgments. 557-60. *See* JUDGMENTS

MINUTE BOOKS, of corporation or company, effect of, 373-4
proof of, 555
of bankruptcy meetings, admissible as public registers, 349

MISCARRIAGE. *See* ABORTION

MISNOMER, AND MISDESCRIPTION, in documents, parol evidence admissible to explain, 332, 624-26, 649-57. *See* DOCUMENTS, MISTAKE

MISREPRESENTATION, when evidence of fraud, 149-50. *See* FRAUD
similar acts admissible to show knowledge of, 174, 181
distinction between actions for rescission for, and for damages for deceit, 150
parol evidence admissible to prove, as to documents, 327, 330-1, 584, 601

MISTAKE, similar facts admissible to rebut a defence of, 175, 181-3
in judicial records, when provable by extrinsic evidence, 576, 584
in deeds and contracts, 585, 601-2, 624-6, 649-57
in wills, 327, 332, 576, 586, 601, 603, 624-6, 649-57

MODERN POSSESSION of land, how provable, 113

MOHAMMEDANS, how sworn, 459

MONTH, statutory words of time, &c., not generally explainable by parol, 622. *See* TIME
primâ facie means lunar and not calendar, 641-2

MORAVIANS, how sworn, 459

'MORE OR LESS' extrinsic evidence admissible to explain these terms in written contracts, &c., 633, 663

MORTGAGE, judgments against mortgagor, when bind mortgagee, 415
when covenant for interest is merged in judgment for principal, 421
conveyance may be proved by parol to be only a, 580
parol evidence admissible to rebut presumption of merger of equity of redemption and intervening charge, 85, 153-4, 580, 671. *See* MERGER

MORTMAIN, conveyances in, how proved, 565

MOTION, evidence on, and further consideration, 500-1

MOTIVE, witness may testify directly as to his own, 61, 82-3
when relevant to connect party with act, 137, 139, 164
similar facts, admissible to prove, 164, 172-85

MOTOR-CAR, speed of, may be proved by untested watches, &c., 162-3, 170-1, 485-6
opinion of one witness as to rate of speed not sufficient, 401, 485-6
but constable's testimony as to time by watch is of fact, not opinion, and does not need corroboration, 486
accused competent to testify in Ireland under Motor Car Act (1903), 453
proof that person drove part of journey some evidence that he drove rest, 104, 121. *See* SERVANT

MURDER, what facts admissible to identify accused in cases of, 136-44
to show motive, malice or intent, 137-44, 149, 151, 154, 180
to show insanity, 161, 167
similar acts admissible to show intent, 176, 180
similar deaths admissible to show cause of death, 170
or to identify instrument used, 70
witness must not testify that accused 'murdered' or 'killed' deceased, but only to the constituent incidents of the act, 56, 65, 401
what statements admissible as parts of *res gestæ* in cases of, 79-81. *See* RES GESTA
threats of suicide by deceased, when evidence for prisoner, 80, 167
threats to, or assaults by, deceased on, prisoner, are evidence for latter, 174, 190
bad character of deceased is evidence for prisoner, 190
dying declarations by deceased, when admissible, 320-3
acquittal for, is bar to second charge for manslaughter, and *vice versâ*, 417, 424

MUTILATION of documents, 528. *See* ALTERATIONS

MUTUALITY, when necessary to admissibility of judgments, 412-5, 417-9. *See* RES INTER ALIOS ACTA
of depositions, 437, 439-40
when to admissibility of parol evidence to vary documents, 577, 589
of estoppels by deeds, &c., 683-4

NAME, identity of name of party as executing or witnessing documents, 121
how proved, 136, 523
as owning ship or vehicle, 97, 225, 236
presumption where father and son bear same name, 627, 640
of client not privileged from disclosure by solicitor, 205
of witnesses when privileged, 207, 468
effect of omission of, in deeds and wills, 613. *See* BLANKS
mistake of, in deeds or wills, when curable by parol. *See* MISTAKE, MISNOMER
ambiguity in, when curable by evidence, 617-8, 620-7, 639-61

NAUTICAL ASSESSORS, evidence in trials before judge and, 385

NAVAL COURT, order of, when conclusive, 360

NAVY, list, not admissible as public register, 353
log-books of, admissible, 351
certificates by superior officer of service in, are evidence, 371

NEGLIGENCE, functions of judge and jury as to, 17
burden of proof in actions of, 31
by agents and servants, principal liable for, 88, 94-5, 99
custom and practice of others when admissible as standards of comparison in cases of, 107, 126
similar acts admissible to show spot dangerous, but not to show defendant's, 163, 171, 186

NEWSPAPER. *See* GAZETTES
register of proprietors of, is evidence of ownership of, 348
publication in, when admissible to prove knowledge of, or notice to, a party, 146, 152, 153
discovery is compellable of publisher, &c., of libellous, 216

NEMO TENETUR PRODERE SEIPSUM,
history of maxim, 211-13. *See* CRIMINATING QUESTIONS

NEW TRIALS, granted in civil, but not in criminal cases, for wrongful admission or rejection of evidence, 689-90
for erroneous decision as to right to begin and reply, 32, 39
or as to course of evidence, 32, 39; when as to stamp, 532, 690

NEXT FRIEND, admissions by, when evidence against infant, 238

NIHIL FACIT ERROR NOMINIS CUM DE CORPORE CONSTAT, maxim applied to let in evidence to explain misnomer, &c., in documents, 624-6, 649-57

NOMINAL AND REAL PARTIES, admissions by, 237-8
judgments for or against, 412-5, 417-9

NON ACCIPI DEBENT VERBA IN FALSAM DEMONSTRATIONEM, &c., 624, 649-57

NON-CONSUMMATION OF MARRIAGE, is evidence of incapacity, 119

NOTARY, seal of, to protests, &c., when judicially noticed, 24
certificate of, when admissible, 366
duplicates of notarial instruments are primary evidence of original, 366, 538, 548, 560
protest of notary received on matter of pedigree, 317
notarial copies of foreign wills, &c., when admissible as secondary evidence, 539, 548, 560. *See* COPIES

NOTES, PROMISSORY. *See* BILLS
judge's. *See* JUDGE
broker's bought and sold, 536

NOTICE, facts relevant to prove, 145-8, 151-3. *See* KNOWLEDGE
constructive notice, 146-8
notice to agents, solicitors, partners, trustees, directors, 89-91
burden of proof as to guilty knowledge and, 35-6

NOTICE TO PRODUCE, object, service, and form of, 544
original documents obtainable in civil cases from opposite party by, 537, 544
or in criminal cases, from prisoner by, 442-3, 537
but not from prosecutor by, 537
when unnecessary, 545-6—
(*a*) when document is duplicate original, or counterpart executed by opponent, 545
(*b*) when document is itself a notice, 545
(*c*) when adversary knows he is charged with possession of document, 545
(*d*) when adversary admits loss of document. 545
(*e*) when adversary has document in court, 546
(*f*) when adversary has obtained document by fraud or force, 546
(*g*) in the case of merchant seamen suing masters, 546

NOTORIETY, when evidence of knowledge, 146

NOTORIOUS FACTS, judicially noticed, 25

NOVA SCOTIA, register of marriages in, admissible, 345

NULLITY OF MARRIAGE, evidence may be heard *in camera* in cases of, 464

NUMBER OF WITNESSES, and corroboration, one witness generally sufficient, 484. *See* CORROBORATION
history of rule as to, 484
exceptions in cases of treason, perjury, personation at elections, breach of promise, bastardy, orders of removal, and under Criminal Law Amendment Act, 1885, the Children Act, 1908, and Motor Car Act, 1903, 485-6
corroboration usually required of claims against deceased persons, 485
and of testimony of accomplices, and in certain other cases, 486-7

OATHS, AFFIRMATIONS AND DECLARATIONS, 458-63
generally all witnesses must testify under sanction of, 458
except children, witness merely producing documents, counsel, the Sovereign, &c., 461-2
believers, when may swear or affirm, 458
atheists, when may swear or affirm, 458
forms of: usual form, 458
kissing the book, 459
Scotch, sectarian and heathen forms, 459-60
who may administer: in, or out of, England, 460-1
proof of affidavits in perjury trials, 557, 562. *See* PERJURY

OBJECTIONS TO EVIDENCE, 688-91. *See* WRONGFUL ADMISSION
in civil cases, 688-90
in criminal cases, 690-1
to depositions, 439, 499
arguing as to, in presence of jury, 42

OBLITERATIONS in documents, 528-30. *See* ALTERATIONS
evidence of experts admissible to decipher, in wills, 394
when physical interference may be used to decipher, 394

OFFICE COPIES, 540. *See* COPIES

OFFICIAL CAPACITY OR CHARACTER, title to, may be proved by acting therein, 109-10, 281, 288

OFFICIAL CERTIFICATES, 363-71. *See* CERTIFICATES
history of, 363
admissibility of, at common law, 364

OFFICIAL CERTIFICATES—*Continued*
by statute, 364
proof of, 553, 556
proof of identity of person named in, 343-4, 364, 523

OFFICIAL GAZETTES, judicially noticed, 22, 338. *See* GAZETTES
admissibility and proof of, 337-8

OFFICIAL RECEIVER'S reports are evidence of conduct of bankrupt, 434-5

OFFICIAL SEALS AND SIGNATURES, when judicially noticed, 22-4

OFFSPRING. *See* CHILD

OMNIA PRÆSUMUNTUR RITE ESSE ACTA, presumption that, 33, 109-10, 326, 515, 631
throws burden of proof on party denying, 33
will assist defective execution of wills, 326
of deeds, 515, 523-4
validity of public appointment is presumed from acting therein, 109. *See* ACTING IN CAPACITY
consecration of chapel is presumed from services held therein, 109

ONUS PROBANDI. *See* BURDEN OF PROOF

OPENING CASE TO JURY. *See* COUNSEL, RIGHT TO BEGIN, JURY
what matters not to be stated in, 38
opening facts without proving them, rule as to, 38-9

OPERATIVE WORDS in deed are original evidence, recitals hearsay, 218

OPINION AND BELIEF, existence of how proved, 64-5, 82, 86, 104, 121
generally inadmissible to prove other facts, 382-403
exceptions—
general reputation receivable to prove public rights, pedigree, marriage, or identity of person libelled, 383-5. *See* REPUTATION
opinions of experts receivable on matters requiring special study or experience, 385. *See* EXPERTS
(1) competency, credit and value of expert testimony, 386
(2) subjects of expert testimony—science, art, trade, technical terms, handwriting, foreign law, 386-90
subjects on which experts may not testify, construction of documents, conduct, morals, English law, 390-1
(3) scope of opinion, hypothetical questions, 391
(4) grounds of opinion, corroboration, illustration, impeachment, 391-2
(5) reference to text-books, price-lists, &c., 392-3
examples, 393-8
opinions of non-experts, admissible to prove—
identity and resemblance, 398-9
reference to plaintiff and meaning of words in libels and threats, 399
handwriting, 399-400
mental and physical condition, age, speed, 400-1
character, 188, 401
interlocutory and other matters, 401, 499-500
examples, 401-3

OPPRESSIVE process, 447-8, 484. *See* ABUSE OF PROCESS
questions in cross-examination, 478-9

ORAL EVIDENCE. *See* WITNESS
admissibility of, to affect documents. *See* EXTRINSIC EVIDENCE

ORDERS IN COUNCIL, proof of, 550

ORDNANCE SURVEY maps, how far evidence. *See* MAPS, SURVEYS, PUBLIC INQUISITIONS
as reputation, 297, 305
as public documents, 360
to show general geographical facts, 378-9
to explain conveyances of property, 624

ORIGINAL EVIDENCE, defined, and distinguished from hearsay, 5-6, 60-1, 218, 225-6
conditions of admissibility of, 60, 103, 218

OWNERSHIP, acts of, admissible to prove title, 109-13, 127-33. *See* ACTING IN CAPACITY
similar acts in other places, when evidence, 161, 167-9. *See* SIMILAR FACTS
verdicts and judgments when evidence, as acts of, 113, 426
when, as admissions, 235, 427, 429
as reputation to prove public rights, 298, 306, 426

PALMISTRY, &c., facts admissible as parts of transaction, on charges of, 71. *See* ASTROLOGY
facts not admissible to show defendant's *bonâ fides*, 126, 155

PARCEL or **NO PARCEL** is question for jury, 15
but construction of documents bearing on it, is for judge, 15
parol evidence admissible to show what is, under *general* descriptions, 616-7, 625-6, 634. *See* EXTRINSIC EVIDENCE
how far admissible under *specific* descriptions, 623-4, 625-6, 648-9, 655-6

PARENTS. *See* CHILD, LEGITIMACY
statements by, bastardising offspring, excluded, 198-9, 309, 679. *See* BASTARD, ACCESS
burden of proof, in transactions between children and, 33
presumption as to advancements to children by, 669, 674

PARISH, boundaries of, are matters of "general" interest, provable by reputation, 294, 299, 303
admissibility of registers and books of, 339-40, 344. *See* REGISTERS
proof of registers and books of, 554

PARLIAMENT. *See* HOUSES OF

PARLIAMENTARY JOURNALS, admissibility of statements in, 335-6
proof of, 552
Hansard's Debates not admissible as, 552

PAROL EVIDENCE, admissibility of. *See* EXTRINSIC EVIDENCE

PARSEE, how sworn, 459

PARTIALITY of witness, may be proved to discredit his testimony, 481-2. *See* BIAS, CREDIT, CROSS-EXAMINATION

PARTICULARS, evidence must be confined to, 28
when may be amended, 28
case cannot be stated as to mere sufficiency of, 691
of the transaction in issue, how far may be given in evidence, 55-7, 65-7. *See* RES GESTA
of evidence in mitigation of damages in libel actions, 191
of sale. *See* CONDITIONS OF SALE
of complaints, 113-6. *See* COMPLAINTS
of verbal facts and summarised statements, 320-1

PARTIES, who are, 237-8, 412-5, 417-9. *See* PRIVIES
admissions by nominal and real, 237-8
statements in presence, and documents in possession of, 255-62
judgments for and against, 412-5, 417-9. *See* JUDGMENTS
qu. whether can be ordered out of court when witnesses? 464-5

PARTNERS, acts and representations of, admissible against each other, 90
knowledge of, and notice to, 90
declarations by, when admissible to prove partnership, &c., 90
acknowledgments by, under Statutes of Limitation, 244
admissions by, 242-6
judgments against, when bind rest, 413-5

PARTNERSHIP. *See* PARTNERS
proof of, by agreement or conduct, 90
by previous existence of, 121
by admission, 242-5

PARTNERSHIP—*Continued*
existence of, as distinct from terms of deed, may be shown by parol, 572
access to books of, is evidence of knowledge and acquiescence in contents, 145, 258
books of partnership generally evidence against partners, 258

PASS-BOOKS, banker's, are evidence against bank and customer, 234, 376-7

PASSENGERS' TICKETS, when knowledge of conditions on, presumed, 147

PASSING OFF, how far opinions of witnesses admissible in cases of, 65. 393-4
facts not admissible in actions for, 118

PATENT, grant of, how far an estoppel, 683. *See* LETTERS PATENT
is judicially noticed, 549
on question of utility of, public user or non-user, admissible, 75, 87, 118
what statements are part of transaction in action for infringements, 75, 87
judgment as to infringement of, estops parties as to all grounds of invalidity, 417-8, 424
judgment as to construction of, binds strangers, 427
how far expert evidence admissible to explain patents, 393
what surrounding circumstances admissible to construe, 393, 612, 620
register of, is admissible as public document to prove title to, 348, 370
certified and sealed copies of patents, specifications, &c., admissible, without production of originals, 549
patent agent, communications to, not privileged, 202
certificate of comptroller of, is *primâ facie* evidence of contents of register, &c., 348, 370

PATERNITY. *See* LEGITIMACY, PEDIGREE, AFFILIATION, BASTARD, ACCESS
resemblance of child, is evidence of, 118
connection of mother with other men, and her ill-fame, provable to rebut, 139, 190
statements by parents not admissible as to access, or to bastardise offspring, 199, 679
except when part of conduct, 77, 679

PAUPER, proof of settlement of by apprenticeship, 128. *See* SETTLEMENT
terms of conveyance of land to, must be proved, even between strangers, by production of the deed, 570-1
when such terms may be contradicted, 577-8
removal orders at Quarter Sessions, how proved, 558

PAYMENT, acts and declarations relevant to prove, 73-4, 117-8
may be proved, or contradicted, by parol, though written receipt given, 571-2, 577
under Statute of Limitations. *See* LIMITATION
fact of payment into Court, not to be disclosed to jury, 38

PEDIGREE, matters of, may be proved by declarations of deceased relatives, 307-17. *See* DECLARATIONS BY DECEASED PERSONS, REPUTATION
family conduct and treatment, also admissible to prove, 117, 312, 317
reputation as to, admissible, 384
judgments between strangers, how far admissible as reputation to prove, 312-3

PEERAGES, not receivable in evidence as public registers, 353

PENALTY, questions subjecting to, when need not be answered by witness, 211-6. *See* CRIMINATING QUESTIONS, FORFEITURE
may be proved to be liquidated damages, by parol, 583

PENCIL, signature in, valid, 516, 529. *See* SIGNATURE
but alterations in, are presumed to be deliberative, not final, 529

PERAMBULATIONS, statements as to, how far admissible as reputation, 296
or as part of *res gesta*, 111

PERJURY, number of witnesses, &c., required in cases of, 485
in cases of, the former trial may be proved by certificate, &c., 367, 557
affidavit containing, how proved, 556, 562

PERPETUATION OF TESTIMONY, depositions in civil and criminal proceedings for, 502, 510-11

PERSONALTY. *See* PROBATES, LETTERS OF ADMINISTRATION

PERSONS IN AUTHORITY. *See* CONFESSIONS
confessions induced by, are inadmissible, 263
who are such persons, 265, 270

PETTY JURORS. *See* JURORS

PHARMACOPŒIA is evidence as standard for ingredients of drugs, 109, 380

PHOTOGRAPH, identification of persons by, 398-9
of objects by, 540-1
photographic copies of documents are primary evidence of each other, but secondary evidence of the common original, 537, 540-1

PHYSICAL APTITUDE or **CAPACITY**, when relevant to connect party with crime, 137, 142, 163

PHYSICIANS. *See* MEDICAL MEN

PLACARDS, &c., proof of inscriptions on, 533, 548. *See* INSCRIPTIONS

PLANS. *See* MAPS
inspection by court of verified plans, 8
how far restrictive of deeds to which they are annexed, 623-4, 648-9

PLEADINGS, evidence must be confined to issues raised by, 27
variance from, and amendment of, 28-9
admissions in, generally conclusive in *same* proceedings, 18
in *other* proceedings, admissible to show what were issues, but not truth of facts, unless the pleadings are sworn to, &c., 235, 251, 435-6
proof of, 562

POLICY OF ASSURANCE, company when bound by acts of agent, 96-7, 99
intention of assured in affecting, may be proved by his declarations, 84-5, 153
as also may the health of the assured, 83
parol evidence, how far admissible to affect:
not admissible to except particular ship from marine, 589
nor generally to contradict terms of, 591-2, 596
but admissible to disprove payment of premium, 586-7, 600
to identify documents referred to in, 633
prior proposals for, admissible to identify subject-matter of, 633
broker's slip, how far admissible for this purpose, 633. *See* SLIP, BROKER
usage admissible to annex incidents to, 105, 123-4
or to interpret words in, 661-3
course of dealing admissible to interpret, 664
proof of age of assured, in, 225. *See* AGE

POLITICAL MATTERS, when judicially noticed, 21

POOR LAW BOARD, seal of old, judicially noticed, 24. *See* LOCAL GOVERNMENT BOARD
orders of old, how proved, 551

POOR LAW VALUATIONS AND ASSESSMENTS, admissibility and effect of, 361; proof of, 555

POOR RATE BOOKS are *primâ facie* evidence of occupation, &c., 361

PORTRAITS, likeness of to sitter, provable both by expert and non-expert witnesses, 387, 399
family, are evidence in pedigree cases, 311

POSSESSION, ancient, provable by expired leases, &c., 112, 129-33
conditions on which such documents receivable, 112-3
presumption of title increased with long possession, 112
modern, cannot be proved by expired leases, 113
of property, and acts of ownership, relevant to prove title, 111-12

POSSESSION—*Continued*
of security is *primâ facie* evidence of payment, 117
of property and documents is relevant to connect accused with crime, 138, 142-3
or to implicate co-conspirators, 93
or to show knowledge of contents of documents, 145-8
declarations explanatory of, are admissible as part of *res gesta*, 72-3
admissions by predecessors in title, made while in, are admissible, 238-41
and statements against proprietary interest similarly made, 279
documents in possession of party, when admissible against him, 257-8, 261-2

POST LITEM MOTAM, declarations by deceased persons, when must have been made. 210, 295-6. *See* LIS MOTA

POSTING AND DELIVERY of letters. *See* LETTERS
proof of, by showing course of business to post, or to deliver, 105, 122
by declarations of deceased clerk, 291

POSTMARKS on letters are evidence of dates and places named, 122, 348

POSTMASTER-GENERAL, decision of, that a publication is a newspaper, is not binding, 435
orders, &c., by, how proved, 552

POST OFFICE, registers publicly kept at, are evidence of their contents, 348
letters intercepted at, when admissible, 102, 181. *See* LETTERS

PRAYER-BOOKS AND MISSALS, entries in, are evidence of pedigree, 311, 317

PREAMBLE of statutes, admissible to interpret them, 609, 615. *See* STATUTES

PREDECESSORS IN TITLE, admissions by, are evidence against party, 238-41
rule only co-extensive with identity of interest, 239
admissions must qualify declarant's title, 240
and be made during currency of interest, 240
examples, 240-1
judgments, for or against, when bind party, 413-4, 418-19

PREJUDICE, offers of compromise made without, are protected, 231, 235 (*cp.* 208

PRELIMINARY CONTRACT and negotiations, not admissible to vary subsequent conveyance, 575, 590
how far admissible to interpret such conveyance, 616, 633-9

PRESENCE. *See* STATEMENTS IN PRESENCE OF PARTY, 255-62

PRESENTMENTS of manor jury, are evidence of reputation, 297-8, 305. *See* MANOR

PRESUMPTIONS OF LAW AND FACT, defined and distinguished, 7, 676-82
conclusive presumptions of law, 7, 676-7
rebuttable presumptions of law, 677-81
as to legitimacy, access, marriage and celibacy, 32, 678-9
possibility, or failure, of issue, 679
continuance of life, death, and survivorship, 32, 104, 680
killing presumed to be unlawful, 33
sanity, 32, 104, 680
innocence, regularity, and *omnia rite esse acta*, 32-3, 680-1
undue influence and martial coercion, 33
that persons intend the probable consequences of their acts, 148, 677
as to documents, *e.g.* date, 280, 515, 681; sealing and delivery, 517-8; ancient documents, 523-5; alterations, 529; stamps, 532; that judicial documents are correct, 584
signature sometimes presumed from reduction of agreement to writing, 516
execution of lease raises presumption that counterpart also executed, 516
consideration for bills and holders in due course, 32

PRESUMPTIONS OF LAW AND FACT—*Continued*
rebuttable as to ownership of soil of river and highway, 671, 675
as to executors, *e.g.* extinguishment of debt by appointing debtor executor, acceptance of office, and right to residue, 670, 674-5, *See* EXECUTORS
equitable presumptions as to double portions, satisfaction, ademption, advancement, resulting trust, and cumulation of legacies, 667-74
as to merger, 671 (*cp.* 580)
shift burden of proof, 32-4, 678
conflicting presumptions, 34
presumptions of fact, 7, 103-93, 681. *See* RELEVANT FACTS
rules of construction distinguished from, 666

PREVENTION OF CRIMES ACT, 1908, proof of formalities under, 189-90

PREVIOUS CONDUCT, of parties, relevant to identify doer of act, 137, 139-42
to show states of mind, 146-57, 172-85
to interpret contracts. *See* COURSE OF DEALING

PREVIOUS CONTRADICTORY STATEMENTS admissible to discredit adversary's witness, 474-81
or party's own witness, if adverse, 471-3

PREVIOUS CONVICTION of accused must not, in general, be disclosed in opening a prosecution, 38
except where act is only a crime if done after such, or upon appeals from justice's *sentences*, 38
nor be proved until *after* verdict and to affect punishment, 41-2
except—
(1) when forming an essential ingredient of the offence, 38, 41-2, 189, 454; or (2) showing guilty knowledge, 42, 174-5, 189; or (3) rebutting good character, 188-90, 454-5; or (4) to contradict defendant's denial of the conviction, 42, 454, 482; or (5) to prove public rights, 42, 298, 428; or (6) to prove a plea of *res judicata*, 42, 412, 424-5; or (7) in summary cases, 42
of witness (other than accused), admissible to discredit him, 482
proof of, 367-8, 482, 557-9

PREVIOUS EXISTENCE OF FACTS, when relevant to prove their subsequent existence, and *vice versâ*, 103-5, 120-1. *See* CONTINUANCE

PREVIOUS SIMILAR STATEMENTS, not generally admissible to corroborate witness, 114, 488
exceptions, 114, 488
how far admissible to discredit witness, 479-81 (*cp.* 166)
how far to interpret documents, 176, 612, 619-20. *See* SIMILAR DOCUMENTS

PRICE-LISTS, admissible to refresh memory of experts, 392

PRIEST, confessions to, not privileged, 202, 265

PRIMA FACIE evidence, best evidence of facts not now generally necessary, 47. *See* BEST EVIDENCE, STRICT PROOF, CONCLUSIVE EVIDENCE
exceptions, 47-8
judicial notice, when conclusive and when only *primâ facie* proof, 19
admissions when only, and when conclusive, 18
when burden of proof shifted by, 32-7
judgments when conclusive and when only, 404-5, 407-25. *See* JUDGMENTS
statutory certificates, when conclusive and when only, 364. *See* CERTIFICATES
share certificates, when are, 370
registers, when are, 339, 571, 577, 588

PRIMARY EVIDENCE of documents, 533-65
definition of, 6
forms of—
(*a*) original document, 535-7; production of, how obtained, when in possession of party or strangers, 537
(*b*) admissions, 537-8
(*c*) copies made under public authority, 538-9
of handwriting, 400, 519

PRINCIPAL AND AGENT. *See* AGENT, SERVANT

PRINCIPAL AND SURETY. *See* SURETY

PRINT, signature, when may be in, 516
when documents partly written and partly in, writing prevails, 614, 654, *cp.* 602

PRISONER, statutory examination of, when must not be upon oath, 508-10
history of the judicial examination of, 211-13
unsworn statements by, before magistrate, practice as to putting in, 44-5
statutory caution must be given to, before taking examination, 508
when examination, inadmissible under statute, may be admissible as a confession, 509
facts relevant to identify, or connect him with crime, 136-44
to show state of mind of, 145-57
similar facts when relevant to prove criminal act, identity, or state of mind. *See* SIMILAR FACTS
character of, when relevant, 186-92. *See* CHARACTER
confessions by, 263-75. *See* CONFESSIONS
statements in presence, or documents in possession of, when admissible, 255-62. *See* STATEMENTS IN PRESENCE
explanatory statements by, at time of crime, 81-2
competency and testimony of, under Cr. Ev. Act, 1898, 453-7
attendance of, as witness in other trials, how procured, 444
documents and property in possession of, may be detained, 9
and are evidence against, 93, 137, 142-3, 257, 261
when originals required from, notice to produce, not subpœna, should be served on, 537
medical inspection of, against consent, illegal, 9-10

PRISONS, seal of Commissioners of, is judicially noticed, 24
conveyance to Commissioners of, extrinsic evidence rejected to explain, 639

PRIVATE ACTS. *See* STATUTES

PRIVATE DOCUMENTS, proof of execution of, 515-25. *See* DOCUMENTS
of contents of, 532-65

PRIVATE EXAMINATIONS in bankruptcy and winding-up, privileged from disclosure, 198

PRIVILEGE, facts excluded by, 200-17
nature of claim, and by whom and how made, 200
effect of, when allowed, 200
subject-matter of:
(1) professional confidences, 201-9. *See* PROFESSIONAL CONFIDENCES
(2) party's title-deeds, evidence and lien, 209-10. *See* TITLE-DEEDS
(3) matrimonial communications, 210-11. *See* MATRIMONIAL COMMUNICATION
(4) criminating questions, 211-16. *See* CRIMINATING QUESTIONS
(5) admissions of adultery in divorce cases, 216-17

PRIVITY, defined. 239
of three kinds, blood, law, and estate, 239
admissions by party bind his privies, and *vice versâ*, 239
judgments against party bind his privies, and *vice versâ*, 412-15
depositions when evidence against privies, 436-40

PROBABLE CONSEQUENCES of acts are presumed to be intended. 148, 677

PROBATES of will of personalty how far operate *in rem*, 408-10, 431-3
can, in general, only be impeached in Probate Court, 431-2
are conclusive even against strangers of appointment of executors, and of validity and contents of will, 408-10, 431
are not conclusive, or even perhaps admissible, evidence of death, domicile, or on charges of forgery, of genuineness of will, 408-10, 432
of will of realty only conclusive when proved in solemn form, or in contentious proceedings, 432

PROBATES—*Continued*
are generally primary evidence of contents of will, 431, 560
except to prove declarations by deceased, when they are secondary, 311, 432, 560
when original will may be looked at in aid of construction, 431, 538, 560, 613, 637, 661
proof of, 560
right to begin in probate suits, 38

PROCEDURE, defined, 1
matters of parliamentary, executive and judicial, are judicially noticed, 20-1

PROCESS. *See* WITNESSES

PROCLAMATIONS by Sovereign, admissible as public documents, 335
proof of, 539

PRODUCTION of documents may be obtained as follows:
in Civil Cases:
before or *after* trial, from parties or strangers, by judge's order, 442-3
at trial, from party, by *notice* to *produce* (under which production is optional), 537
notice to produce, rules as to, 544-6. *See* NOTICE TO PRODUCE
from either party or stranger, by *subpœna* (under which production is compulsory), 442-3, 537
in Criminal Cases:
from prosecutor, by subpœna; and from accused, by notice to produce, 442, 537
witnesses called merely to produce documents, need not be sworn, 442, 462
right to inspect documents produced on notice, or referred to by witness. 471, 473, 477
of original document is primary evidence of its contents, 534-5
origin of rule requiring, 48, 534-5
what documents are excluded, or privileged, from production, 194-216
of property at trial, when compulsory, and when not, 8

PROFERT, history of, 534-5
is origin of rule requiring production of original document, 48, 534-5

PROFESSIONAL CONFIDENCES, generally privileged, 201-9
principle of protection, 201
privilege confined to legal advisers; clergy, doctors, &c., not included, 201-2
(*a*) the retainer, sole or joint, 202
(*b*) scope of employment, 203
(*c*) communications must be necessary and confidential, 203
(*d*) joint interest destroys privilege, 203-4
(*e*) duration of privilege, 204
(*f*) waiver of privilege, 205-6
examples of matters privileged, or the reverse, 205-9

PROMISSORY NOTES. *See* BILLS OF EXCHANGE

PROOF. *See* EVIDENCE, PRIMA FACIE, CONCLUSIVE
definition of, 1
effected by (1) evidence, (2) presumptions, (3) judicial notice, and (4) inspection, 1
rules of, generally same in civil and criminal cases, 10
exceptions—
(1) in civil cases rules of evidence may be relaxed by consent or order of the Court, 10
(2) rules as to character, complaints, confessions, dying declarations, competency, and compellability of witnesses, are peculiar to criminal law, 10
(3) civil issues provable by preponderance of evidence, criminal ones beyond reasonable doubt, 10
burden of, rules as to, 30-7. *See* BURDEN OF PROOF
strict proof of facts not generally required, 47. *See* BEST EVIDENCE
exceptions, 47-8
of authorship, execution, and attestation of documents, 514-32. *See* DOCUMENTS

PROOF—*Continued*
of contents of documents, by primary evidence, 532-9. *See* PRIMARY EVIDENCE
by secondary evidence, 539-49. *See* SECONDARY EVIDENCE
of particular documents—
public (statutes, registers, Corporation books, &c.), 549-56
judicial, 556-63
private, 563-5.

PROPER CUSTODY OF DOCUMENTS, 524-5. *See* ANCIENT DOCUMENTS

PROSECUTOR, is not a party to the proceedings, in criminal cases, 38, 270, 413, 537
wife or husband of, is compellable witness, 457
must not, in opening case, disclose previous conviction of accused, 38
nor prove same before verdict, 41-2
admissions by, not evidence for prisoner, 270, 413
may be ordered out of court if a witness, 464-5
character of, when relevant, 190
is *person in authority*, so that confessions induced by, inadmissible, 265
public. *See* PUBLIC PROSECUTOR

PROTECTION OF WITNESSES, 447-8. *See* WITNESSES

PROXY, when blank, may be filled in after execution, 530. *See* BLANKS

PUBLICAN, acts, knowledge, and declarations of barman, &c., when evidence against, 96. *See* INNKEEPER

PUBLIC AUTHORITY, registers kept under. *See* PUBLIC REGISTERS
inquisitions and surveys under. *See* PUBLIC INQUISITIONS

PUBLIC AND GENERAL RIGHTS—
declarations by deceased persons as to, 294-306. *See* DECLARATIONS
general reputation as to, 384
judgments as to, 426, 428. *See* JUDGMENTS

PUBLIC DOCUMENTS—
defined, 335, 339, 355
principle of admissibility of, to prove *truth* of the statements contained, 335, 355
(1) statutes, State papers, and Government gazettes, 335-8
(2) public registers and records, 339-54
(3) public inquisitions, surveys, assessments and reports, 355-62
(4) official certificates, 363-71
(5) corporation, company, and bankers' books, 372-7
(6) published histories, maps, dictionaries and scientific or mercantile records, 378-81
proof of the *authenticity* and *contents* of various public documents:
statutes, British, Colonial, and Foreign, 549
statutory rules, 549
treaties, charters, letters-patent, &c., 549
proclamations and Orders in Council, 550-2
parliamentary journals, 552
general records of realm, 552
public registers, inquisitions, surveys, assessments, corporation books, by-laws, certificates and manor books, *generally*, 553-6
registers, British, Colonial, and Foreign, 554
inquisitions, Surveys and Extents, 555
assessments, 555
corporation and bankers' books, 555
certificates, 553, 556
by-laws, 555-6
manor-books, 556
military and naval records, 556
notarial protests, 556 (*cp.* 366, 538, 548, 560)

PUBLIC HEALTH BOARD, seal of, judicially noticed, 24

PUBLIC HOUSE. *See* LICENCE AND LICENSING CASES

PUBLIC INQUISITIONS, SURVEYS, ASSESSMENTS AND REPORTS, admissible when made under public authority and as to public matters, 355
principle of admission, 355
(1) what is public authority, 355
(2) what is public matter or purpose, 355-6
(3) excess of jurisdiction; irregularity; interest of officer in subject-matter of inquiry, 356
examples of, 357-362
inquisitions in lunacy, or by coroner, 356
ancient inquisitions under royal, statutory, or judicial authority, 357-9
Doomsday Book, Down Survey, Terriers, Bishop's returns, &c., 357-9
duchy and manor surveys, 357-8, *cp.* 297-8, 304-5
Tithe Commutation maps, 359; *cp.* 304-5
Ordnance Surveys, 360; *cp.* 298, 305
herald's visitation books, 360
orders of Naval Courts or Board of Trade, 360
land tax assessments, poor law valuations, and rate-books, 361
reports by custom-house officials, charity commissioners, &c., 361-2
railway deposited plans, 360
proof of, 555

PUBLIC POLICY, facts excluded by, 194-9
(1) affairs of State, 194
(2) information for the detection of crime, 195-6
(3) judicial disclosures by judges, arbitrators, barristers, and jurors, 196-8
private examinations, &c., in bankruptcy, winding-up, lunacy, or before receiver of wreck, 198
(4) statements by parents bastardising their offspring, 198-9

PUBLIC PROSECUTOR, consent of, to prosecution, presumed until challenged, 190. *See* CONSENT
signature of, not judicially noticed, 23-4
may be proved by witness familiar with handwriting, 189-90
or who has received letter of consent in ordinary course after application therefor, 190

PUBLIC REGISTERS are *primâ facie* evidence of truth of matters recorded, 339-54. *See* REGISTERS
but may be contradicted by parol, 577, 588
and do not exclude other evidence of the matters registered, 571
(1) must be kept under public authority and for public benefit, 339
parish registers within the rule, 339
also non-parochial, when deposited under statute, 339-40
and colonial and foreign, when kept under local authority, 340
(2) entries must be made by proper officer, and promptly, 340
(3) originality; errors; interest of officer in matter recorded, 341
(4) entries are only evidence of matters it was officer's duty to record, not of extraneous particulars, 341-2
registers of birth, baptism, marriage, death and burial, how far admissible, 342-3
identity of persons referred to must be proved *aliunde*, 343
proper custody of, 525
proof of, 554
examples of:
registers of birth, baptism, marriage, death, and burial, 344-7
bishops' registers, monastic registers, vestry and parish books, 347
registers of public offices, *e.g.*, Inland Revenue, Excise, Patent, Post Office, &c., Beer and Spirit Licences, 348
registers kept under Copyright and Newspaper Acts, &c., 348
Bank of England Transfer Books, 348. *See* BANKERS' BOOKS
minute-books under Bankruptcy Act, 349
registers of deeds, &c., in Yorkshire and Middlesex, 349
registers of voters under Ballot Act, 350
registers of convictions, &c., under Summary Jurisdiction Acts, 349, 350, 558
military and maritime registers; army, navy, and law lists, 350-3
log-books, passenger lists, coastguard and lighthouse journals, 352-3
medical registers; university, college, and manor books, 354
private registers generally inadmissible, 339-40; and *cp.* 290-1. *See* REGISTERS, SHOP-BOOKS
as to mechanical registers, *e.g.* of gas, water, &c., see 163

PUBLIC WORKS, seal of commissioners of judicially noticed, 24

PUBLISHED HISTORIES, admissible to prove public, but not private or local matters, 378, 381
when Court may refer to, to refresh memory, 26, 379-80

QUAKERS, may affirm instead of taking oath, 459
marriage registers of, when admissible as public documents, 340, 344

QUI SENTIT COMMODUM SENTIRE DEBET ET ONUS
ground of admission of judgments against privies, 413-5

RAILWAYS, seal of Commissioners of, judicially noticed, 24

RAILWAY TICKETS, knowledge of conditions on, when may be inferred, 147

RAPE, facts admissible to prove or disprove, 67, 119, 185
admissibility of complaints in cases of, 114-6, 488-9
bad character of prosecutrix may be proved in cases of, 190
also previous connection of prosecutrix with prisoner or others, 190, 478
qu. whether consent is defence of an imputation on character, 454

RATE, justices protected though rate distrained for invalid, 405
rate-book admissible to prove the making, &c., of a, 361. *See* RATE-BOOKS
making, &c., of, must be proved by rate-book, or copy thereof, and not by parol, 573
admissions by ratepayer are evidence against churchwardens, &c., 238

RATE-BOOKS, are admissible as public documents, to prove treir contents, 361
proper custody of, what is, 525; proof of, 555

RATE OF SPEED of motor-cars provable by opinion of witnesses, by watches, &c., 162-3, 170-1, 485-6. *See* MOTOR-CAR

REAL EVIDENCE, defined, 5
production of, is not generally compulsory, 8-10, 47

REALTY, admissibility of wills, or probate of wills, of, 432-3
proof of wills, or probate of wills, of, 563-4

REASONABLE AND PROBABLE CAUSE, functions of judge and jury in cases involving, 16
burden of proving absence of, is on plaintiff in actions of malicious prosecution, 31
burden of proving presence of, is on defendant in actions for false imprisonment, 31
bad character of plaintiff is not admissible to show defendant had, 191
in actions for malicious prosecution, depositions must be put in, 558

REASONABLE TIME, when a question for the judge, 16

REBUTTING EVIDENCE, rules as to, 40
when defendant has special reply on plaintiff's, 43
evidence in reply must be rebutting, not confirmatory, 40, 496
prisoner's evidence of good character may be met by, 188-90

REBUTTING PRESUMPTIONS raised by words of document, parol evidence admissible for purpose of, 665-75
principle, 665
rules of construction distinguished from those of presumption, 665
as to satisfaction of portions and debts, 667, 671
as to ademption and repetition of legacies, 668, 672
as to advancement and resulting trust, 669, 674
as to executors, 670, 674-5
as to miscellaneous instances, 671, 675

RE-CALLING WITNESSES, when allowable, 41, 483-4

RECEIPT, is an admission against party signing, 234
written, when may be contradicted, &c., by parol, 577, 586-7, 588-9

RECEIPT—*Continued*
when admissible, as part of *res gesta*, to prove payment, 66
unstamped, may be used to refresh memory, 471, 531
by deceased agent, &c., is admissible as against his interest, 278, 282, 285
by deceased clerk, &c., is admissible if given in course of duty, 290
of rent does not estop, 686. *See* RENT
oral evidence of loan admissible, though receipt and inventory of goods, also taken, 571-2

RECEIVER, entries in account books of deceased, admissible as against interest, 278, 282, 285
and also as made in course of duty, 290
report of official, as to bankrupt's conduct, is evidence of contents, 434
depositions taken by official, are privileged, 198, 208
of wrecks, depositions before, are privileged, 198, 208
confessions by, when evidence against thief, and *vice versâ*, 260, 269
and thief, testimony of, does not require corroboration in charge against the other, 487
guilty knowledge of, how proved, 174-5, 178-9
statements by, exculpating himself, how far admissible, 81

RECEIVING STOLEN GOODS, facts admissible to prove, 174, 178. *See* RECEIVER
previous conviction for fraud, not *per se* sufficient to shift proof of *scienter* from prosecution, 175

RECENT POSSESSION OF STOLEN GOODS is evidence of guilt and calls on prisoner to explain, 35, 138

RECITALS in deeds, are hearsay, but operative words are original evidence, 216
when operate as admissions or estoppels. 112, 234, 683-4. *See* DEED, ESTOPPELS
by deceased relatives in family deeds are evidence to prove matters of pedigree, 311
in ancient deeds are evidence of reputation, to prove public or general rights, 296
but not to prove private rights (except as admissions), 112, 296
nor (except as admissions) to prove ancient possession, 112
when are primary evidence of document recited, 538, 684
when are secondary evidence, 541
of formal, and sometimes of substantial, matters may be corrected by parol, 585-6, 601-3. *See* MISTAKE, MISNOMER.
married women and infants how far estopped by, 684

RECOGNISANCE, binding witness by, 443
disobedience to, 447

RECORDS OF THE REALM, public and judicial, proof of, 552-3

RECOVERIES, proof of fines and, 562

RECRIMINATION, by witnesses, 41, 483

RECTIFICATION, of documents for mutual mistake, &c., 585-6

RECTOR. *See* VICAR, CLERGY

RE-ESTABLISHING CREDIT OF WITNESS, 483

RE-EXAMINATION, of witness, only allowable when cross-examined, 483
must be confined to explanation of matters in cross-examination, 483
new facts can only be elicited in, by leave of judge, 483

REFEREE, admissions by, 252-3
effect of reports and awards by official, or special, 434-5. *See* REPORTS

REFERENCE, incorporation of documents by, 147, 525-8, 612 *See* INCORPORATION
to complainant in cases of libel or threat, 399, 620
to persons and things in documents, generally extrinsic evidence admissible to show. *See* INTERPRETATION

REFRESHING MEMORY of judge, 21, 26, 378. *See* MEMORY
of experts, by reference to text-books, price-lists, &c., 392-3
of witness, principle of, 469-71
by whom document may be written, 469
must be contemporaneous, 470
independent recollection not necessary, 470
originals and copies, 470-1
inadmissible document may be used for, 471
production of documents used for, and cross-examination as to, 471

REGIMENTAL MATTERS, military registers, are evidence of, 350-1, 353
gazette is evidence of, 337
army list is evidence of, 353
at common law, officers' certificate no proof of military service, &c., of subordinate, 365
but now, by Army Act, 1881, certificates, letters or returns by Secretary of State, or commanding officers, are evidence of such, 365, 371

REGISTERS, public, admissible to prove facts stated, 339-54. *See* PUBLIC REGISTERS
but are in general only *primâ* evidence, and may be contradicted by parol, 577, 598
and does not exclude other evidence of the registered facts, 571
effect of, when required to be sealed, 374
non-public, inadmissible at common law to prove facts stated, 339-40, *cp.* 290-1
by statute Company registers are evidence, 373-5. *See* COMPANY
gas- or water-meters are evidence of quantities used, 163

REGISTRATION OF DEEDS, &c., 530, 543, 563-4.
secondary evidence generally admissible of documents requiring, 543, 563-5
certificate of, is evidence of fact and date of, 530-1, 563-5

REGULARITY of facts when presumed, 109, 326, 515, 681. *See* OMNIA PRESUMUNTUR, &c.

RELATIONSHIP. *See* PEDIGREE, TREATMENT

RELEASE of deed, how far may be proved by parol, 588

RELEVANCY, defined, 49
legal and logical, distinction discussed, 52
admissibility distinguished from, 49-50
Stephen's rules as to, 50-51
objections to these rules, 51
his distinction between relevancy to issue, and relevancy to truth of matter considered, 51, 221-2
views of Thayer, Wigmore & Chamberlayne, 52-3

RELEVANT FACTS, defined, 49. *See* RELEVANCY
facts relevant to prove main fact or transaction, 103-35
to show identity or connection of the parties, 136-45
to prove states of mind, 145-57, 172-85
similar facts when relevant to prove the main fact or identity of the parties, 158-171
when relevant to prove states of mind, 172-85
presumption of *continuance* of facts generally weakens with lapse of time, 103, 120-1. *See* CONTINUANCE
aliter in the case of the possession of land, &c., 112

RELEVANT STATEMENTS, 103, 145, 221-2

RELIGIOUS BELIEF, not now necessary to render witness competent, 449, 458
and questions as to, not admissible to discredit him, 478
party's own declarations as to his, admissible, 64, 121
when once proved, continuance of, presumed, 103, 121

REMOVAL. *See* PAUPER, SETTLEMENT

RENT, receipt or payment thereof, though evidence of tenancy, does not estop, 686
fact of payment of, may perhaps be proved by parol, though written lease exists, 573
but not *amount* of, even in actions between third parties, 570, 573
nor can amount of, be contradicted by parol, unless rectification be claimed, 602; *op*, 585-6
and not always where rectification is claimed, 602
receipt for later, is evidence of payment of earlier, 117.

REOPENING CASE, for further evidence, when allowed, 42

REPAIRS, doing of, is evidence of ownership, 111
liability to repair bridge or highway, repairs or indictment for non-repair, of other parts, admissible on questions of, 132-3, 168-9

REPLY, evidence in, must not be confirmatory, 40, 483
except where party misled, or suprised, 40
right to, 42-5. *See* RIGHT TO REPLY

REPORTS by public officials, when receivable as public documents to prove the matters reported, against strangers, 355-62, 359, 361 2
proof of such, 555
by judicial officers, though not admissible as public documents, sometimes receivable *inter partes*, by Statute, 434-5
by referees, &c., under the Arbitration Act, equivalent to verdicts, 385-6
under this Act the judge may also order independent report and experiments to be made by experts for his own guidance, 385-6
by Official Receivers, Board of Trade, Committee of Law Society, admissible for special purposes, 434-5
by Chancery Visitors, Company Inspectors, &c., not evidence of facts stated, 434-5
by judge, admissible to show what matters were in issue in trial, 416, 434
by police or detectives, sometimes admissible to show party's *bona-fides*, 133, 262
by deceased engineer, as to Thames Tunnel, admissible as public document, 380
by Charity Commissioners, 361, 434
by Government officials to heads of departments, generally privileged, 194

REPUTATION, generally inadmissible to prove facts, 382
except public rights, pedigree, marriage, and identity, 384-5
admissible in such cases although divided, discontinuous, or restricted to particular class or locality, 384
sometime admissible for other purposes, *e.g.*, as convertible with character, 188, 383
or as affording reasonable grounds for party's belief, 155, 383
or as showing the state of the public mind as to some material matter, 84, 283
for untruthfulness, admissible to discredit witness, 482

RESCISSION of contract for unilateral mistake, &c., 585
extrinsic evidence, how far admissible on questions of, 487-8, 603-4

RESEMBLANCE of child to parent is evidence of paternity, 118. *See* CHILD
of portrait to sitter, opinions of artists, or friends, admissible to prove, 387, 399
of libellous description or picture to plaintiff, provable by general repute, 384; or opinions of witnesses, 398-9
of copy to infringed picture, &c., may be proved by comparison, although neither is produced in Court, 8, 47, 548, 573. *See* COMPARISON

RES GESTA, definition of term, 55-6
history and principle of rule as to, 55-6
what facts admissible as parts of, 55
the fact in issue, *per se*, 56, 65
constituent facts, 56-7, 66
cumulative and continuous transactions, 56-7, 67-9
documentary transactions, 57, 69
accompanying facts, 57

RES GESTA—*Continued*
what incidents other than declarations, 58, 70-1
declarations accompanying acts, 58, 71-82
(1) The act must be in issue, or relevant, and that declarations must relate thereto, 58
(2) must be contemporaneous, 58-9
(3) by whom made, 59
(4) documentary declarations or acts, 59-60
(5) the declarations are original evidence, not hearsay; of what facts they are evidence, 60-1
(6) miscellaneous provisions, 61
declarations as to mental and physical conditions, 61-5, 82-7
direct testimony and declarations out of Court, 61-2, 82
(1) as to health and feelings, 62-3, 83-4
(2) as to intention and motive, 63-4, 84-6, 148. *See* INTENTION
(3) as to opinion, 64-5, 85-6. *See* OPINION
(4) as to knowledge, 66, 86-7, *See* KNOWLEDGE
examples, 65, 87
declarations (*civil cases*) as to accidents, collisions, &c., 71-2
as to identity, ownership, possession, &c., 72-3
as to business transactions, *e. g.*, to explain payment, to show to whom goods sold or credit given, in what capacity document signed, reasons for loss of contract, land, or custom, 73-75
as to bankruptcy, 75-7
as to domicil, 77
as to legitimacy, marriage, adultery, &c., 77-8
(*criminal cases*) sedition, murder, assault, 79-81
explanatory statements by accused and others, 81-2

RES INTER ALIOS ACTA, history of maxim and bearing as a test of irrelevancy, 159-60
as the supposed ground of exclusion of similar facts, 159
of hearsay, 221
of judgments, 426, and depositions, 436
parol evidence admissible to vary documents when *inter alios*, 577-8, 589

RES JUDICATA. *See* JUDGMENTS

RESOLUTIONS, &c., at company meetings, effect of, 373-4; proof of, 555
at creditors' meetings, minute-books are evidence of, 349, 561,
may be proved by parol, though recorded in minute-books, 571
read out ot public meetings, may be proved at parol, without production of document, 572 (*cp.* inscriptions and placards exhibited at such meetings, 533, 545)

RESPONDENT. *See* CO-RESPONDENT, DIVORCE, ADULTERY

RE-SWEARING witnesses before fresh judge or juror, 42

RETAINER, of solicitor, informal, sufficient to render clients' communications privileged, 202
if disputed, requires corroboration, 487

REVISING BARRISTER, how far bound by rules of evidence, 689

REVOCATION OF WILL, direct declarations by testators inadmissible to prove, 328
but their declarations of intention may afford presumptive evidence of, 324, 328, 333-4
so, in cases of dependent relative revocation, 328

RIGHT OF WAY. *See* WAY

RIGHT TO BEGIN, in civil cases, 37-8
(1) where onus of proving *any* of the issues is on plaintiff, he begins, 37
(2) where no issue is on plaintiff but he claims substantial and unliquidated damages, he begins, 37

RIGHT TO BEGIN—*Continued*
(3) otherwise, where all issues lie on defendant, latter begins, 37
in criminal cases prosecution always begins, 38
matters not to be disclosed in opening, 38
new trial may be obtained for erroneous decisions as to, 32, 39

RIGHT TO REPLY—
in civil cases, 42-3
when opponent adduces evidence, 42-3
does not adduce evidence, 43
when there are joint defendants, 43
in criminal cases, 43
where defendant calls witnesses other than himself, 43-4
where he calls none, or only himself, defendant generally replies, 44
except (1) in Crown cases where law officers prosecute, 44
(2) or prisoner makes statement to jury, 44-5
rules where there are joint defendants, 45

RINGS, inscriptions on, how proved, 47, 533, 545
are evidence in pedigree cases, 311

RIVERS, acts of ownership upon other parts of, when evidence of title to *locus in quo*, 161 ; *cp.*, 167
public rights in, may be proved by reputation, 294, 299
presumption that owner of bank of non-navigable, owns the bed, *usque ad medium filum aquæ*, 671, 675
liability to repair bridges over, 132-3, 168, 305

ROAD, rule of, custom as to, judicially noticed, 21. *See* WAY
repairs to, are evidence of ownership of, 132-3, 168-9
dedication of, to public, 130-1
reputation is evidence of ownership or boundaries of public road, if not relating to particular facts, 294, 299, 301, 304
as also are verdicts, judgments, and indictments, 298-9, 305-6, 405, 428
and ordnance maps, 305-6
as to injuries caused by obstructions on, 169

ROLL OF SOLICITORS, and Law List, are proof of solicitors' admittance, &c., 353

ROLLS of Manor, admissibility of, 297-8, 305. *See* COURT ROLLS, MANOR
proof of, 297, 556

ROMAN CATHOLICS, how sworn in Ireland, 459
priests, communications and confession to, not privileged, 201-2, *cp.*, 269
marriage and other registers of, 340, 344-5. *See* REGISTERS, MARRIAGE, &C.
entries in such registers, made by deceased priests, in course of duty, 290-1

ROYAL PROCLAMATIONS, admissibility of, to prove facts stated, 335
proof of, 550

RUMOUR, generally inadmissible to prove facts, 382. *See* REPUTATION
or to fix a party with knowledge of facts, 383

SAILOR. *See* SEAMEN

SALE. *See* BILL OF SALE, CONDITIONS OF SALE, CONTRACT

SALE OF GOODS Act, 1893, in contracts under, terms implied by law may be varied by parol, 579

SAMPLE, equality of bulk with, may be proved without production of either, 47

SANITY, *See* INSANITY, LUNACY
how far presumed by law, 32, 680
burden of proof in questions of, 32
inquisitions in lunacy, and masters' orders and doctors' certificates, how far admissible on issue of, 356
reports of chancery visitors as to party's, privileged, 435

SANITY—*Continued*
opinions of experts as to, 386, 395
of non-experts, 400
as to own sanity, whether admissible, 400, 452
admissibility of testator's conduct and declarations to show his, 61-4, 84, 86, 161, 167, 181, 324
prior insane conduct of same party and his relatives, admissible, 161, 167
See SIMILAR FACTS
treatment of friends and strangers, how far admissible to show, 84, 134-5
testimony of friends, &c., how far admissible as to party's, 82, 400

SATISFACTION of judgment by debtor, bars recovery against co-debtor, 415
of portions and debts, 667-8, 671-2

SCHEDULES, how far are restrictive of deeds, 624, 626
parol evidence, when admissible to identify goods in lost, or absent, 616, 632

SCIENCE, opinions of experts, admissible on matters of, 386-7, 393-7

SCIENTER. *See* KNOWLEDGE

SCIENTIFIC INSTRUMENTS, accuracy of watches, thermometers, gas and water meters, &c., presumed, 162-3, 170-1. *See* SIMILAR FACTS

SCIENTIFIC TERMS, experts may explain, 387, 393-4, 630, 665

SCIENTIFIC WORKS, *e.g.*, almanacs. tables, and records, when admissible as public documents, 380
may be referred to by experts to refresh memory, or confirm or correct opinion, 399
pharmacopœia, admissible as standard for drugs, 109

SCOTCH law, 14, 20, 388. *See* FOREIGN LAW
registers of marriage, &c., 340, 345
form of oath, 459

SEALING AND DELIVERY of deeds, proof of, and presumptions as to, 517-19
when sealing of register required, unsealed register inadmissible, 374

SEALS AND SIGNATURES, history of, 566-7
judicial notice is taken of the following:—
The great seals of the United Kingdom
The royal sign manual
The signatures of the principal Secretaries and Ministers of state
The seals of the old Superior Courts of Jnstice
The signatures of Judges of the Superior Courts, of the Examiners, of the Judges and Registrars in Bankruptcy and of the County Courts
The seals of the central office, and of the District registries, &c., &c., 22-4

SEAMEN, contracts with masters may be proved without calling attesting witnesses, 523
and contents thereof, by secondary evidence without giving notice to produce original, 546
attendance of naval, as witnesses, how procured, when detained by superiors, 444

SEARCH, what is sufficient, to let in secondary evidence of lost documents, 547

SEAWORTHINESS, *See* SHIP

SECONDARY EVIDENCE, definition of, 6-7
of documents, 539-49
of handwriting, 400, 515
of attestation, 519-20
FORMS OF—
(A) *copies*—
Government printer's copies, 539; Gazette copies, 338-539
copies sealed by foreign States, courts, officials or notaries, 539
exemplifications, examined, office, and certified copies, 539-40
machine, printed, and photograph copies, 540

SECONDARY EVIDENCE—*Continued*
counterparts, drafts, minutes, abstracts, recitals, memorials, 541
notarial copies of foreign documents, 366, 538, 548, 560
(B) oral testimony and admissions, 541
(C) presumptive evidence, 541
(D) entries in registers, 542
(E) statements of deceased persons, 542
inadmissible forms: copies of copies, &c., 542
DEGREES OF—
in general, no degrees of, recognised, 542
except in case of public documents and depositions, 543
CASES IN WHICH ADMISSIBLE—
(1) when original is a public or *quasi*-public document, or, though private, is enrolled, or registered, 530, 535, 543, 563-5
(2) when original is in possession of adversary, 543
notice to produce, when necessary, 544. *See* NOTICE TO PRODUCE
when unnecessary, 545-6
(3) when original is in possession of a stranger, 546
(4) when original has been destroyed or lost, 546-7
proof of search, &c., necessary, 547. *See* SEARCH
(5) when production of original is physically impossible or highly inconvenient, 547-8
(6) when permission obtained by summonses for directions, 499, 548
(7) in interlocutory proceedings, 499, 548
(8) other cases, 548-9

SECRETARY. *See* COMPANY

SECRET TRUSTS, in wills, parol proof of, when admissible, 327-8, 580-1, 598
when declarations inadmissible to prove, 242, 246, 286, 581

SECRETS of State, evidence as to, excluded, 194-5
of trade, qualified protection given in cases of, 202
of client and lawyer, when protected, 200-9. *See* PRIVILEGE

SEDITION. *See* TREASON

SEDUCTION, previous but not subsequent bad character of female relevant to mitigate damages for, 191

SEISIN, in fee, presumed from possession or occupancy of land, 112, 279, 283

SELF-CRIMINATION. *See* CRIMINATING QUESTIONS

SELF-HARMING STATEMENTS, 228, *See* ADMISSIONS

SELF-SERVING EVIDENCE, party's statements, or shop-books, not generally evidence for himself, 229. *See* MAKING EVIDENCE FOR ONESELF
history and principle of rule, 229-30
exceptions to rule, 230

SENSES, evidence addressed to the, 4-5, 8-10, 47. *See* REAL EVIDENCE

SERVANT, acts and knowledge of, when bind master, 88-9, 95-6, 99. *See* AGENT
admissions by, 248
confession obtained by master's threat or promise, inadmissible, 265, 270
judgments against master for negligence of, how far evidence against, 404
declarations by deceased, when admissible as, *res gestae*, 83, or against interest, or in course of duty, 282, 289-93
memo of contract with, by deceased master, is not admissible as declaration against latter's interest, 283-4
what is evidence that driver of conveyance was defendant's servant or acting in course of his employment, 97, 121, 225 236, 352

SERVICE OF PROCESS, subpœna, summons, 445. *See* WITNESS
attendance waives irregularity of, 445
tender of expenses with, 445-6

SETTLEMENT of paupers, orders as to, operate *in rem*, 408. *See* PAUPERS
when proved, presumed to continue, 104
place of, declarations by deceased pauper not admissible to prove, 225-6, 313

SHARES, certificate of, is *prima facie* evidence of ownership, 370, 685. *See* COMPANY, COMPANY BOOKS
certificates, but not certifications, estop company, 685
blank transfers of, invalid, 530, 685. *See* BLANKS

SHERIFF AND UNDER-SHERIFF, acting as, is evidence of due appointment, 110
admissions by latter when evidence against former, 253

SHIP, unseaworthy during voyage, presumed to be so when started, 104, 186
seaworthiness provable by prior seaworthiness, 163, 171, 186
evidence of experts as to, admissible, except when court assisted by assessors, 385, 387, 397
fact that experts acted on their opinions, is admissible, 397
what facts are part of *res gesta* in collision cases, 70, 71-2. *See* COLLISION
log books, how far admissible, 251-2, 351-2. *See* LOG BOOKS
registers and passenger lists, how far, 352
coastguard, lighthouse, and lightship journals, how far, 352
statements by officers, crew, and pilot, when evidence against owner, 251-2, 351
depositions before Receiver of Wrecks, privileged, 207, 252, 361
under Merchant Shipping Act, 502. *See* DEPOSITIONS
judgments of condemnation of, as prize, operate *in rem*, 408, 410
in rem, no bar to actions *in personam*, 419-20
order of Naval Court, discharging seaman from, is conclusive, 360
reports by masters of, to owners, how far evidence, 248, 251
by searchers at the Custom House, 362
by masters of foreign ships, required for landing cargo, not admissible as public document, 362
by Board of Trade as to negligent navigation of, not admissible, 360-1
when owners affected by knowledge of illegal papers carried by, or of character of, 142-3, 152
certificate of registration of, is evidence of facts stated, 370

SHIPOWNERS AND SHIP'S OFFICERS, admissions by, 251-2

SHOP BOOKS, admissibility of in party's own favour, 229. *See* ACCOUNT BOOKS, BOOKS OF ACCOUNT, history of this topic, 229-30

SHOPMAN, admissions by, when receivable against master, 248, *See* SERVANT, AGENT

SIGNATURE, proof of, 515; when presumed, 517. *See* HANDWRITING
various modes of: manual, mark, stamp, print, ink, pencil, &c., 516, 529
identity of writer, witness and document must be proved, 523
intention in executing may be shown, 326-7, 517, 583, 599
effect of signature by one party only, 516, 599
repeated or qualified signatures, 516-7, 592
when signed or unsigned entries in public books are admissible, 354, 372
by agents', managers', directors', &c., 516-7, 581-2
official signatures, when judicially noticed, 22-3, *See* SEALS

SIGNATURES, ROYAL, OFFICIAL, &c., when judicially noticed, 22-3

SIKHS, how sworn, 460

SILENCE, ADMISSIONS BY, 255-61. *See* STATEMENTS IN PARTY'S PRESENCE

SIMILAR DOCUMENTS, how far admissible to interpret document in question, 612; examples, 176, 612, 650
similar libellous documents admissible to show malice, 175

SIMILAR FACTS, admissible when part of transaction, 56, 58, 67-9. *See* DISSIMILAR FACTS
generally inadmissible to prove main fact, or identity or connection of party, 158-71
inadmissible whether done by same parties or third persons, 158, 165
dissimilar facts also inadmissible to disprove the main fact, or the party's identity, 120, 159, 165, 167, 187

SIMILAR FACTS—*Continued*
grounds of exclusion. The maxim *res inter alios acta* considered, 159-60
exceptions: agency, sexual intercourse, insanity, acts done to parts of same whole, title from acts done at same or connected spots, manorial and trade customs, conduct and propensities of animals, action of physical and mechanical agencies, condition of places or things, market value, 162-3
when relevant to show identity of parties, 163-4
system to show identity, 164
examples, 164-71
generally admissible to prove states of mind, 172-6
principle, and qualifications, 172-3
knowledge; receiving with guilty intent, 174-5
single acts or system admissible to show knowledge; receiving with guilty intent, 174-5
or to rebut accident, mistake, or innocent intent, 176-7. *See* SYSTEM
proof of system, 164, 174; by whom similar acts must have been done, 174
how far admissible to corroborate witnesses, 163, 491-4

SIMILAR STATEMENTS, 114, 488-9. *See* PREVIOUS SIMILAR STATEMENTS and SIMILAR DOCUMENTS
generally inadmissible to corroborate witness, 114, 488
exceptions, 488
how far admissible to re-establish credit of witness, 113-15, 488
how far to interpret documents, 176, 612, 650. *See* SIMILAR DOCUMENTS

SLANDER. *See* LIBEL
utterance of words may be directly proved or disproved by witness, 65
reference to plaintiff and meaning of words may be shown by surrounding circumstances, 620
by opinions of friends, &c., as witnesses, 399, 401
by general repute, 384, 401-2
proof of malice, in cases of, 157, 166, 176
plaintiff's bad character, when provable in mitigation of damages, 191-2
plaintiff cannot be cross-examined to credit if has given no evidence in chief, 475

SLIP, brokers', when constitutes contract, 536-7. *See* BROKER
when admissible to explain or correct policy, or identify matters referred to therein, 537, 612, 633, 664
when words in, may be explained by course of dealing of parties, 664
bookmaker's, when admissible as part of gambling transaction, 69. *See* BOOKMAKER

SOLICITOR AND CLIENT, acts, &c., of former, when bind latter, 89, 94
knowledge of, or notice to, former, when affects latter, 89
admissions by former, or his managing clerk, when affect latter in civil and criminal cases, 249-50
statements in presence of solicitor when evidence against client, 259
confidential communications between, privileged, 201-9. *See* PRIVILEGE
how far fact, or character, of retainer, is privileged from disclosure, 202
lien by former, when exempts him from producing latter's documents, 210

SOVEREIGN, accession and demise of, judicially noticed, 21. *See* CROWN
existence of titles of foreign, judicially noticed, 21
royal sign manual, judically noticed, 22
recognition by, is evidence of legitimacy of peer, 117, 312
certificate of, how far evidence of facts certified, 364
is a competent witness, 449
testimony of, admissible even (perhaps) though unsworn, 463
reputation is evidence for or against Crown, 294
patents have same effect against the Crown as against a subject, 683
as to proof of treaties, charters, letters-patent granted by, 549
as to inquisitions under Crown authority or as to Crown lands, *see* 356-8
as to admissibility of royal proclamations, speech from throne and addresses to Crown, *see* 335
as to proof of these, 549

SPARKS FROM ENGINE, liability for damage caused by, 170. *See* ENGINE
proof that same, or similar, engine previously emitted, is relevant, 170

SPEAKER. of House of Commons, certificate of is admissible to prove various parliamentary matters, 366

SPECIFICATION, *See* PATENTS

SPEECH. habits of. treated sometimes as explanatory evidence and sometimes as evidence of intention, 610, 610n.
how far admissible to identify legatees, &c., 611-2, 615, 621, 624, 626

SPEECH FROM THE THRONE, is evidence of facts stated, 335; proof of, 549

SPEED, of motor-car, rate of. 401. *See* MOTOR-CAR
provable by opinion of witnesses, 401, 485-6
but opinion of single witness requires corroboration, 401, 485-6
also provable by watches and speedometers, 162-3, 170-1, 485-6

SPLITTING A CASE, 39, 416

STAMPS, unstamped instrument generally inadmissible, 531
except in criminal cases, or to refresh memory, 531
new trials not allowed where judge rules that stamp is sufficient, 532, 690
aliter where he rules it insufficient, 532, 690
where documents lost, &c., they are presumed to be duly stamped, 532
but if proved to have been unstamped, presumed to have so continued, 532

STANDARDS OF COMPARISON, admissible to gauge conduct on questions of negligence, reasonableness, &c., 107-9, 125-7
genuine specimens admissible as, to prove handwriting, 108
but genuine and disputed documents must be produced in court, 108
specimens need not be admissible for other purposes, 108
the party may be required to write in court, 109
doubtful if fictitious specimens admissible, 109
genuineness of ancient documents provable by comparison, 109
pharmacopœia is admissible as standard of drugs, 109, 380
to prove market value of property value of similar properties admissible as, 163

STATE, affairs of, protected from disclosure by public policy, 194

STATE PAPERS, admissibility of, to prove truth of contents, 335
Royal proclamations, Speeches from Throne, Addresses to Parliament, diplomatic correspondence, Parliamentary Journals, admissible to prove matters stated, 335
proof of, 549

STATEMENTS, when whole, or only parts of, admissible, 79. *See* DIVIDED STATEMENTS
verbal facts, or summarized statements, may be admissible, but *particulars* thereof excluded, 220-1

STATEMENTS ACCOMPANYING ACTS, *See* RES GESTA

STATEMENTS BY DECEASED PERSONS, *See* DECLARATIONS BY DECEASED PERSONS

STATEMENTS BY PARTY, in his own favour. *See* SELF-SERVING EVIDENCE
against his interest. *See* ADMISSIONS, SELF-HARMING EVIDENCE

STATEMENTS IN PRESENCE OF PARTY, 255-62
principle of admission, 255
when statements replied to, 256
when statements not replied to, 256-7, 259-61

STATEMENTS IN PUBLIC DOCUMENTS, 335-8. *See* PUBLIC DOCUMENTS

STATES OF MIND. party's direct testimony admissible to prove his, 61, 82-3
See MENTAL AND PHYSICAL CONDITIONS
party's declarations out of Court, when admissible to prove, 63-4, 80-6

STATES OF MIND—*Continued*
presumed to continue, 103-4, 121, 324, 327, 329
what facts, previous and subsequent to main fact, are relevant to prove, 145-57
proof of knowledge and notice. *See* KNOWLEDGE, NOTICE
of intention. *See* INTENTION
of good and bad faith. *See* GOOD FAITH
of fraud. *See* FRAUD
of malice. *See* MALICE
facts similar to main fact when admissible to show party's knowledge, intent, good or bad faith respecting the main fact, 172-85
opinions of experts and non-experts when admissible to show, 386, 395, 400-1, 403

STATUTES, existence of, is judicially noticed, 20
public, are admissible to prove public matters stated therein, 345-6
private, are not evidence of their contents against strangers, except in peerage claims, 336
nor even as notice of facts contained, 336
proof of public and private, 20, 549
colonial, provable by expert testimony, or official copies, 388, 549-50
foreign, provable by expert testimony, 388, 549
preamble of, admissible to interpret, 609, 615
marginal notes admissible to interpret, 614-15
extrinsic evidence, how far admissible to interpret, 619-20, 629, 661-5
meaning of words in, cannot be proved by experts or parol, 388, 390, 622 630, 642, 665

STATUTE OF FRAUDS, only bars enforcement of, does not extinguish claims unsupported by writing, 587, 604
signature under, may be by mark, initials, stamp, &c., 516. *See* SIGNATURE
where contract under, contained in several documents, connection must be shown by internal reference, not by parol, 525-7
extrinsic evidence not admissible to supersede contracts under, 570
nor to contradict, vary, or add to, them, 576
exceptions, 578-88
but admissible to identify parties or subject-matter, 616, 630-9

STATUTE OF LIMITATIONS, bars remedy, but does not extinguish debt, 677
what acknowledgments, or part payments, take case out of, 244, 279-80

STATUTORY DECLARATIONS, admissibility of, 501

STATUTORY MEANING OF WORDS, cannot be altered by parol, 388, 390, 622, 630, 642, 665

STRICT PROOF OF FACTS, not generally required, 47. *See* BEST EVIDENCE, PROOF
exceptions, 47-8

SUBPŒNA, *See* WITNESS
may be *ad testificandum*, or (when for production of document) *duces tecum*. 441-2
not allowed in case of judicial documents, 442, 537, 543, 556-63
or bankers' books, 375, 442, 537
service of, 445
disobedience to, 446-7
must not be oppressive, 447-8

SUBSCRIBING WITNESS. *See* ATTESTATION

SUBSEQUENT CONDUCT, admissibility of, to identify accused, 9, 138, 142-3. *See* IDENTITY
to show malice, and other states of mind, 151, 156, 175-6. *See* STATES OF MIND

SUBSEQUENT EXISTENCE OF FACT, when revelant to prove its prior existence, 120-1, 680. *See* CONTINUANCE

SUICIDE, threats of by deceased, admissible in prisoner's favour on murder trial, 79-80, 102, 143
declarations by deceased, admisaible against prisoner to rebut defence of, 83
accidental death, rather than, is presumed, 680
on charge of conspiracy to commit, declarationa by conspirators are admissible against each other, 80, 102

SUMMONS. attendance of witness when procurable by, 443. *See* WITNESS
in what cases, may be used, 443
service of, 445
disobedience to, 447

SUPERIOR COURTS, jurisdiction and rules of, judicially noticed. 20
thia does not apply to inferior courts, unless regulated by statute, 20
seals of old superior courts judicially noticed, 23
Judicature Act gives no seal to, 23
effect of judgments in, *See* JUDGMENTS
proof of proceedinga in, 556-7
judges of, not compellable to disclose judicial matters, 196. *See* JUDGE

SUPREME COURT, *See* SUPERIOR COURTS

SUPPRESSION OF EVIDENCE. relevant to connect party with crime, 138

SURETY, admissions by principal when evidence against. 243
payments hy principal when deprive surety of benefit of Statute of Limitations, 244
judgmenta against, how far evidence against principal, 404, *cp.* 427
judgments against principal will not, in absence of agreement, bind surety, 415
surety for one partner may sue another, though creditor could not, 414
parol evidence admissible to prove suretyship, though contract in writing, 582

SURGEON, statutory certificate of, is evidence of age of child, or disease of workman, 371. *See* MEDICAL MAN, AGE

SURPRISE, when ground for rejecting relevant evidence, 50, 159, 186

SURROUNDING CIRCUMSTANCES, what facts admissible as, to interpret documents, 615-20, 630-41
Wigram's classification with respect to, criticiaed, 610-11

SURVEYOR, estimate on which Vestry acts, admisaible without calling. 47, 69
judge may obtain assistance, and act on certificate, of, 385. *See* EXPERTS
may testify as expert, 387
reports of deceaaed, when admisaible, as made in course of duty, 289
when admisaible as public documents, 380

SURVEYS.. *See* MAPS, PUBLIC INQUISITIONS

SURVIVORSHIP, is a matter of pedigree, of which reputation is evidence, 308
presumptions as to, 680. *See* COMMORIENTES
facts relevant to show, who survived iu common calamity, 118, 680

SWEARING WITNESS. *See* OATHS

SYSTEM, evidence of, whether admissible to identify accused, 164
admissible to show his state of mind, 174-5, 176-85
or to corroborate other evidence affecting him, 176, 488, 491-4

TABLES, mathematical, admissibility of, 380

TAKING ACCOUNTS. *See* ACCOUNTS

TECHNICAL TERMS, meaning of is for jury, 15
testimony of experts admissible to explain, 387, 630, 665
in documents, extrinsic evidence admissible to explain, 630, 665

TELEGRAM, post-marks, on, are evidence of date of, 122, 348. *See* POST-MARKS, POSTING
the original is one sent, not one delivered, 537.

TENANT, admissions by, when evidence against landlord, 239-40. *See* LANDLORD, LEASE
when estopped from disputing landlord's title, 685

TENDER OF EXPENSES TO WITNESS, 445-6. *See* WITNESS

TERRIERS, ecclesiastical, are evidence as public documents of matters contained, 359. *See* PUBLIC INQUISITIONS, SURVEYS, &c.

TERRITORIAL DIVISIONS, of this country are judicially noticed, 22

TESTATORS, declarations by, explanatory of their wills when admissible, 324-53, 613, 617-9, 622-30, 639-41, 642-61. *See* DECLARATIONS BY TESTATORS and of INTENTION
statements by, receivable against, but not generally in favour of, their representatives, 239
judgments against, bind executors, legatees and devisees, 413

TEXT-BOOKS, not evidence *per se*, but may be referred to by experts. 399-400

THREATS, against victim, relevant to show identity of accused, 137, 140
or his malice, 151
by deceased to accused, relevant on a plea of self defence, 190-1
in action for damages in consequence of, letter containing or enclosing is part of *res gesta*, 75
threats of suicide by deceased, admissible in prisoner's favour on murder trial, 79-80, 102, 143. *See* SUICIDE
province of judge and jury as to construction of letter containing, 15
ambiguous expressions in, may be explained by witness or surrounding facts, 399, 620

TIME, limitations of. *See* LIMITATIONS
measurement of, by watches, &c. *See* SPEED
statutory words of, cannot, in general, be varied by parol, 388, 390, 622, 630, 642, 665
how far affects admissibility of evidence :
(1) contemporaneousness essential in cases of declarations which are parts of *res gesta*, or made in course of duty, or documents used to refresh memory. *See* CONTEMPORANEOUSNESS
(2) previous and subsequent existence of facts, 61-5, 83-7, 103-5, 120-1. *See* CONTINUANCE, MENTAL AND PHYSICAL CONDITIONS
(3) character, must be at a time proximate to date of charge. 188
(4) similar facts, to show state of mind of accused, must have occurred within reasonable time, 173; but see as to malice in libel cases, 175-6
statutory limits as to time in cases of receiving, 174-5
(5) fraud, &c., letters prior to act charged held admissible, those subsequent rejected, 155
(6) ancient documents (*i. e.*, thirty years old), presumed genuine, 523

TITHE COMMUTATION MAPS, when admissible as *reputation* to prove public rights, 297, 304-5
admissible as *public documents* to prove public, but not private, rights. 355, 357-60

TITLE, acts of ownership, when admissible to prove, 111-13, 128-33, 299. *See* ACTS OF OWNERSHIP
similar facts, when admissible to prove, 161, 167-8
admissions by predecessors in, are evidence against successors in, 238-41
declarations by deceased persons in disparagement of their, are admissible as against proprietary interest, 279, 283

TITLE-DEEDS, of stranger, privileged from production, 209-10
of party, privileged where relating to own title and not supporting opponent's, 209-10
not privileged where title not affected, 210
answers of witness exposing him to charges of stealing, or concealing wills or title-deeds, how far protected, 215-16

TOMBSTONES, inscriptions on, are evidence of pedigree, 311. *See* INSCRIPTIONS
proof of such inscriptions may generally be given by copy, 547

TRADE, CUSTOM OF, when provable to annex incidents to contracts, 105-6, 124, 579. *See* CUSTOM USAGE
when to interpret contracts, 629, 663
when similar customs admissible to prove, 161-2, 169
how far opinions of experts admissible to prove, 105, 387, 394

TRADE MARKS, registers of, admissible as public documents, 348. *See* PUBLIC REGISTERS
comparison of, in cases of infringement, 8, 47
surrounding circumstances admissible to construe, 620

TRADER, admissions by shopman when evidence against, 248
shop-books of, when admissible, 229. *See* ACCOUNT-BOOKS, SHOP-BOOKS

TRANSLATION of foreign documents may be required from experts, 15, 390, 630, 665, *See* FOREIGN DOCUMENTS

TREATIES, proof of British, or foreign, 549

TREASON, two witnesses necessary in cases of, 485
what facts are part of *res gesta* in trials for sedition or, 7
prior declarations and speeches by defendant, when evidence in his own favour, 79, 154

TREASURY, seal of solicitor to, but not of lords of, judicially noticed, 22. *See* SEALS
orders, &c., issued by Commissioners of, how proved, 551

TREATMENT, acts of, by parties and strangers, generally irrelevant, 116-7, grounds of exclusion, 117
except to prove marriage, relationship, legitimacy, title, age, and the genuineness of ancient documents, 117
or to identify persons or property referred to in documents, 611, 615, 621, 624. *See* EXTRINSIC EVIDENCE

TRIALS, new. *See* NEW TRIALS
verdicts and judgments in former. *See* VERDICTS, JUDGMENTS
depositions in former. *See* DEPOSITIONS
facts in former, usually excluded, 29, 464

TRUST, the acceptance or disclaimer of written, may be proved by parol, 580, 598
secret, may be proved by declarations of grantor, but not by hearsay of deceased trustee. 328, 580, 598
breach of, facts showing party's knowledge admissible, 97-8
relating to land, other than resulting, must be in writing, except in cases of fraud, 580
existence or communication of secret, to trustee, cannot be shown by hearsay, 325, 328, 581, 598

TRUSTEE, acts of, and notice to, one, when bind co-trustees, 90-1
cannot set up privilege against *cestui que trust*, 203
burden of proof lies on, in actions with *cestui que trust*, 33
admissions by, are evidence against *cestui que trust*, and *vice versa*, 237-8
as well as against co-trustee, 242
but, admissions by bankrupt not evidence against trustee, or creditors, 253
if called as witness, not compelled to produce title-deeds of *cestui que trust*, 209-10
declarations of deceased, not admissible to prove existence of communication of trust to co-trustee, 328, 580, 598

TRUTH, witness'a general reputation for want of, admissible to discredit, 482

UNDER-SHERIFF, admissions by, are evidence against sheriff, 253-4

UNDUE INFLUENCE, on issue as to, party pleading begins, 38

UNIVERSITY, and college books, admissible to prove degrees, &c., 354, 372. *See* CORPORATION, COLLEGE
existence of Oxford and Cambridge, and their object to advance learning, judicially noticed, 25
calendara of, not evidence of matters contained, 354

UNWILLING WITNESS OR DEPONENT, practice as to, 446, 495, 498

USAGE, admissible to annex incidents to oral or written contracts, 105-6, 124, 579. *See* CUSTOM, TRADE CUSTOM
knowledge of, when will bind party, 106
proof of, 106-7
admissible to explain technical terms, or interpret documents, 612, 629, 661
admissible as standard of comparison to rebut negligence, &c., 107, 126
or to fix party with knowledge of subject-matter of usage, 146
or to rebut an alleged criminal intent, 184

VAGRANT, age under Vagrancy Act, 1824, may be proved by inspection, 8
intent, under same Act, may be proved by defendant's character, &c., 183
wife of defendant is competent witness against him, without his, but not without her consent, on charges under the Act, 455-6

VALUATION LISTS, admissible as public documents, 361

VALUE, opinions of experts admissible to prove, 387. *See* MARKET
reasons for expert's opinion as to, usually reserved for cross-examination, 399

VARIANCE AND AMENDMENT, rules as to, 28
in civil and criminal cases, 28
in superior and inferior courts, 28-9

VARYING DOCUMENTS by parol, 574-604. *See* EXTRINSIC EVIDENCE

VENDOR, declarations by, admissible to identify property sold, 631
as well as to show its extent, 633. *See* EXTRINSIC EVIDENCE
recitals in deeds 20 years old are evidence between purchaser and, 524. *See* DEED, RECITALS

VERACITY OF WITNESS, affects his credit, 477, reputation for untruthfulness may be proved or rebutted, 482-3. *See* CREDIT

VERBAL FACTS, may be admissible though *particulars* excluded, 201-2

VERDICTS, conclusive of finding, as between parties and privies, 433
only admissible between strangers as *reputation*, 298, 306, 433
or when *in rem*, 426, 428, 433
proof of, 433, 557

VERITAS NOMINIS TOLLIT ERROREM DEMONSTRATIONEM, 624. *See* INTERPRETATION

VESTRY AND CHURCH BOOKS, when admissible as public documents to prove parish matters therein recorded, 347. *See* CHURCH, PARISH, VICAR

VETERINARY SURGEONS, register of, is evidence of qualification, 354

VICAR, how far acting as evidence of appointment, 110, 190-1. *See* CLERGY
entries in parish register, when may be made by clerk, or substitute of, 340
custody of registers and books of, 525
entries by deceased as to receipt of tithe, are admissible as against interest, 278
returns of, for Queen Anne's Bounty, are public documents, 359
proof of deeds of relinquisbment by, 565

VIEW, 7-10. *See* INSPECTION

VISITATION BOOKS. *See* HERALDS
heralds' are public documents, admissible to prove matters of pedigree, 360
dates of first and last visitations, 312

VIVA VOCE, evidence when to be given, 464

VOIR DIRE, examination of witness on, former practice as to, 451

VOTES AND VOTING, register of votes and poll books are evidence of their contents, 350
charges of personation at elections must be proved by two witnesses, 485
mistake in voting-paper may be explained by parol, 649-50

WAR, existence of, when judicially noticed, 21-2. *See* ARMY, NAVY
articles of, judicially noticed, 20

WARD, burden of proof in transactions with guardian, is on latter, 33
address of Ward of Court must be disclosed to Court, 205

WARRANTY, parol, when may be added to written agreement, 578-9, 593-7
parol evidence admissible to show whether representation was intended as condition or, 617

WATCHES, working accuracy of, presumed, 162-3
evidence of, admissible to show speed of motor-car, 170-1

WAY, RIGHT OF, acts of user are evidence of, 72-3, 130-1. *See* ROAD
declarations by persons using, or obstructing, when admisaible, 72-3
by deceased persons are evidence to show *public* but not *private*, 294, 299, 301, 304
dedication of, to public, 130-1
maps and surveys when admissible to show public, 297, 305-6
verdicts and judgments, when, 298-9, 305-6, 405, 428

WEATHER, state of wind and in collision cases, is part of *res gesta*, 70
official records of, admissible as public documents, 352

WEIGHT of evidence is for jury, 11
not determinable by arbitrary rules, 676
various considerations which may affect, 676
what evidence sufficient to be left to jury, 13

WHOLE STATEMENT, or part of, when admissible. *See* DIVIDED STATEMENTS

WIFE, admissions by, when evidence against husband, 248-9. *See* ADMISSIONS BY AGENTS, HUSBAND, MARRIAGE
competent witness in *civil* cases against husband, 449
when competent in *criminal* cases, 455-7
not bound to answer questions criminating husband, 211
nor as to her adultery in divorce cases, 216-7
communications to or from husband, privileged, 210, 455
declarations and letters as to adultery or legitimacy, by, on leaving home, &c., admissible to show intent, 77, 83
meaning 'wife' in wills, &c., provable by parol, 642, 651-2

WIGRAM, on extrinsic evidence in aid of interpretation, quoted and criticised, 606-9
his division of explanatory evidence and evidence of intention, analysed and contested, 606-9
his seven propositions considered and qualified, 610, 615, 621, 626

WILLS, declarations by testators as to when admissible, 324-34. *See* DECLARATIONS
proof of, 563-4. *See* PROBATES, PERSONALTY, REALTY
proof of probates of, 560
of what facts probates are evidence, 431-3
original will, when may be looked at, 311, 431, 560, 613, 637, 661
when is primary and when secondary evidence, 311, 538
Foreign and Colonial wills and probates, how proved, 548, 560, 561
alterations made after execution, how far operative, 529
presumptions as to alterations in, 394, 529, 681
declarations by testator admissible to rebut such presumptions, 327, 331-2
mistakes in executing or revoking, 327-8, 332-3, 586

WILLS—*Continued*
mistakes in inserting words, without knowledge of testator, 327-8, 586
in date of execution, 586
cannot generally be corrected by parol, 327-8, 332-3, 586
parol evidence admissible to interpret, *i. e.*, to identify persons or property named or described in, 617-9, 621, 639-61. *See* INTERPRETATION.
conditional, 327, 333, 583
revocation of, 328-9. 333, 588. *See* REVOCATION
attestation of, 519-23. *See* ATTESTATION
judgments as to construction of, when bind strangers, 430

WIND. *See* WEATHER

WINDING-UP of company, attendance of witness in, 443
orders directing, are not judgments *in rem*, 408
private examinations in, are privileged from disclosure, 198, 208
notes of proceedings in, when admissible on misfeasance summons, 253, 502
depositions in, 502

WITHOUT PREJUDICE, communications made, generally protected, 208, 231

WITNESS,
attendance of, 441-8
PROCESS—
subpœna *ad testificandum*, and *duces tecum*, 441-3
recognisance and summons, 443
witnesses when present in court, though not subpœnaed, 444
witnesses when in prison, or out of jurisdiction, 444
witnesses when detained by superior officers in army or navy, 444
SERVICE OF PROCESS—
subpœna and summons, 445
attendance waives irregularity of, 445
TENDER OF EXPENSES—
in civil and criminal cases, 445-6
DISOBEDIENCE TO PROCESS—
to subpœna, recognisance, or summons, 446-7
ABUSE OF PROCESS: PROTECTION OF WITNESSES—
from arrest, threats, and actions, 447-8
competency of, 449-57. *See* COMPETENCY
former exceptions to competency: interest, atheism, crime, 449-51
present exceptions to competency—
objections, how taken, 451
(1) defective intellect, from infancy, lunacy or drunkenness, 453
(2) in criminal cases, 453-7
compellability of, 457, *See* COMPELLABILITY
oaths, affirmations, and declarations, 458-63. *See* OATHS
administration to believers and atheists, 458
forms of oath or affirmation; usual form; kissing the book; Scotch form; other forms, 458-60
re swearing, before fresh judge or juror, 42, 439
who may administer oaths, 460-1
when, may give testimony without oath or affirmation, 461-3
when, may give evidence by affidavit, 495-7. *See* AFFIDAVITS
depositions by, before Examiners or on Commission, when admissible, 497-99. *See* DEPOSITIONS
in civil cases, 497-502
in criminal cases, 502-13
before Coroners, 511-12
in India and abroad, 512-13
statutory declarations by, not generally admissible, 501-2
hearings *in camerâ*, 464
exclusion and separation of unexamined, 464-5
suppression of name of, 205, 207, 468
examination, cross-examination, re-examination, *See* EXAMINATION, &c.
privilege of. *See* PRIVILEGE
when adverse or hostile, 469, 472-3, 474, 480-1
protection of, from abuse and oppression, 447-8
from oppressive subpœna, 447-8
or not *bonâ fide* required, 447
from oppressive cross-examination, 447, 475
from undue number being called, 484

WITNESS—*Continued*
examination by judge and recalling, 41, 483-4
when deemed incapable of being called, 438, 475, 497, 506-8
number required, and history of rule, 484-5
testimony of, when must be corroborated, 485-7. *See* CORROBORATION
what facts admissible, in corroboration of, 487-93
previous similar statements generally inadmissible to corroborate, 488
exceptions, 488-9
credit of, and modes of impeaching, 477-83. *See* CREDIT—
facts admissible, or not admissible, to affect credit, 477-9
knowledge, observation, memory, 477
errors, omissions, inconsistencies, exaggerations, improbabilities, 477
antecedents, associations, and mode of life, 478-9
previous contradictory statements, 479-81
bias or partiality, previous conviction, reputation for untruthfulness, 481-2
compulsion to answer, and contradiction, 479-81
re-establishing credit, and recrimination, 482-3
attesting, rules as to, 519-23. *See* ATTESTATION

WORDS, meaning of technical, is for jury, 15. *See* TECHNICAL TERMS
meaning of common words and phrases, is judicially noticed, 25
meaning of, in document, extrinsic evidence when admissible to explain, 605, 611-13. *See* INTERPRETATION
ambiguities, inaccuracies, equivocations, 613-4
printing, writing, figures, 614
See the various Rules as to Extrinsic Evidence to explain, 615-30, and the examples of these Rules, 630-65

WRECKS, depositions before Receiver of, are privileged, 198, 207. *See* SHIP
in actions for negligence in not lighting sunken wreck, what facts are part of *res gesta*, 66-7. *See* COLLISION

WRITINGS, *See* DOCUMENT, DEEDS, EXTRINSIC EVIDENCE

WRITS are admissible to show sum claimed, but not debt due, 435-6
proof of, 562-3

WRONGFUL ADMISSION, &c., OF EVIDENCE, remedies for, 688-91. *See* OBJECTIONS TO EVIDENCE
in civil cases—
trials by judge and jury, 688
when admissible evidence rejected, 688
when inadmissible evidence received, 688
trial by judge alone, 688-9
in County Courts, 689
trials by Commercial Court, arbitrators, compensation juries, licensing justices, revising barristers, 689
new trials for, only allowed when substantial wrong done, 689-90
wrongful admission of evidence by examiners, 498-9
in criminal cases, 688-91
new trials, now abolished, 690
Crown cases reserved, 690
Criminal Appeal Act, 1907, 690-1
appeals from justices, 691-2

X-RAYS, result of examination by, admissible to determine party's age, 119

YORKSHIRE, registration of deeds in, 349, 370. *See* REGISTRATION

PRINTED BY THE CARSWELL COMPANY, LTD., TORONTO, CAN.